

# THE HUMANITARIAN FOUNDATIONS OF ASYLUM: A STUDY OF JUSTICE, ETHICS, AND STATE POWER

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## Abstract:

Asylum denotes the States's power of protecting a person from persecution of another State from where he actually belongs. In this article the author analyses the meaning, historical evolution, legal foundations, and it's relevance in the contemporary era. It further evaluates the principle of non-refoulement and the growing influence of international human rights law giving the rationale for the same. It also explores the various forms of asylum and concludes with the India's stance on this for, of humanitarian obligation.

**Keywords:** Asylum, State Sovereignty, Humanitarian, Non- refoulement, Persecution etc.

## 1.INTRODUCTION

The liberty of a State to accord asylum to a person overlaps to a certain extent with its liberty to refuse extradition of that person at the request of some other State, an overlapping is best seen in the grant, commonly, of asylum to political offenders, who correspondingly are not as a rule extraditable. Asylum ceases, as it were, when extradition begins, and this connection makes it vital to analyze the two problems together.

The term "Asylum" has no definite meaning and is applied in diverse settings. Instruments of International Law allude to asylum, but do not define it or describe its meaning. European Community law utilizes the term in distinct contexts. In the treaty of European Community<sup>1</sup>, "Asylum" is strongly tied to protection given pursuant to the Refugee Convention, 1951 which would be too restrictive a description for present purposes<sup>2</sup>. In academic writing, the definition of asylum adopted by *Institute du Droit International* at its Bath Conference in 1950 is often applied:

".....the terms "asile" designe [1] La protection [2] qu' un Etat accorde [3] sur son territoire ou dans un autre endroit relevant de certains de ses organs a' [4] un individu quiest venu la Chercher -" the term "asylum" means [1] the protection [2] offered by aState [3] on its territory or elsewhere to [4] an individual who came to seek it".

According to this definition, initially the phrase "individual", (element-[4]) as the drafter of this definition clearly tacitly meant, the term asylum relates only to protection granted to immigrants. States owe

<sup>1</sup>Treaty on European Union, July 29, 1992, 1992 O.J. (C 191) 1, art. K.1.

<sup>2</sup> **Hemme Battjes**, European Asylum Law and International Law 5 (Martinus Nijhoff Publishers 2006).

protection to their nationals on account of that nationality; such protection consequently needs no juridical category. Thus, “an individual” should be regarded as a person not possessing the nationality of the State he demands protection against. Secondly, the term “protection” (factor [1]), denotes some threat or danger from which the individual needs refuge. Hence, asylum concerns protection by a State from a danger that threatens the foreigner beyond the State’s jurisdiction. Thirdly, considering territorial scope the term purposely covers both protection supplied on the territory and protection offered at embassies and consulates. Fourthly, the definition restricts “asylum” to protection supplied “by State” (factor [2]), thus barring protection by a church or other non-State entities.

Official explanations remain respect to the notion of refuge as having a long historical pedigree in Britain. A home office memorandum of 1984 is an example of this: The UK, like most other western European Countries, has a long tradition of granting refuge to those who have fled their own countries to escape political or religious persecution..... a historical account.....would need to back at least 16th century when the grant of asylum to those who fear persecution for their religious beliefs became common place. But it is worth mentioning that the first piece of contemporary immigration legislation– The Aliens Act, 1905, specified that anyone who requested asylum on political or religious grounds should be permitted admission and should not be refused, leave to land even if he was likely to fall heavily on public rates. In the same manner today a valid claim for asylum transcends the standard criterion of immigration control that other immigrants must satisfy in order to enter or remain there<sup>3</sup>.

Until the mid-1980s only refugees could plead International Law to fight deportation to a perilous country of origin. The progress of International Law since that time has been quick - paced and profound. This is most obviously under European Human Rights Law. No less an authority than House of Lords has declared that the right of non-return extends not only to refugees, but to any person at risk of torture or inhuman or degrading treatment or punishment, and at least where the risk is clear and extreme, applies also where any right of life, freedom from slavery, liberty and security of person, to protection against ex post facto criminality, the right to privacy and family life, and to freedom of thought, conscience or religion is threatened<sup>4</sup>. Another accepted view is that the word Asylum is a Latin word and it is derived from the Greek word ‘*Asyilia*’ which means inviolable place<sup>5</sup>. The legal dictionary defines Asylum as “Protection from arrest and extradition, given especially to political refugees by a nation or by an embassy or other agency that has diplomatic immunity”.

The term is referred to those cases where the territorial State declines to surrender a person to the requesting State, and provides shelter and protection in its own territory. Thus asylum involves two elements.

<sup>3</sup> Home Office Memorandum (1984–85), Third Report from the Home Affairs Committee, *Refugees and Asylum with Special Reference to the Vietnamese*, at 67, as cited in Prakash Shah, *Refugees, Race and the Legal Concept of Asylum in Britain* 6 (Cavendish Publ’g Ltd. 2000).

<sup>4</sup> R (Ullah) v. Special Adjudicator; Do v. Sec’y of State for the Home Dep’t, [2004] UKHL

<sup>5</sup> **M. Cherif Bassiouni**, *International Extradition: United States Law and Practice* 137 (4th ed., Oceana Publ’ns 1996).

1. Firstly, the shelter, which is more than a temporary refuge.
2. Secondly, a degree of active protection on the part of the authorities in control of the territory of asylum<sup>6</sup>.

These two elements distinguish asylum from that of immigration. A person enjoying asylum may be referred to as an *asylee*. Thus generally speaking the term “asylum” is used to designate the protection which a State grants to a foreign citizen against his own government<sup>7</sup>. The nature of the doctrine is well outlined by the Institute of International Law in the following terms:

“Asylum is the protection which a State grants on its territory or in some other place under the control of certain of its organs, to a person who comes to seek it”.<sup>8</sup>

Embedded in this definition is the fundamental distinction between territorial asylum granted within the territorial jurisdiction of a State, and ex-territorial asylum granted in embassies, legations, consulates, warships and merchant vessels and, thus, within the territory of another country. Before going into details we will discuss the history of Asylum.

## 2. HISTORICAL BACKGROUND OF ASYLUM

Historically the word extradition stands for the opposite notion of traditional hospitality offered to an alien and is, therefore “extra-tradition”. It is a process which derogates to the tradition of asylum. The practice of asylum preceded in origin to that of extradition and, therefore, extradition became an exception to asylum, both by reason of substance and as a consequence of their historical development<sup>9</sup>. Asylum was the place where a State could not exercise its authority over any individual, bestowed there in or upon any individual, the inviolability of his person. This gave rise to legal relationship between asylum and jurisdiction.

Asylum was not always equally acknowledged or implemented by cultures through history, in reality the practice was uneven, at one point it was selectively administered, and at other it was seen as a privilege rather than right. Maximum examples of its use throughout the periods are increasingly relied upon to lend credence to the argument of Suaaz and Grotius that asylum is a fundamental human right arising from Natural Law. The practice originated in sanctuaries supplied by the holy places in ancient times. The sacred places, by virtue of their affiliation with divinity, came to be viewed as inviolable by the pursuing mortals. These sites, consequently, afforded shelter to the pursued. The devotion for holy places was probably based either on the notion that the wrath of the God would fall upon the violator, or on the respect which these places demanded as being the dwelling of God<sup>10</sup>. Divinity thus shielded the unhappy member of the society from some primitive and terrible form of retribution.

Thus ‘The Asylum’, the sacred location, was available even against the civic authority of the countries, where the religious and civil authorities remained distinct. However, in countries where the two were united under one supreme authority, asylum was not accessible against the civil authorities.

<sup>6</sup> I.A. Shearer, *Starke’s International Law* 323 (11th ed., Butterworths 1994).

<sup>7</sup> Manuel R. Gracia Mora, *International Law and Asylum as a Human Right* 1 (Public Affairs Press 1956).

<sup>8</sup> Article 1, Resolution Adopted by the Institute of International Law, Sept. 1950, reprinted in **45 Am. J. Int’l L. 15 (1951)**, as cited in *Id.*

<sup>9</sup> M. Cherif Bassiouni, *Law of Extradition and World Public Order* 86 (A.W. Sijthoff Publ’rs 1974).

<sup>10</sup> S. Prakash Sinha, *Asylum and International Law* 5 (Martinus Nijhoff Publ’rs 1971).

A distinct notion prevailed in other ancient cultures. In India for example, the Laws of Manu stressed upon the punishment of the crime. According to Manu, the punishment (the outcome) of the wrong (the act) is justice, which is, following the Hindu idea, a necessary reality. Therefore, it would be in the interest of the guilty to subject himself to justice through punishment, rather than to escape from it. Accordingly the Laws of Manu would not approve Asylum. Furthermore, the monarch who did not punish a crime was regarded an accomplice to it, whereas the king who punished the crime was to achieve fame in this life and greatest happiness after his death. In such regime, there would not be any room for asylum.

By the 16th century thoughts on the reform of criminal justice developed and by the 17th century, religious wars and persistent religious feuds subsided, particularly after the Treaty of West Phalia (1648). By the 18th century, criminal reform and concern for world order started to emerge and this development brought to new constraints on the law and practice of asylum. Among these were: Place should not confer absolute immunity to all types of fugitives because States

- a. have duty to prosecute common criminals, aut dedere aut judicare.
- b. States have a reciprocal duty to each other in furtherance of developing world order.
- c. On the other hand the presence of asylum and refugee rights is sometimes viewed as an achievement of the current International Law. Indeed, it has grown increased relevance since the beginning of the 20th century and has become a key concern of the modern democracies. Since, the second half of the 20th century international refugee law, asylum rights and the system of extradition has made enormous strides. Through the bilateral and multilateral agreements made under the leadership of United Nations, an efficient and complicated system has been developed. The recent development is intimately associated with the evolution of human rights, which gained prominence following Second World War.
- d. The national and international traits can be readily identified. The national character was distinctive until 17th century, when national legal orders and criminal procedure were uncertain and could not give efficient guarantees and remedies in case of failure. The fundamental goal behind this privilege was to provide support to the accused against intrusion before the criminal procedure commenced with its legal assurances for a fair and just trial. The asylum rights with international aspects, acting between States, were mainly political and humanitarian motives. The legal institution had been seen as a shared arena for both criminal and International Law until 19th century, when refugees due to the European revolutions and wars for independence and the increased transport facilities, fled to the other countries. By that time the topic of competency finally seemed to be decided and the International Law approach was accepted. Thus, there is no obvious dividing line in history to identify the move from main practice of religious and ecclesiastic shelter to what became political asylum. The transition was gradual and it came about with the loss of ecclesiastic temporal power and the emergence of political concept of government and State and their relationship to the individual, which occurred throughout the 17th and 18th century. Thus the refuge was thus not based on fear of Gods but on geographical sovereignty of States that could exist only among independent sovereignties.

### 3. RATIONALE FOR ASYLUM

- i. Religious refuge declined with the rise of the non-ecclesiastic State, in most of European Countries after the separation of Church from the State and as the divine claims of the monarchs were now disputed and this particularly occurred during reformation. This led to the formation of the asylum as it extant now days, i.e. a type of exemption from foreign legal proceedings conferred by the State

- of refuge to a foreigner subject to its jurisdiction. The applicability of this sort of asylum was inside the territorial jurisdiction of a State rather than within the walls of a temple or Church.
- ii. The idea of asylum remains one of personal immunity from the authoritative processes of a decision maker other than that of the jurisdictional authority under whose power the alien falls.
  - iii. On this basis the asylum can be categorized into: a. Territorial Asylum b. Extra Territorial Asylum
  - iv. M.Cherif Bassiouni interprets these two phrases as:
  - v. 1. Territorial Asylum : Denying another authoritative process the capacity to exercise jurisdiction over an individual through extradition or other modes of rendition of the person sought but who was given asylum and
  - vi. 2. Extraterritorial sanctuary: Granting sanctuary in an embassy or aboard a vessel. Hereinafter comes the debate on various sorts of asylum.

#### 4.TYPES OF ASYLUM

As has been discussed previously asylum has been put into two categories which include Territorial and Extra Territorial Asylum.

##### 4.1 TERRITORIAL ASYLUM

Asylum is territorial where the State of refuge provides it to an individual upon its own territory. International Law affords every State an exclusive jurisdiction over persons on its territory. They have this intrinsic right, as an aspect of their sovereignty, to offer sanctuary on their territory to all sorts of refugees, including the fleeing offenders, but they are not under a legal obligation to grant asylum to a fugitive. The Territorial Asylum has been further classed into: i. Political Asylum, i.e., for political defectors.

- ii. Refugee Asylum i.e., for people who fear persecution in their own country.
- iii. General Asylum i.e., for those who have departed their nation to seek economic advancement but do not enjoy the status of immigration.<sup>11</sup>

In the absence of treaty obligations, a State is neither bound to admit aliens to its territory nor is it prevented from admitting them. It may choose to admit any one it pleases, it may exclude anyone it pleases or it may admit one on whatever terms and condition it pleases<sup>12</sup>. This competence is a consequence of the territorial sovereignty of States. A State has even no obligation under customary International Law to extradite as has been already discussed that the rules of extradition have been developed through treaties and a large number of States has concluded such treaties. Various kinds of Territorial Asylum are being discussed in detail below.

##### 4.1.1POLITICAL ASYLUM

Right to Political Asylum is an ancient juridical notion, under which a person persecuted for political opinions or religious beliefs in his or her own country may be protected by another sovereign authority, a foreign country, or church sanctuaries ( as in medieval times). Political asylum is similar, but not identical to modern refugee laws which deal with massive influx of population, while the right of asylum concerns individual and is usually delivered on case to case basis. There is an overlap between the two because each refugee may demand political asylum on individual basis.

<sup>11</sup> J.G. Starke, Introduction to International Law 358 (10th ed., Butterworths 1989).

<sup>12</sup> J. B. Moore, A Digest of International Law 156, Vol. IV (1906).

International practice confirms the proposition that it is in the matter of political offences that States have the widest discretion to grant or to refuse asylum. It is a familiar legal postulate that in the absence of a treaty, States have an almost unlimited competence to grant asylum to those prosecuted for political offences. The reason of the exemption can be found in the well founded apprehension that to surrender unsuccessful rebels to the demanding State would surely amount to delivering them to their summary execution, or, in any event, to the risk of being tried and punished by a justice colored by political passion. It is unquestionable that human rights and values are most vitally at stake in times of turbulent political conditions, and it is precisely for this reason that no one would really care to see criminal punishment meted out to those who have failed in their attempt to overthrow an existing government. Thus to surrender political rebels has been looked upon with a singularly marked antipathy and the granting of asylum to such refugees has come to be generally regarded as moral duty.

With this background in mind, it can be readily seen that the law deeply rooted in sentiments of justice and humanity has placed political offenders in a special category. But in trying to draw a proper line of demarcation between common and political offenders, one is at once plunged into never ending controversy and a desperate confusion. This has been rightfully considered as the most acute and persistent problem of law, still offering considerable difficulties in application.

#### 4.1.2 REFUGEE ASYLUM

The principle outlined above with respect to 'political' asylum applies also to refugee. Indeed, most applicants for territorial asylum will also claim the status as refugees. A refugee is defined in Article 1 of the Convention Relating to the Status of Refugees, 1951, '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 return to it'. At present there are 145 States Parties to this Convention.

The United Nations High Commissioner for Refugees (UNHCR), and other concerned humanitarian organisations, have promoted a concept of 'temporary refuge' that would fall short of asylum or refugee status in the technical sense but would allow for the determination of the status of the claimant and for the finding of 'durable solutions', such as resettlement in a third State or even eventual repatriation. The object of the concept is to relieve the fear of the State of first resort that it will carry the burden of looking after refugees for an indefinite period. The UNHCR actively seeks places in other countries for persons granted temporary refuge, and call upon all States to assist materially in alleviation of what has become a major world problem under the principle of international solidarity.

#### 4.1.3 GENERAL ASYLUM

At the base of the concerns of many States faced with an actual or threatened influx of asylum seekers is the reality that some of these may not qualify as refugees in the sense of the 1951 Convention, or as victims of persecution in the sense of Universal Declaration<sup>13</sup>, but are seeking a better life for economic reasons or social reasons. This can only be determined on a case by case basis. Such persons are not asylum seekers but would be immigrants. Other persons may be genuine asylum seekers, not for political or similar reasons but as a result of civil war in their own countries, or natural disasters such as famine or flood. Normally the need for such asylum will not be lengthy before repatriation can take place, but the States

<sup>13</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (Dec. 10, 1948), art. 14

offering temporary asylum may need international assistance in order to bear the burdens. This kind of asylum comes under the category of general asylum.

#### **4.2 EXTRA TERRITORIAL ASYLUM**

Asylum granted by a State not on its physical territory, but on its notional territory, like in legation and consular premises in the physical territory of another State, and on warships, is called the extra territorial asylum.<sup>40</sup> Such kind of asylum finds its basis in:

- i. The Principles of Extra Territoriality
- ii. The Diplomatic Privileges
- iii. Custom
- iv. Usage
- v. Treaty or Regional International Law

The extra territorial asylum can be further classified into:

- i. Diplomatic Asylum
- ii. Asylum in Premises of International Institutions
- iii. Asylum in War Ships
- iv. Asylum in Merchant Ships

##### **4.2.1 DIPLOMATIC ASYLUM**

The granting of asylum in the legation premises is known as diplomatic asylum but it is an exceptional measure and controversial. The Vienna Convention on Diplomatic Relations, 1961 contains no provision on the subject although in Article 41, reference to “special agreements” in force between the sending State and receiving State makes room for bilateral recognition of the right to give asylum to political refugees within the mission premises. But on the other hand, Para (3) of Article 41 of the Convention provides that the premises of the mission must not be used in a manner “incompatible” with the functions of the mission. It is also very doubtful whether a right of diplomatic asylum for either political or other offenders is recognized by general International Law.

##### **4.2.2 ASYLUM IN PREMISES OF INTERNATIONAL INSTITUTIONS**

The Headquarters agreements of the United Nations and specialized agencies reveal no general right of international institutions to grant asylum or even refuge in their premises to offenders as against the territorial State, and does not even recognize a right of protection on humanitarian grounds. It is difficult to conceive, however, that a right to grant temporary refuge in an extreme case of danger from mob rule would not be asserted and conceded

##### **4.2.3 ASYLUM IN WAR SHIPS**

The warships are treated as floating territory of the flag State and enjoy all immunities from the jurisdiction of the foreign State in whose port or waters they are found<sup>14</sup>. They enjoy immunity under International Law and because of the similarity with the rule that diplomatic premises are inviolable, it has been claimed that there exists an analogue right of asylum on boarding such ships.

The diplomatic practice has also, to a great extent, assimilated the position of warships with the status of diplomatic premises in this regard. It is a generally held view that an individual, who is not a member of the crew and take refuge on board of a vessel after committing a crime on shore, cannot be arrested by the

<sup>14</sup> **Kalinga Kumar Panda**, A Textbook of International Law **183** (Anmol Publ'ns 1998).

local authorities and removed from the vessel if the commander of the ship refuses to hand him over. On the other hand there is another view that such an asylum should be granted only on humanitarian grounds if, the life of the individual seeking asylum is threatened. Asylum may also be granted to political offenders on war ships.

#### 4.2.4 ASYLUM IN MERCHANT SHIPS

Asylum on Private vessels or merchant ships, in foreign territorial water do not enjoy that immunity from local jurisdiction as is enjoyed by public vessels, except with respect to acts which affect the vessel internal order and which do not disturb the peace of the port<sup>15</sup>. Therefore, these vessels cannot accord asylum. Nor has any practice of State developed distinctly to invest in such vessels a right to do so. Consequently, local authorities have the right to arrest refugees in such vessels.

#### 4.3 SIMILARITIES AND DIFFERENCES BETWEEN TERRITORIAL AND EXTRATERRITORIAL ASYLUM

Bassoioni has rightly analyzed and brought about the points of similarities and distinction between territorial and extraterritorial asylum when he states that, the most publicists and panelists who treat the subject consider that the territorial asylum differs from extraterritorial or diplomatic asylum which some consider as yet another form of asylum, and consequently, have come to regard them as different institutions. The rationale advanced is that, extraterritoriality denies the sovereignty of State on whose territory it is exercised, while territoriality affirms the sovereignty of the State on whose territory it is practiced.

The development of the distinction brought about the dichotomy between diplomatic and extraterritorial asylum which are within the scope of customary International Law and territorial asylum which is within the preview of municipal law. Thus, territorial asylum is often referred as internal asylum as distinguished from extraterritorial or external or diplomatic asylum. Each of these two forms became, therefore subject to two different sources of legal control, i.e., International Law and municipal law. On the other hand territorial asylum and extraterritorial asylum has been considered as two sides of the same coin. Sovereignty over territory confers the right to exclude the exercise of jurisdiction over that same territory by any other sovereign. Thus territorial asylum is the assertion of that right. Its applicability by extension encompasses embassies, legations, military bases, territorial enclaves and vessels. The extraterritorial application of sovereignty implies the same exclusive jurisdictional control as does the principle of territoriality. As already discussed the source of legal authority is said to differ in both, the basis of territorial asylum is municipal law, whereas extraterritorial asylum is said to have its legal basis in International Law, be it customary or contractual. The distinction is rather tenuous in view of contemporary humanitarian International Law and its application to municipal law. Furthermore, extraterritorial asylum is only an extension of territorial asylum, even though recognition of this extension is grounded in International Law rather than municipal law.

#### 5. POSITION IN INDIA

The Indian position on the principle of non re-foulement can be best judged from the time when India was born alongside the modern regime of International Law at the inception of post war era. As a result, many of the basic principles of the United Nations and its Universal Declaration of Human Rights can likewise

<sup>15</sup> D.P. O'Connell, *International Law*, Vol. II, 814 (2nd ed., Stevens & Sons 1970).



be found in the Fundamental Rights of the Constitution of India. While India's Constitution was founded with a progressive set of human rights, however, it's ongoing relationship with International Law falls in line with more traditional approaches.<sup>16</sup> Since India has not yet ratified or acceded to the treaty regime having near universal effect pertaining to refugees i.e. 1951 Refugee Convention and its 1967 Protocol on the Status of Refugees which is magna carta of refugee law, its legal obligation to protect refugees is traced mainly in customary International Law<sup>17</sup>. The Constitution of India contains just few provisions on the status of International Law in India leading among them is Article 51(c) which states that:

“The State (India) shall endeavor to foster respect for international law and treaty obligations in the dealing of organized people with one another”.

Article 51(c) is placed under the Directive Principles of State Policy in Part IV of the Indian Constitution, which means that it is not enforceable provision. However when Article 51 (c) is read in the light of other Articles, judicial opinions and foreign policy statement, it suggests otherwise.

It is here important to note that though India is not signatory to the 1951 Convention Relating to the Status of Refugees or the 1967 Protocol, yet India is a signatory to various other International and regional treaties and Conventions relating to universal human rights and refugee laws such as UN Declaration of Territorial Asylum, 1967; the International Convention on Civil and Political Rights, 1966. India is also member of Executive Committee (ExCom) of the United Nation High Commissioner for Refugees (UNHCR) whose current Members are 87.

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<sup>16</sup> **Omar N. Chaudhary**, Turning Back: An Assessment of Non-Refoulement under Indian Law, **39 Econ. & Pol. Wkly. 3257** (2004).