

REALISING THE RIGHTS OF REFUGEE CHILDREN THROUGH THE JURISPRUDENTIAL LENS OF CHILD RIGHTS: LAW AND PRACTICE IN INDIA

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Abstract

In this paper, the author determines the positionality of refugee children in India's domestic legal framework. While India is not bound by international instruments on the rights of refugees generally, this paper argues that India remains bound by its international commitments under child-rights instruments when it comes to the rights and entitlements of refugee children. It notes that the immigration detention, forced parental separation, and incarceration, or institutionalisation of children remains a violation of international law regardless of India's non-ratification of instruments on the status and treatment of refugees. Based on the Convention on the Rights of the Child (CRC) this paper proceeds to enumerate the rights available to all children, including refugees, and their violation under India's ad hoc law and policy on 'foreigners'. It finds that there is often a complete failure in realising a range of rights under the CRC ranging from the right to non-institutionalisation, to identity, nationality, and family unity. In light of these findings, the paper proposes an approach to refugee rights through a child-friendly lens, the first step to which is primacy being given to the best interests of the child. The primary argument underlying this paper is that refugee children are to be treated as children first, and foremost, and entitled to the full range of rights and protections available to all children, and at par with all children.

Keywords: refugee child, detention, immigration status, institutionalisation, best interests.

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Introduction

India has not signed the 1951 United Nations Refugee Convention ('Refugee Convention') or the Protocol relating to the Status of Refugees, 1967, which spell out refugee rights and states' responsibilities to protect them, nor does it have its own laws protecting refugees. This absence of a well-defined refugee law results in refugees being subject to arbitrary government policies which often fail to adequately implement constitutional and judicial safeguards of refugees' rights and entitlements (Bhattacharjee, 2008). Consequently, refugees are forced to rely on an ad hoc, and case-to-case implementation of their rights.

There have been reported instances of refugee children being killed while in detention (Sharma, 2023), indefinitely detained, forcefully separated from their parents at the border, institutionalised, and denied nutrition, education, and other facilities (Refugees International, 2023; Prasad & Law, 2024). These instances draw attention to the plight of refugees, that lack legal status in India, and are often alleged to be illegal immigrants, or 'foreigners' under the law (Sur, 2023; Sharma, 2023). As of August 2022, of the around 294 refugees detained in India, at least four were little children (Rathore, 2022). Refugee children are particularly vulnerable, losing access to good health, nutrition, a stable environment, security and family life in the course of displacement (Vijayakumar, 2012).

A number of significant judgments on the rights of refugees in India, have involved refugees that were below the age of majority (*Ktaer v. UOI*, 1999; *U Myat v. State*, 1991). However, they make no mention of the Convention on the Rights of the Child (United Nations, 1989) despite India being a party to the CRC. The CRC, under Article 22, imposes specific obligations on governments to protect the rights of refugee children. Therefore, there is an urgent need to examine the status of refugee children and the scope of their rights under Indian law.

This paper attempts to answer the following questions. *First*, is the practice of grounding refugee children's claims on the same protections and rights as refugee adults under the present structure, in contravention to children's rights and India's international obligations? *Second*, what ought to be the status and scope of protection afforded to a refugee child under the Indian law to bring it in line with international best practice?

Within the broader category of ‘children on the move’, this project focusses on refugee children to account for their vulnerability caused by the absence of formal legal status. The scope of rights examined is limited to the attainment of refugee status, right against detention of the parents or the child, and participation rights of the child. This limitation aims to focus on the specific rights being denied to refugee children, and may in turn support the refugee child’s claims to health, nutrition, education and other entitlements common to children in general.

This paper examines how the practice of grounding refugee children’s claims on the same protections and rights as refugee adults renders invisible the particular vulnerability of refugee children. Further, by not acknowledging the peculiarities that may arise when considering the ascertainment of refugee status for children this approach may deny children the full protection of their rights. Finally, this approach does not account for the scope of rights specific to children irrespective of recognition or non-recognition as refugees, as well as the rights that may accrue particularly to refugee children. Therefore, this paper seeks to propose an approach to the rights and entitlements of refugee children grounded on the CRC, and the theory and practice of child rights jurisprudence.

Part II discusses the normative framework against which refugee children’s rights and attainments are evaluated in the present paper. It highlights the applicability of the CRC, as well as the significance of its conceptualisation of the rights of particularly vulnerable children. This provides a foundation on which to ground the analysis of the issues at hand.

In Part III the different doctrines relevant to the rights of refugees are laid down and placed in the context of children’s rights, specifically those under the CRC. The attainment of refugee status for children is understood through this lens. Situating the refugee child in the law is significant as it accounts for the distinct realities of the child from the adult which is discussed within this Part. The law and practice in India is measured against international practice which provides useful guidance to the full realisation of the promise of the CRC.

Part IV discusses India’s treatment of child refugees, to ascertain the scope of these rights once refugee status is attained. This is evaluated against the framework of the child rights discourse. Therefore, it ascertains

the applicability of the Juvenile Justice Act, 2015 ('JJ Act 2015') to refugee children, in order to protect them from exposure to the adult criminal justice system following immigration related detention, and the desirability of such application, determining the urgent need for change in India's treatment of child refugees. Part V concludes the discussion.

Research Methodology

The method of study is doctrinal and analytical. This uses domestic case laws and statutes as primary sources to evaluate the domestic legal framework. The CRC and other relevant international treaties are also analysed to determine the scope of India's international obligations. Owing to the contemporariness of various discussions in light of the Rohingya refugee crisis, a number of news reports, and opinion pieces are relied on to highlight the plight of refugee children, and the persistence of the legal uncertainty surrounding their entitlements. Additionally, secondary sources such as General Comments, UNHRC reports, commentaries, guidebooks, and online sources provide useful insights answer the research questions. This paper shall adhere to all ethical guidelines.

Research Limitations

This paper is based on qualitative data owing to the inadequacy or inaccuracies in quantitative data on account of discrepancies on legal status, and record-keeping of stateless populations. It provides an in-depth analysis of refugee children within the Indian legal framework and make jurisdiction specific recommendations; accordingly, the research is geographically limited.

The Normative Framework for Children's Rights

To determine the attainment of the entitlements of children, it is first necessary to identify a normative standard against which such attainment can be measures. This part discusses *first*, the applicability of the CRC as a source of rights, and *second*, the specific entitlements of the CRC applicable to refugee children.

Enforceability of The CRC in India's Dualist System

India ratified the CRC in 1992, and through such ratification it is under an obligation "to review National and State legislation and bring it in line with provisions of the Convention" (Roy & Butterflies, 2015). In its Third and Four

Combined Periodic Report on its implementation of the CRC, India noted that its approach to the furtherance of children's rights draws from the Constitution of India, domestic legislation, policies and programmes and demonstrates its continuous commitment to children, and the cause of strengthening the framework for the realisation of children's rights (Committee on the Rights of the Child, 2011).

Article 51 of the Constitution of India obligates the State to foster respect for treaty obligations through a non-binding directive to the government. However, the Supreme Court (SC) has frequently used international law to domestic proceedings in order to enhance the ambit of constitutional guarantees in a manner that aligns with international conventions (*Vishakha v. State*, 1997; *NCPCR v. Rajesh Kumar*, 2020, 2).

Despite a formal dualist system, courts in India frequently apply international law regardless of the extent of legislative enactments, and provide them substantive importance (Chandra, 2017, Part 4.2). Further, it has also acknowledged the obligation upon India, as a responsible member of the international community to adopt such an interpretation of law that is in line with its international commitments, particularly when not in conflict with statutory mandates (*Justice K.S. Puttaswamy v. UOI*, 2017, 29, 61, 131-33).

Finally, the near universal ratification of the CRC (see *Frequently Asked Questions on the Convention on the Rights of the Child*, n.d.), grants it considerable authority as the source of the internationally agreed-upon standard for the minimum set of rights of children which are obligatory upon all governments. Therefore, the CRC provides a powerful tool to evaluate the extent of protection of the rights of refugee children in India and avenues for reform.

Additionally, the Juvenile Justice Act, 2000 and the JJ Act, 2015 were enacted to give effect to and keeping in mind the standards prescribed under the CRC, and demonstrate the strong legislative intention towards its domestic implementation. Both the CRC and the JJ Act make codify the principle of non-discrimination and make no distinction between children based on their citizenship. Therefore, the CRC and the Act apply to all children, whether citizens of India, or not.

The Scope of Rights Relevant to Refugee Children

Four overarching general principles, which were enumerated by the CRC Committee, govern the application of the CRC (UN. Committee on the Rights of the Child (1st sess. : 1991 : Geneva), 1991, 13; UN. Committee on the Rights of the Child, 2003, p. 12; Lundy & Byrne, 2017). These principles, are the right to non-discrimination (CRC, article 2), the best interests of the child as a primary consideration (CRC, article 3, sub-clause 1), the right to life, survival, and development (CRC, article 6), and the right to be heard (CRC, article 12). These principles are to be read with each other and with other rights.

A significant contribution of the CRC, that is absent in other human rights instruments is the combination of autonomy with vulnerability (Ryngaert & Vandenhoele, 2017, p. 212). For example, while protection, best interest, survival and development rights, may characterise a child as dependent demonstrate a welfarist approach, when read with participation rights, the child is imbued with agency and a right to be heard in all decisions that affect them. This attains particular significance in India, where countless reports on child refugees discuss their immense vulnerability in the face of circumstances (Sur, 2023) without problematising their lack of participation in decisions regarding their status and rights.

Additionally, the CRC views vulnerability in its particular context, and in a manner which provides for the heterogeneity of vulnerable children. Consequently, under Article 22, CRC specific obligations are imposed on states to secure the rights of refugee children, and those seeking refugee status (UN. Committee on the Rights of the Child, 2013, 54). Further, in light of the frequent detention of children along with their families, the right against arbitrary deprivation of liberty, and detention as a last resort must be examined. Finally, CRC rights to identity, nationality (articles 7 and 8), and family unity (article 9) gain particular significance in the case of refugee children. The next section discusses the application of these rights to India's laws on refugees, and refugee children in particular.

The Attainment of Refugee Status by Children

In India, in the absence of a formal legal framework on refugees, they are regulated by the Foreigners Act, 1946, the Passports (Entry into India) Act, 1920, and the Registration of Foreigners Act, 1939. Therefore, refugees enjoy

no distinct status and may be prosecuted as ‘foreigners’ under the Foreigners Act for illegal entry into India. This puts them at risk of detention or deportation but there has been a limited expansion of rights of refugees under various policies and judicial decisions.

The rights of refugees under Indian law include a right to determination of their refugee status, the adherence to due process while this status determination occurs, and a right against non-refoulment (Bhattacharjee, 2008). Certain exemptions for refugees include the issuance of Long-Term Visas, which has formally connected with ‘refugees’. Further, refugees in India, particularly Rohingya refugees are entitled to registration by the UNHCR, although the scope of protection on account of such status is still left to the discretion of the government (The Hindu Bureau, 2023).

The determination of refugee status is significant for the enjoyment of rights and entitlements under the Refugee Convention, and all other human rights treaties that include protections for refugees (United Nations, 1951, article 1), which have found indirect incorporation into the Indian legal framework. Further, the rights of refugees under the CRC are more expansive and encompass both refugees and those seeking refugee status (CRC, article 6).

The internationally accepted definition of a refugee is found in Article 1 of the Refugee Convention which defines a refugee as a person forced to flee their country owing to war, persecution or violence, and is unable to return owing to a “well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership of a particular social group” (United Nations, 1951, article 1).

Further, the CRC Committee has noted that this definition must be interpreted in a manner that is age and gender sensitive accounting for particular manifestations of persecution experienced by children, including child labour, sexual exploitation and trafficking, and female genital mutilation (UN Committee on the Rights of the Child (UNHCR - The UN Refugee Agency, n.d., 74). For this assessment, it is integral that the child’s voice be heard.

In India, the determination of refugee status has failed to account for the refugee child. On one hand, when children are accompanied by adults, their claims are often subsumed within the primary claims of a family member.

Protection status if granted, is subsidiary to the status of this member. On the other hand, particularly in the case of older refugee children, there is a tendency to completely disregard the age of a child for refugee status determination.

In the former case, the refugee child goes completely unheard, with the added risk of the expiry of their refugee status on attaining majority. In the latter case, the specific vulnerability of the child remains unacknowledged even while according a higher degree of autonomy to the said child. The harm is that it fails to account for both the age-specific determinants for refugee status, which could include, persecution even by denial of human rights under the CRC; and, it fails to provide for specific entitlements of the refugee child, such as to family unification or education.

In the landmark case of *Ktaer Abbas Habib Al Qutaifi v. Union of India*, the plaintiffs who were 16, and 17 years old, had been separated from their parents, and fled to India to avoid compulsory military service in Iraq. The court stayed the detention in the said case, but left the determination of status to the UNHCR. Significantly, a strong case could've been made that forced recruitment for the armed forces would constitute an age-specific ground for persecution. However, the court failed to undertake any nuanced analysis based on the principles and rights within the CRC.

Significantly the court referred to the case of *Minister of Immigration and Ethnic Affairs v. Teoh* ('Teoh'), to argue for the enforceability of international obligations. In the said case, the Australian court had interpreted the phrase "in all actions concerning children" (CRC, article 3, clause 1) very widely to encompass any actions that were to any degree touching, relating to or having any bearing on children. Arguably, the most significant contribution of this case was this wide interpretation, expanding the application of the 'best interests' principle to support the application of the 'best interests' principle to the refugee status application of the parent. Yet, the SC, even in its reference to *Teoh*, ignored this application of 'best interests' in a wider sense.

This interpretation is supported by Canadian jurisprudence which is significant as it has seen the most development in the sphere of the application of the 'best interests' principle to deportation issues affecting children. In *Baker v. Canada* (1999), the court noted that the principles of the CRC did not allow the needs and interests of children to be minimised in decisions affecting their

future, which would include the immigration status of their parent, in this case their mother (*Baker v. Canada*, 1999, paras. 71-75). The procedural aspects of such consideration of children's best interest would involve notice being given to the children as well as the other parent, a right for children to make submissions in this regard, and a right for them to have counsel present (*Baker*, para. 18).

There are multiple reports of refugee children not being informed of the refugee status or detention of their parents, let alone being accorded any say in the proceedings for the same (Naik, M. & Firdous, M., 2023; Paliath, S. 2022). In the absence of any enactments on these procedural safeguards for the rights of children under the principles of their best interest and right to be heard, and their right to family unity, these rights are not being realised in India's treatment of its refugees.

Therefore, under the present framework, the child's absence under refugee laws sees the failure of both substantive and procedural realisation of the principles and rights under the CRC. This is aggravated by the spillover onto other aspects of children's rights once refugee status is left under question, which is discussed in the following section.

Locating the Refugee Child in Indian Practice

Children are conspicuous by their absence in the Indian discussion on the rights of refugees. However, considering that children, regardless of status, are entitled to certain rights, the extent of the realisation of these rights needs to be evaluated.

First, under Article 9 and 10 of the CRC the rights of family unity, and reunification is codified. *Second*, under both the CRC and the JJ Act 2015 the detention of a child, and the institutionalisation of the child are measures of last resort (CRC, article 37(b); Government of India, 2016, §3(vii)). In the case of the refugee child, these present an inherent dichotomy.

In *Mohammad Salimullah v. Union of India*, the SC allowed the deportation of certain members of the Rohingya community to Myanmar in clear violation of the principle of non-refoulment. When this and other such instances caught public attention, it came to light that in the course of such deportation parents were being separated from their children with no clarity

on reunification (Hassan, 2022). In light of the recent crackdown on Rohingya refugees, despite the recognition of their refugee status, they are effectively faced with one of two outcomes, either detention, which is often for an indefinite period, or deportation, or both. While in the first case, there is a grave risk of separation of the family, as noticeable from the above example. The latter may have several different implications for the refugee child.

First, in many instances the child may be detained along with the parent. Recently, the government of India drafted and circulated a ‘Model Detention Centre/Holding Centre/ Camp Manual’ (Singh, 2019). In addition to various other provisions, the manual stipulates that families must not be separated. However, in effect this envisions and accommodates children within a detention centre without accounting for the profound adverse impact it may have on their mental and physical health and development (UNICEF, 2018, pp. 2-3; Alice Farmer & Forced Migration Review, 2013). An account of the Sarai Rohilla detention centre in New Delhi captures this impact in the words “they are not permitted to play or be outdoors” (Sur, 2023). In this regard, the Committee has also noted that the detention of a child based on the migration status of their parent always constitutes a violation of the child’s rights, and of the best interest principle (UN. Committee on the Rights of Child, 2012, para. 78).

As a result, it has been proposed that children be treated as Juveniles under the JJ Act, 2015 and tried only by Juvenile Justice Boards under the provisions for children in conflict with law (Menon, M. & Commonwealth Human Rights Initiative, 2020). This approach is *prima facie* problematic as it criminalises refugee children. Further, even the practice of treating the child as a child in need of care and protection under the Juvenile Justice framework is inconsistent with the full realisation of the rights of the child.

Under the Act, a child may initially be placed in a child care institution (usually a children’s home), particularly if the parents have been detained as ‘foreigners’. Owing to the uncertain legal status of the parents, the child may remain institutionalised without any periodic review of the child’s situation which is otherwise mandatory under Section 36(3) of the JJ Act, 2015. In certain cases, even after the release of the parents from detention, the children have remained institutionalised, in clear violation of the principle of family reunification (Paliath, S. 2022).

In order to resolve this dichotomy, the participation of children, and the ‘best interest’ of the child must form a primary consideration even in determining the substantive rights of parents. The Guahati High Court has already paved the way for the same, albeit to a very limited extent, through its judgment in *In Re State of Assam*, in which it directed for the constitution of a High-Powered Committee to provide details about women declared as ‘foreigners’ whose children were detained with them, and thereafter, evaluate the eligibility of the mother to be released with the child in the best interest of all parties. While this was an extraordinary measure taken in light of COVID-19, India’s adherence with its commitments under the CRC and the overarching framework of child rights requires it to take a similar approach to its treatment of child refugees, favouring the liberty of the family in the best interest of the child.

A Child-Friendly Approach to the Rights and Entitlements of Refugee Children

It is evident that the government in India, in formulating and applying the laws on citizenship has ignored an important constituent that is children. Here, India’s failure to sign and ratify international instruments on refugees, and statelessness, has been used as a defence to its lacking immigration policies. However, in the case of children, their claims are given weight by other international instruments that India is bound by, most significantly, the CRC.

Streamlining the process of attainment of refugee status, including of adults would provide a *prima facie* means of preventing detention. The best interest of the child, and the principle of institutionalisation as a measure of last resort should inform the treatment of the refugee child. Further, this should be extended to the determination of immigration status of the parents. As discussed above, cases such as *In Re State of Assam*, align with international obligations under which the family’s liberty can be protected so as to secure the best interest of the child.

Further, when a child is apprehended at the border, there should be provisions for the prompt appointment of a Child Welfare Officer, or other social worker to advocate for the humane treatment of the child. For this purpose, Child Welfare Committees should take *suo motu* cognisance of children in

detention centres, and refugee camps, as children in need of care and protection, as empowered under Section 30(xii) of the JJ Act, 2015.

This should counter their present treatment as children in conflict with law (CCL), rather than as children who have fled persecution, and may be separated from their parents, thus needing care and protection (CNCP). The law pertaining to unaccompanied minors should also be clarified to accord them a special status which allows for their legal adoption in case their parents cannot be found.

International best principles stipulate that immigration detention of children of their families should be legally prohibited (Families & Child, 2017, Principle No. 4). Additionally, children should be allowed to remain in family settings, or in “non-custodial, community-based contexts while their immigration status is resolved.” The implementation of these principles would ensure neither children, nor their parents are initially institutionalised, and once immigration status is determined the relevant protections may be availed by them on account of their refugee status.

The scope of these protections has been enumerated by the SC and other courts in a number of cases. However, their effective realisation requires the enactment of a refugee law in India. In fact, the proposed Asylum Bill, 2021 categorises unaccompanied children as “persons with special needs” who may enjoy additional entitlements (Tharoor, S., 2021). Clause 35, and 36 of the proposed Bill provide that children of refugees, asylum seekers, and mass influx refugees shall be provided the same healthcare rights, and free and compulsory education that is available to Indian citizens.

This is an important codification of a pre-existing right, which would effectively prevent instances of refugees being denied legal entitlements of health or education on account of inadequate documentation such as Aadhar cards or voter identity cards. Therefore, the enactment of a comprehensive refugee law may go a long way in securing the entitlements of refugee children and should be expanded to cover their nutritional needs, and rights against exploitation.

The right against exploitation is of particular significance for refugee children, who are vulnerable to being recruited for criminal purposes, being engaged in informal child labour, as child soldiers, or being trafficked as slaves,

or for immoral purposes. These risks necessitate the strengthening of the state's legal framework in dealing with refugee children, and a collaborative approach with civil society, non-governmental organisations, and international bodies.

Conclusion

The framework of rights both under the CRC and the domestic law of India applies to all children regardless of status. Therefore, irrespective of India's position on the Refugee Convention, it is under an obligation to protect, at the very least, the rights of children, which must encompass all rights under the CRC, irrespective of the extent of rights enjoyed by refugee adults.

A significant barrier to the realisation of this conception of rights of refugee children has been the ad-hocism even in the mainstream adult law and policy on the rights of refugees in India, caused in part by India's non accession to the Refugee Convention. When the policy on refugee rights is left to the discretion of the government, in the absence of formal laws, children are bound to be left out.

This is noticeable at all stages of the immigration process, beginning from the attainment of refugee status, which does not account for a child-specific determination of factors constituting persecution, and in the course of which the child remains unheard. A significant concern at this stage is the absence of the child's participation both in the determination of their status as a refugee, and that of their parent, despite each being a concern bearing a direct effect on the child.

This may entail either the detention of the child with the parents without accounting for the impact such detention may have on the child, or a forced and sustained separation of the family. In each instance, the participation of the child, and the consideration of their best interests in detention and deportation related decisions needs to be formalised through procedural and substantial safeguards.

While stateless minors are entitled to a number of fundamental rights guarantees under the Constitution, most importantly, Articles 14, 21, 21A and 23, and 24, the state enjoys a wide discretion in determining their immigration status, and may exercise this discretion to the disadvantage of child refugees. Refugees have been granted a special status by courts in India granting them rights of rehabilitation, non-refoulment, resettlement, nutrition, health and education.

In practice, refugee children are often denied these entitlements. The process of obtaining documentation is complicated by various administrative hurdles, and lack of legal certainty. Consequently, refugee children face the risk of being detained or institutionalised at the border. This is violative of international India's obligations.

International best practice dictates that refugee children be protected and kept in community-settings, rather than be punished. This is possible through a streamlined process of granting refugee status which would entitle 'foreigners' to more expansive entitlements, as well as through a specific enactment on refugees.

The subjects of this research are entitled to the full protection of the CRC and core human rights instruments, and this paper exposes the lack of protections available to refugee children. By doing so, this paper provides a basis for recommendations to eliminate the gaps in the present legal framework. This paper promotes an approach that has due regard to the rights of "all children" regardless of immigration, or citizenship status. Additionally, heed must be paid to the specific vulnerabilities of refugee children who face persecution, loss of identity and family, and a risk to their life and liberty. To resolve these issues, their status as 'children' rather than refugees, or migrants, must inform their treatment.

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