

# NO TIME FOR LOVE: INDIA'S STAND ON REFUGEE PROTECTION!

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## Introduction:

This essay will be an attempt to understand India's policy on asylum seekers and treatment of refugees. India presently has no law governing Refugee status, but I will discuss the prevalent legislative and administrative policies used by the central government to handle refugee influx and the constitutional provisions that apply to non-citizens. Then, I will discuss the important role the Indian Judiciary and the National Human Rights Commission (NHRC) has played in protecting and nurturing the human rights of refugees. Further I will try to discuss the asylum bill of 2015, which if passed by the parliament would serve as the competent law governing refugee influx in India. India's obligations towards the International community and under the provisions of customary International Laws and relevant treaty bodies will also be covered.

## Present Legislations dealing Refugee Status:

India has had refugee influx since the partition of India and Pakistan in the year 1947.<sup>1</sup> Even though India is not a party to the refugee convention of 1951 and its additional protocol of 1967, but it is a member of the Executive Committee of the UNHCR (EXCOM). The Indian government has always welcomed refugees and tried to rehabilitate them in the best way possible.<sup>2</sup> The External Ministry has always felt that the Convention of refugees is euro-centric, does not have a “burden sharing” mechanism and is not focused at the mass influx situation

<sup>1</sup> B.S. Chimni (ed), International Refugee Law: A Reader (SAGE, New Delhi 2000) 462.

<sup>2</sup> Ibid, 463.

that India has always experienced.<sup>3</sup> The refugee convention like the other treaties does not have a treaty body governing the legality of a states action, or hold a state responsible for breach of obligation rather it puts the legal protection entirely upon the state.<sup>4</sup> Therefore India has never been tempted to be a party of the Convention. The quality and care of protection and rehabilitation that was provided to the first few groups of refugees was better than how the later groups were treated. The recognition, care and protection process of refugees and asylum seekers has eroded over the years, and one of the major reasons for this is that at present we do not have a legislation governing refugee law. The United Nations High Commission On Refugees (UNHCR) has in 2015 estimated the number of current refugees in India to be 205,764, out of which only 30,000 are registered with the UNHCR headquarters in New Delhi.<sup>5</sup>

There are no laws dealing with refugees in India, but there are several laws that deal with Foreigners, unfortunately Indian government, to manage refugees that enter the Indian borders uses these legislations. The first legislation used is the Passport Act 1920.<sup>6</sup> This act states that any person entering the borders of India through land, water or air shall carry a valid passport,<sup>7</sup> any contravention with the provisions of this act may amount to imprisonment up to three months, a fine or both.<sup>8</sup> Under this act any police officer that is not below the rank of a sub-inspector and a customs officer who is empowered with general or specific orders from the central government can arrest a person without a warrant if he/she has violated the rules of this act or a order by the central government or there is a reasonable suspicion.<sup>9</sup> The Central government is also empowered to make special or general orders to remove a person from the territory of India in case of violation of the rules.<sup>10</sup> To support the purpose of the passport act 1920, even further the Central Government issued Passport (Entry into India Rules) 1950, which extend to the whole of India and require a valid visa in addition to a valid passport to enter India.<sup>11</sup>

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<sup>3</sup> Singh, Jai S. "Refugee Law and Policy in India: Efforts of Indian Courts." ISIL Year Book of International Humanitarian and Refugee Law 9 (2009), 219.

<sup>4</sup> Nariman, Fali S. "Refugee Protection." ISIL Year Book of International Humanitarian and Refugee Law 2 (2002), 8.

<sup>5</sup> UNHCR, Sub regional Operations Profile, South Asia (2015) <http://www.unhcr.org/pages/49e4876d6.html>

<sup>6</sup> Act No. XXXIV of 1920 (India).

<sup>7</sup> Ibid, section 3(1).

<sup>8</sup> Ibid, section 3(3).

<sup>9</sup> Ibid, section 4.

<sup>10</sup> Ibid, section 5.

<sup>11</sup> Passport (Entry into India) Rules, 1950, Rule 5.

The second important and widely used legislature is The Registration of Foreigners Act 1939. The purpose of this act is to register the foreigner, entering, departing and staying in India.<sup>12</sup> Section 2(a) of this act defines a foreigner as a person who is not a citizen of India.<sup>13</sup> To further contribute to the purpose of this act, the central government implemented The Registration of Foreigners rules of 1992. In accordance to this every foreigner who stays in India for a period exceeding 180 days shall register himself with a Foreign Registration Officer (FRO) of that jurisdiction, and every time they change their address or leave the borders of India they have to take authorization from the FRO, a contravention will amount to imprisonment of up to 1 year or a fine of INR 1000 or both.<sup>14</sup>

The Foreigners Act 1946, empowers the central government to make rules and orders relating to the prohibition, regulation, restriction of entry, stay and departure of any foreigner or class of foreigner in India.<sup>15</sup> Under this act too a foreigner is defined as a person who is not a citizen of India.<sup>16</sup> The important provisions under this act that concern refugees and stateless person are the ones, which determine the nationality of a foreigner. The final determination of a person's nationality depends upon the concerned authority in the country the foreigner is connected with, and this decision cannot be challenged in any court of law.<sup>17</sup> The penal provisions are also very strict under this act; a contravention will amount to imprisonment up to 5 years.<sup>18</sup> This Act is to be read with the provisions of the Passport act 1920 and the Registration of Foreigners Act 1939, making the entire regime much more restrictive and stricter.<sup>19</sup> The purpose of the foreigners Act 1946 and the extension order of 1946 were to restrict the entry and movement of refugees and other foreigners in India. It restricts the entry of foreigners without a valid passport and visa in public interest.<sup>20</sup> This act also puts restrictions on foreigners who are temporarily staying in India,<sup>21</sup> who are visiting prohibited places,<sup>22</sup> and

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<sup>12</sup> Act No. XVI of 1939 (India).

<sup>13</sup> Ibid.

<sup>14</sup> The Registration Of Foreigners Act 1939, Section 5.

<sup>15</sup> Act No. XXXI of 1946 (India), Section 3.

<sup>16</sup> Ibid, Section 3(a).

<sup>17</sup> Ibid, Section 8.

<sup>18</sup> Ibid, Section 14.

<sup>19</sup> Ibid, Section 12.

<sup>20</sup> The Foreigners Order, 1948: Cl. 3(2)(a); Cl. 4(a) and Cl.5.

<sup>21</sup> Ibid, Cl 7.

<sup>22</sup> Ibid, Cl 8.

prohibited areas,<sup>23</sup> restriction on employment;<sup>24</sup> and movement.<sup>25</sup> Because these provisions dealing with foreign nationals are so stringent, they should not be applied to a refugee or a person-seeking asylum. A refugee or asylum seeker should not be prima facie detained if he/she is not in possession of proper travel documents under this act, until they have been given a proper chance to explain their circumstances and reasons for entering India and claiming refugee status or asylum.

India Hosts two kinds of refugees, Mandate refugees and non-mandate refugees. Mandate Refugees are those who have been registered by the UNHCR and non-mandate refugees are those who are not registered and are directly under the Indian Government, which prefers to deal issues regarding them at a bilateral level with the countries concerned.<sup>26</sup>

#### Role of The Indian Judiciary In Protecting Refugees:

The status of refugees in India is treated on an ad hoc basis.<sup>27</sup> However the Indian government has taken many Tibetans, Sri-Lankans, Pakistani, Afghans, and Bangladeshi refugees over the years. As India has no legal remedies for refugees, the Supreme Court (SC) has time and again in many cases tried to put the rights of the refugees under the Fundamental Rights granted by the Indian Constitution. Not all Fundamental rights can be granted to refugees but the following cases show that the judiciary has tried to cover article 21 under this ambit. The Indian Judiciary has played a major role in protecting the rights of these refugees. In *NHRC v State of Arunachal Pradesh and another*,<sup>28</sup> the Supreme Court held that “we are a country governed by the rule of law, and the constitution confers some rights to every human being and certain rights to citizens.<sup>29</sup> Every person is entitled to equality before law and equal protection of the laws, thus the state is bound to protect the life of every human being, be it a citizen or otherwise, and it

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<sup>23</sup> Ibid, Cl 9.

<sup>24</sup> Ibid, Cl 10.

<sup>25</sup> Ibid, Cl 11.

<sup>26</sup> Ragini Zutshi, Jayshree Satpute Md. saood Tahir, *Refugees and the law*, 2nd edn. HRLN (2011), pg 56.

<sup>27</sup> V. Survanarayan, *Needed a National refugee Law*, *The Hindu*, Delhi, (June 3 2000) pg 10.

<sup>28</sup> 1996 AIR 1234, 1996 SCC (1) 742.

<sup>29</sup> Article 21 Part III The Constitution Of India 1946, No person can be deprived of his Right to life and person liberty except according to the procedure established by law as held in *State of Arunachal Pradesh v Khudiram Chakma*,

cannot permit anybody or group of persons to threaten the chakmas<sup>30</sup> to leave the state. The state government must act impartially and carry out its legal obligations to safe guard the life, health and the well being of the chakmas residing in the state without being inhibited by local politics.” The SC also issued a writ of mandamus to the state government to ensure that the life and personal liberty of every chakma is protected and they get an opportunity to apply for citizenship under section 5 the Citizenship Act of 1955.<sup>31</sup>

In *N.D Pancholi v state of Punjab*,<sup>32</sup> The SC put a stay order against the deportation of a Burmese refugee and sanctioned him time to stay in India until he could seek “refugee status” from the UNHC office in New Delhi. In the case of *Dr. Malvika Karlekar v Union of India*,<sup>33</sup> the SC put a stay on the deportation of Burmese refugees who were on the Adaman Island till they could apply for refugee status to the UNHCR, further the court stated that they were not a threat to security of the country. In *PUCL*<sup>34</sup> v Union of India,<sup>35</sup> the SC held that “It is an accepted proposition of law that the rules of Customary International law, which are not contrary to the municipal law shall be deemed to be incorporated in the domestic law”<sup>36</sup> Now I shall move on the High Court Cases, The majority of which are from the North East and Southern states, because geographically the north Eastern states are closer to Myanmar and Bangladesh and the Southern States are closer to Sri-Lanka.

In *Ms. Zothansangpuii v. The State of Manipur*,<sup>37</sup> The High Court (HC) granted the petitioner, a citizen of Myanmar, who was escaping the atrocities of the Myanmar army, a period of 1 month to visit UNHCR and seek asylum in India, though she had to complete her sentence under the Foreigners Act 1946, The HC stopped the relevant authorizes from

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<sup>30</sup> The refugees who had come to India from East Pakistan now Bangladesh in 1960’s, for more information see. Vijayakumar, Veerabhadran. "Judicial Responses to Refugee Protection in India." *International Journal of Refugee Law* 12.2 (2000) pg. 236.

<sup>31</sup> Citizenship by registration, 5(1): “Subject to the provisions of this section and such other conditions and restrictions as may be prescribed, the Central Government may, on an application made in this behalf, register as a citizen of India any person not being an illegal migrant who is not already such citizen by virtue of the Constitution or of any other provision of this Act...”, Thus the central government of India has the right to register and not the Deputy collector of the state, the collector is a mere instrument who submits the application, but has no right to actually decide to take an application or not. In this case the collector had no right to decide not to take the applications of the Bangladeshi chakmas.

<sup>32</sup> Criminal Writ petition number 243 of 1988.

<sup>33</sup> Criminal Writ petition number 583 of 1992.

<sup>34</sup> Peoples Union for Civil Liberties is an NGO.

<sup>35</sup> 1997 (1) SCC 301.

<sup>36</sup> *Ibid*, para 23.

<sup>37</sup> High Court of Gauhati (Imphal Bench), Civil Rule No. 981 of 1989.



deporting her back to Myanmar. In *Khy-Htoon and ors. v. State of Manipur*,<sup>38</sup> The petitioners were citizens of Myanmar, who were under trial for violation of Foreigners Act 1946, the HC granted them an interim bail on personal bond to go to UNHCR and file for refugee status.

In *Mr. Bogyi v. Union of India*,<sup>39</sup> the petitioner was a fleeing persecution from Myanmar and was under trial in India for violation of the Foreigners Act 1946, The HC had granted him bail to go to New Delhi UNHCR office and seek Asylum. In *U. Myat Kyaw v. State Of Manipur*,<sup>40</sup> The petitioner has entered India with valid travel documents, but was detained and under judicial custody for violation of section 14 of the Foreigners Act 1946. The HC granted him bail for 2 months to visit New Delhi and apply for asylum at the UNHCR office. All the above mentioned cases show how the judiciary has helped asylum seekers to visit the UNHCR headquarters, even after they are in violation of Foreigners Act, the problem is that the present Indian law treats all refugees as foreigners and therefore they have to abide by the provisions of the Act. The judiciary however is trying to fill the gaps between the faulty legislatures and the real situation and trying its best to apply a humanitarian approach to these cases because of the legislative vacuum.

Now I will discuss some cases on the issue of deportation and how the judiciary has tried to balance the lawless situation. In *Seyed Ata Mohamamdi v. Union of India*,<sup>41</sup> the petitioner was granted a refugee certificate by the UNHCR, but he was being deported back under the Foreigners Act, the Central Government passed a statement that because the petitioner had a valid refugee status, he could travel to any country under the settlement program, therefore the HC disposed the petition. In *Mohammad Sediq v Union Of India Ors*,<sup>42</sup> the petitioner was a refugee of Afghan origin, who had received a refugee certificate in 1987, which was extended on an annual basis.<sup>43</sup> In 1998 the petitioner received an impugned order from the government of India under section 3(2)(c)<sup>44</sup> of the Foreigners Act 1948 to leave India and thereafter not re-enter.<sup>45</sup> The petitioner contended that he was not given an opportunity of being heard which

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<sup>38</sup> High Court of Gauhati, Civil Rule No. 515 of 1990.

<sup>39</sup> High Court of Gauhati, Civil Rule No. 1847/89.

<sup>40</sup> High Court of Gauhati (Imphal Bench), Civil Rule No. 516 of 1991.

<sup>41</sup> High Court of Bombay, A.D. 1458 of 1994.

<sup>42</sup> High Court of Delhi, 1998 (47) DRJ 74.

<sup>43</sup> *Ibid*, para 3.

<sup>44</sup> A foreigner shall not remain in [India], or in any prescribed area therein; shall, if he has been required by order under this section not to remain in India, meet from any resources at his disposal the cost of his removal from India and of his maintenance therein pending such removal;

<sup>45</sup> *Ibid*, para 1.

was against the principle of natural justice, and also that he could not return back to Afghanistan due to the on going disturbances in his country.<sup>46</sup> The court ordered that he should be granted an opportunity of being heard, but the extent of the opportunity depends on the facts of each case.<sup>47</sup> The court also held that the Foreigner Registration office, New Delhi has issued a valid order according to the activities of the petitioner, which is prejudicial to the security of India but a reasonable opportunity should be given to the petitioner.<sup>48</sup>

In *Dhong Liam Kham and Ors. v. Union Of India*,<sup>49</sup> both petitioners were from the Chin community of Myanmar and had been granted refugee status by the UNHCR till 2017.<sup>50</sup> In lieu of this the Ministry of Home Affairs granted them Long Term Visas, later they were convicted under Narcotic Drugs and Psychotropic Substances Act 1985. After their release they were deported by the order of the Ministry of Home Affairs, which started procedures to deport them. The petitioners contended that if they were deported back to Myanmar they would face persecutions and threat to their lives. The Home Ministry contended that because of their conviction and involvement in drug related issues they are a threat to the national security and social fabric.<sup>51</sup> The court held that the government had a right to deport any foreigner who is a threat to national security, however in this case if the petitioners were sent back to Myanmar then they would face persecution and that would be against the principle of non-refoulement, which inherent under article 21 as non-refoulement protects the life and liberty of a human being irrespective of his/her nationality.<sup>52</sup>

In *B. Sivashankar v. State of Tamil Nadu*,<sup>53</sup> the petitioner was a Tamil refugee from Sri-Lanka who had been in judicial custody under various sections of the Indian Penal code and the Foreigners Act. The petitioner received an order of detention under the Nation security Act 1980 and filed a petition challenging the order.<sup>54</sup> The HC held that there was no valid reason given for detention and the detention seemed vicious in character as it lacked cogent material

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<sup>46</sup> Ibid.

<sup>47</sup> Ibid, para 16.

<sup>48</sup> Ibid, para 22-23.

<sup>49</sup> High Court of Delhi, 226 (2016) DLT 208.

<sup>50</sup> Ibid, para 3-6.

<sup>51</sup> Ibid, para 20.

<sup>52</sup> Ibid, para 26, 30.

<sup>53</sup> High Court of Madras, Habeas Corpus Petition No. 2718 of 2013.

<sup>54</sup> Ibid, para 1.

for arriving at this subjective satisfaction.<sup>55</sup> The court held this order to be violating article 22(5)<sup>56</sup> of The Constitution of India 1949 and therefore quashed the detention order.<sup>57</sup> In *Namgyal Dolkar v. Union of India, Ministry of External Affairs*,<sup>58</sup> The regional Passport Officers was not granting the petitioner a passport considering her to be a refugee and a non-citizen. The HC held that the petitioner was a citizen of India irrespective of her parent's nationality because of the virtue of section 3(1)(a)<sup>59</sup> of the Citizenship Act 1955, as she was born after 26th July 1950 and before 1st July 1987, and therefore cannot be denied a passport on the grounds that she is not an Indian citizen.<sup>60</sup>

In *Committee for Citizenship Rights for The Chakmas of Arunachal Pradesh and Ors. v. State of Arunachal Pradesh and Ors*,<sup>61</sup> the petitioners had contended that the state of Arunachal Pradesh had not complied with the provisions of the SC in submitting the application of citizenship by the Chakmas to the Ministry of Home Affairs. The local collector in whose jurisdiction the Chakmas reside had failed to do so. The court ordered the respondents to confer citizenship rights to the Chakmas within a period of 3 months in accordance with the Citizenship Act 1955.<sup>62</sup> Till date no action has been taken to grant citizenship. On September 13th 2017, the current Union Minister Kiren Rijiju said that the centre would grant citizenship to the Chakmas and Hjong refugees without diluting the rights of the indigenous people of the state.<sup>63</sup> The Union Home Ministry clarified further that they will be granted limited citizenship, and will not have a right to own land in Arunachal Pradesh, also they will have to apply for inner line permits to reside in the state.<sup>64</sup>

In *K.A Habib v. Union of India*,<sup>65</sup> The Gujarat High Court decided that the principle of non-refoulement is embedded under the meaning of Right of Life and personal liberty enshrined in

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<sup>55</sup> Ibid, para 11.

<sup>56</sup> When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

<sup>57</sup> Ibid, para 12, 14, 17.

<sup>58</sup> High Court of Delhi, W.P (C) 12179/2009.

<sup>59</sup> Every person born in India, on or after the 26th day of January 1950, but before the 1st day of July 1987 has acquired citizenship by birth.

<sup>60</sup> Above n 59, para 31.

<sup>61</sup> Supreme Court of India, WP (Civil) No. 510 of 2007.

<sup>62</sup> Ibid, para 20.

<sup>63</sup> <http://economictimes.indiatimes.com>, last visited on 30th September 2017.

<sup>64</sup> <http://www.thehindu.com>, last visited on 30th September 2017.

<sup>65</sup> 1998 2 Gujarat Law Herald 1005.



article 21 of the Constitution, hence the two Iraqi refugees could not be sent back till there was a fear to their life and security.

Thus we can see that the Indian Judiciary has tried to take a humanitarian approach while dealing with refugee cases, also it has tried to include principles like non-refoulement in the ambit of article 21 of the constitution. It has tried to interpret the Fundamental right of Life and right to equality in a broader spectrum and applied natural justice and rule of law in dealing with refugee cases because there is a clear lack of domestic legislation.

#### Present Treatment of Refugees in India:

At present India has three types of refugees, first are the refugees from Tibet and Sri-Lanka who are directly under the mandate of the Indian Government and have refugee identity documents issued by the government.<sup>66</sup> Second are refugees from Pakistan and Bangladesh, who are registered with the Indian Government for minorities from their country of origin or/and compassion grounds, they have Long Term Visas but do not have documents that grant them refugee status.<sup>67</sup> The third category is of those who are under the mandate of the UNHCR office in New Delhi; these are mostly from Afghanistan, Myanmar, Iraq, Iran, Somalia, and Sudan.<sup>68</sup> It is to be noted that all the above mentioned classes of people have faced persecution in their country of origin, but have been treated in three completely different ways and have been given different status'. India though has always considered a broader definition of persecution and has included generalised violence too and not limited it to individual persecution.<sup>69</sup>

India till today has faced three situations of mass influx, first was in 1959 when his holiness The Dalai Lama was granted asylum in India, which is still continuing, and no permanent solution has been found, and most of these refugees are practically stateless. Also the Tibetan refugees are deliberately dispersed across India for protecting them from Chinese reprisals at the border, which in return robbed them from demographic similarities resulting in a non-

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<sup>66</sup> Sarker S.P. International Standards of Refugee Protection. In: Refugee Law in India. Palgrave Macmillan, Singapore, (2017).

<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

<sup>69</sup> Manohar, Sujata V. "An Indian Perception of International Humanitarian Law and Refugee Law." ISIL Year Book of International Humanitarian and Refugee Law 2 (2002), 6.

acceptance from the host communities.<sup>70</sup> Second was in 1971 when around 10 million refugees from East Pakistan (now Bangladesh) who found refuge in India. They were later repatriated after the situation subsided in Bangladesh. The third is of the Sri-Lankan Tamils, which started in 1983, and since then the exodus has happened in two more phases, one in 1990 and second in 1995.<sup>71</sup> India has treated all these influxes on bilateral policies, which include giving asylum till the situation in the country of origin improves. India also tried to negotiate terms for repatriation of the refugee and persuading the Sri-Lankan government to stabilize the situation so that voluntary and safe repatriation can be achieved.<sup>72</sup> But after the assassination of Prime Minister Rajiv Gandhi by the LTTE in 1991,<sup>73</sup> the attitude towards them gradually changed.

India has also taken under its refuge political asylees from its neighbouring countries with which it has sensitive relationships. The Dalai Lama from China, Taslima Nasrin from Bangladesh and Brahundagh Bugti from balochistan are the political asylees who were granted asylum.

Although India is not a party to the Refugee Convention or its protocol, it let the UNHCR establish its representative office in New Delhi in 1969. This was done mainly to help the Tibetan Refugees get vocational training.<sup>74</sup> Apart from this the NHRC established under the Protection Of Human Rights Act 1993, has time and again fought for the rights of refugees in India. The NHRC has directed the government of Tamil Nadu to submit a detailed report on how many NGO's it had stopped from entering the Refugees camps and how many Sri-Lankan Refugees' movement was restricted within the camp.<sup>75</sup> The NHRC has also filed cases against the violation of the rights of the Chakma Refugees.<sup>76</sup> The NHRC has again directed the Tamil Nadu government to give immediate medical care to the Sri-Lankan refugees in the Vellore Camp,<sup>77</sup> and contributed to the release of many Tamil Refugees from Special Camps.<sup>78</sup>

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<sup>70</sup> Rajesh S. Kharat, *Tibetan Refugees in India: Survival in Exile in the Fleeing People of South Asia*, 2008, 271-72.

<sup>71</sup> Mayilvaganan, M. "Sri Lankan Refugees in India: Peace Process and the Question of Repatriation." *ISIL Year Book of International Humanitarian and Refugee Law* 5 (2005): 261-62.

<sup>72</sup> *Ibid*, pg. 262, Also see the India-Tamil Accord of 1987.

<sup>73</sup> For more information see <http://indiatoday.intoday.in/story/a-detailed-account-of-the-assassination-of-rajiv-gandhi/1/318395.html>.

<sup>74</sup> Vijayakumar, Veerabhadran. "Judicial Responses to Refugee Protection in India." *International Journal of Refugee Law* 12.2 (2000), 240.

<sup>75</sup> *The Statesman*, 8th August 1994.

<sup>76</sup> *National Human Rights Commission v. State of Arunachal Pradesh*, 1996 1 SCC 742.

<sup>77</sup> *Human Rights Newsletter*, National Human Rights Commission, Vol. 1, No. 2, November 1994, 3.

<sup>78</sup> *Ibid*.

This inconsistent treatment has caused many problems internally, for example the Chakmas who have lived in Mizoram and Arunachal Pradesh for over 50 decades have still not been granted citizenship, nor have they been granted work permits. The reason for this is that the local Mizo's have developed hatred for the Chakmas and they fear that they might outnumber them and take away their land and resources. If India had a consistent policy for resettlement of refugees, the Chakmas could have been settled in other states of India so that the rights and resources of the indigenous were not threatened. The present situation in Myanmar with the ethnic cleansing of the Rohingyas had led to a mass influx of refugees who have crossed borders to seek refuge in India. Recently in an interview the chief minister of Uttar Pradesh said, "Sad that certain people are showing concern towards Rohingyas in Myanmar as many innocent Hindus were also killed",<sup>79</sup> what does this statement mean, that because Hindus were persecuted in Myanmar we should not help Muslims who are presently being persecuted? The government's stand is that Rohingyas are illegal immigrants and pose a security threat to India as they have evidence that shows connections with Arakan Rohingya Salvation Army and other prominent terrorist organisations.<sup>80</sup> Prime Minister Modi had visited Myanmar in the first week of September 2017 and at the end of his meeting with Aung San Suu Kyi, a joint statement was released which miserably failed to mention the present military breakdown and persecution of Rohingyas.<sup>81</sup> India is planning to deport 40,000 Rohingyas back to Myanmar on grounds of national security concerns aka "national politics". India fears that its ally Bangladesh that has had an influx of Rohingyas cannot support them and Prime Minister Sheikh Hasina is under great political pressure from the opposition parties close to Pakistan when the 2018 elections are nearing.<sup>82</sup>

It has been reported that the Border Security Force is using pepper spray and stun grenades to keep the Rohingyas outside the national border.<sup>83</sup> A better option would be to register them as refugees and give them identification documents and if at all there are some involved with terrorist groups then steps can be taken against those, it's not possible that all of them have links

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<sup>79</sup> <https://scroll.in/latest/852362/rohingyas-in-india-are-intruders-not-refugees-says-yogi-adityanath>, last visited on 30th September 2017.

<sup>80</sup> <http://www.aljazeera.com>, last visited on 30th September 2017.

<sup>81</sup> <https://www.cnb.com/2017/09/20/myanmars-refugee-crisis-is-a-test-for-india-and-narendra-modi.html>, last visited on 30th September 2017.

<sup>82</sup> Ibid.

<sup>83</sup> <https://blogs.timesofindia.indiatimes.com/The-underage-optimist/rohingya-are-human-too-how-we-can-deal-with-persecuted-refugees-and-still-keep-india-safe/>, last visited on 30th September 2017.

to terrorist organisations. This is the time when we need a proper, non-discriminatory and equal protection regime for asylum seekers in India. In the light of the current events I have to mention the Citizenship Amendment bill 2016, which attempts at protecting religious minorities from blasphemy and persecution in Bangladesh, Pakistan and Afghanistan. The minorities include Hindus, Sikh, Jain, Christian, Buddhists, and Parsis from the neighbouring Muslim countries.<sup>84</sup> It fails to include the Muslim Rohingyas of Myanmar who are also a minority in the Buddhist country and other Muslim Minorities in India's neighbouring countries. If this bill is passed then it will be slap on India's Secular face. The current Modi government have a prominent Hindu vote bank, The BJP has won in the state of Assam after 15 odd years and the reason for this is that they promised to stop the illegal immigrants from Myanmar, pleasing the non-Muslim majority will actually increase the Modi governments vote bank. The deportation plan is currently on hold and pending before the SC of India.

#### The Salient Features of the Asylum Bill of 2015:

- Preamble:

“To provide for the establishment of an effective system to protect refugees and asylum seekers by means of an appropriate legal framework to determine claims for asylum and to provide for the rights and obligations flowing from such status and matters connected therewith”.<sup>85</sup>

- The Definitions:

The inclusion of sex and ethnicity as factors for well founded fear is novel to this bill,<sup>86</sup> also persecution includes acts of generalised crimes, serious and indiscriminate threats and serious disturbances of public order that have threatened the applicant to leave the country.<sup>87</sup> The provision also allows to include the dependants of the refugee i.e.

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<sup>84</sup> <http://thediplomat.com/2017/03/the-trouble-with-indias-new-citizenship-bill/> , last visited on 30th September 2017.

<sup>85</sup> The Asylum Bill, No. 334 of 2015 (India), Introduced in Lok Sabha by Dr. Shashi Tharoor, MP, Preamble.

<sup>86</sup> Ibid, 4(a).

<sup>87</sup> Ibid, 4(b).

spouse, dependent children, aged or infirm family members to be declared as refugees.<sup>88</sup> Mass influx has been defined as “ a situation wherein a considerably large number of people from a specific country or geographical area, arrive at, or cross an international border of India.<sup>89</sup>

- Principles of Refugee protection:<sup>90</sup>
  1. All foreigners who are likely to face persecution or who have faced persecution in their country of origin, and who enter India directly from their country of origin, or indirectly or who are already present in India, are entitled to seek asylum.<sup>91</sup>
  2. The principle of non-refoulement should be upheld.<sup>92</sup>
  3. The determination of application should be in accordance to due process of law, and must be fair and transparent.<sup>93</sup>
  4. The asylum seekers are entitled to interim legal protection and shall not be expelled or returned until a final decision on asylum is reached.<sup>94</sup>
  5. The asylum seekers and refugees are vulnerable people entitled to basic economic and social protection.<sup>95</sup>
  6. The repatriation of a refugee shall be done in a safe and dignified manner and only after ensuring that it is voluntary and informed.<sup>96</sup>
  7. Refugee’s family unity shall be maintained.<sup>97</sup>

#### Mass Influx Situations:

Max Influx as discussed above has been defined in section 2(o) of the bill, further section 30 to 33 of the bill elaborate about the procedure to be followed during mass influx situations. The central government has the power to declare a group or category of person in a mass influx to

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<sup>88</sup> Ibid, 4(2) and 2(1).

<sup>89</sup> Ibid, 2(o).

<sup>90</sup> Ibid, 3.

<sup>91</sup> Ibid, 3(a)

<sup>92</sup> Ibid, 3(b)

<sup>93</sup> Ibid, 3(c)

<sup>94</sup> Ibid, 3(d)

<sup>95</sup> Ibid, 3(e)

<sup>96</sup> Ibid, 3(f)

<sup>97</sup> Ibid, 3(g)



be refugees;<sup>98</sup> this must be in accordance with section 2(o).<sup>99</sup> It further states that persons who have crossed the border in conditions of a mass influx, but have not be declared as refugees by the central government can make an application under section 10 of this bill.<sup>100</sup> The persons declared as refugees under a situation of mass influx shall register themselves in the prescribed form and manner,<sup>101</sup> post this they will be issued with an identity card that will given them all the rights mentioned under section 36.<sup>102</sup> The central government may under a situation of mass influx impose reasonable restrictions on max influx refugees, provided that these restrictions may not hamper the refugees right to seek and enter employment outside such designated area.<sup>103</sup> If a refugee violates the restriction imposed the central government has the power to detain him/her.<sup>104</sup> The central government also has a right to withdraw, extend, alter, substitute by notification an order relating to mass influx, provided that this will only apply to asylum seekers arriving after the date of notification.<sup>105</sup> The commission shall review any such notification revoking or altering the refugee status during a mass influx.<sup>106</sup>

#### Problems in the Asylum Bill 2015:

The shortcomings that I am pointing out may not be in accordance to the Refugee Convention because the convention is too Western and dated for addressing the present problems in India.

According to me the first major flaw in the Asylum Bill is that it does not address the issue of Mix Migration. The IMO states,<sup>107</sup> “Mixed flows concern irregular movements, frequently involving transit migration where refugees, asylum seekers, economic migrants and other migrants move without the requisite documentation, crossing borders and arriving at their

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<sup>98</sup> Ibid, 30(1)

<sup>99</sup> A situation wherein a considerably large number of people from a specific country or geographical area, arrive at, or cross an international border of India.

<sup>100</sup> Ibid, 30(2)

<sup>101</sup> Ibid, 31(1)

<sup>102</sup> Ibid, 31(2). section 36 talks about rights of the refugees and asylum seekers, which include temporary identity cards, employment under government policy, healthcare, free and compulsory primary education, freedom from discrimination and right to relevant courts of law. It is to be noted under section 36(2) that the rights and benefits extended to refugees and asylum seekers shall not be construed to provide more rights and benefits than those accorded to citizens.

<sup>103</sup> Above n 100, 32(1).

<sup>104</sup> Ibid, 32(2).

<sup>105</sup> Ibid, 33(1).

<sup>106</sup> Ibid, 33(2).

<sup>107</sup> International Migration Organization.

destination in an unauthorised manner”<sup>108</sup> India has porous borders and there is ethnic and religious overlapping with almost all of its neighbouring countries and therefore there is a high probability of mix migration. The new law should have provisions for mix migration too. It ought to have proper “profiling and referral”<sup>109</sup> mechanism for scrutinising the most vulnerable group of persons before granting asylum and refugee status should be granted in accordance with the level of vulnerability. Different screening mechanism should be applied to different categories of people during a mass influx of mix immigrants. We have to agree people facing persecution, whether individual or generalised are more vulnerable as compared to migrants, so the new law should have a mechanism for identifying them and excluding the criminals.

The new bill should contain provisions defining mixed migration and ways and authorities to govern it in a systematic and organised manner. According to the UNHCR such movements are irregular and they take place without pre-requisite documentation and commonly involve human smugglers and traffickers, such movements become a threat to the states sovereignty and security.<sup>110</sup> It has become imperative for the whole international community to address this issue in a more consistent and comprehensive manner, so that the vulnerability of refugees is protected.<sup>111</sup> The Asylum bill does not contain any of the points mentioned in the 10-point plan.

The second major flaw is of non-refoulement. Though there is a broader definition of persecution under section 4(1)(a)<sup>112</sup> and 4(1)(b),<sup>113</sup> the principle of non-refoulement,<sup>114</sup> is only applicable for the persons who fall under section 4(1)(a) of the bill. This allows the government to send the persons belonging to class 4(1)(b) back to the country where his or her life is under threat.

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<sup>108</sup> International Migration Organization, Irregular Migration and Mixed Flows: IOM’s approach 1 (98th session MC/INF/297) October 19, 2009.

<sup>109</sup> UNHCR Refugee Protection and Mixed Migration: 10-point plan of action, January 2007, pg 3 point 5.

Available at, <http://www.unhcr.org/en-au/protection/migration/4742a30b4/refugee-protection-mixed-migration-10-point-plan-action.html>.

<sup>110</sup> Ibid, pg 1.

<sup>111</sup> Ibid.

<sup>112</sup> Is outside his country of origin and is unable or unwilling to return to or avail himself of the protection of that country because of a well-founded fear of persecution on account of race, religion, sex, nationality, ethnicity, membership of a particular social group or political opinion.

<sup>113</sup> Has left his country owing to serious and indiscriminate threats to life, physical integrity or freedom resulting from generalized violence or events seriously disturbing public order.

<sup>114</sup> Asylum bill 2015, Section 8.

The third flaw is that it allows frontier rejections. Section 8<sup>115</sup> which deals with non-refoulement only applies to people who are present inside the territory of India, so a person could be stopped from entering the border and then could be either sent back or detained. This is a key discrepancy in the law, as it will give the government a loophole to somehow defeat the principle of non-refoulement.

And finally, the bill does not deal with the problem of statelessness. There should be provisions to grant temporary residence to a refugee, which could be further converted into citizenship if the necessary conditions are fulfilled according to the citizenship act.

There are many other drawbacks, related to the object of the bill, which is too broad and should be limited to non-refoulement, the definition of non-political crimes, disguised extradition and the avoiding asylum shopping by the applicants.<sup>116</sup> All these are valid points, if we want to make a perfect bill, but we have to remember that the bill will become an enactment only after it gets majority and is passed by the parliament. A bill, which leaves very little power in the hands of the government, shall not be enacted and hence we should take one step at a time.

#### India's International Obligation:

Under Customary International Law the principle of non-refoulement is non-derogable and binding. For Customary International Law, two conditions have to be satisfied; first there should be *opinio juris* and second there should be valid state practice.<sup>117</sup> India has a legal duty and in all previous cases mentioned above it has even shown state practice. If we talk about treaties, then under article 13 of the International Covenant on Civil and Political Rights somewhat touches the principle of non-refoulement. But the use of the word "lawfully" discredits certain refugees, and in case of India most of them because people coming from the neighbouring countries either come by land or by boat, but rarely by air or in a lawful manner.

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<sup>115</sup> No refugee present within the national territory of India shall be expelled or returned in any manner whatsoever to any country where his life or freedom would be threatened on account of his race, religion, sex, nationality, ethnicity, membership of a particular social group or political opinion.

<sup>116</sup> See Acharya, Bhairav. "The Future of Asylum in India: Four Principles to Appraise Recent Legislative Proposals." *NUJS Law Review* 9.2 (2016): 173-228.

<sup>117</sup> See Malcolm N. Shaw, *International Law*, 7th Ed. Cambridge University Press, 2014, pg. 53-63.

India is also a party to the Convention Against Torture (CAT). Article 3 of CAT clearly states that no state party to this convention can expel, refouler, extradite any person to a country where there are considerable grounds of believing that he/she shall be subjected to torture.<sup>118</sup> For determining grounds for torture, the state party shall take into consideration “consistent pattern of gross, flagrant or mass violations of human rights”.<sup>119</sup> Thus India is under an obligation to uphold the principle of non-refoulement under CAT.

India is also under obligation of Convention on the Rights of the Child (CRC). Article 22 makes all member states duty bound to provide humanitarian assistance along with appropriate protection to every child who is seeking refugee status or is considered a refugee in accordance with the applicable domestic law or international law.<sup>120</sup> India is also obliged to assist and cooperate with the United Nations or any other non-governmental International organisation for protecting the child and for unification with his family.<sup>121</sup>

India has also ratified the Convention on the Rights of Persons with Disabilities (CRPD). According to article 10 of the convention, India has a duty to protect the inherent Right to life of every human being and ensure its effective enjoyment by the persons with disabilities on an equal basis with others. The SC has already interpreted the Right to Life to include Right of non-refoulement. India also has an obligation under the CRPD to take all necessary measure for the protection and safety of persons with disabilities in situations of risk, armed conflicts, Humanitarian conflicts and natural disasters.<sup>122</sup> This provision definitely includes persecution of peoples with disability.

The SC has been very vocal on India’s obligation under the International Law. In *Gramophone Company of India Ltd. v. Birendra Bahadur Pandey*,<sup>123</sup> the SC opined that “There can be no question that nations must march with the international community and the municipal law must respect international opinion, the comity of nations requires that rules of international law may

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<sup>118</sup> Convention Against Torture 1984, Article 3(1).

<sup>119</sup> Ibid, Article 3(2).

<sup>120</sup> Convention on the Rights of the Child, 1989, Article 22(1).

<sup>121</sup> Ibid, Article 22(2).

<sup>122</sup> Convention on the Rights of Persons with Disability, article 11.

<sup>123</sup> 1984 SCR (2) 664.

be accommodated in the municipal law even without express legislative sanction, provided that they do not run in conflict with the acts of the parliament".<sup>124</sup>

In *Vishaka and Ors. v. State of Rajasthan*,<sup>125</sup> the SC held that "It is now an accepted rule of judicial construction that regards must be held to international conventions and norms for construing domestic law, when there is no inconsistency between them and there is a void in domestic law". Thus the above discussed, perfectly articulate India's obligational towards International Law relating to refugees and asylum seekers.

#### Conclusion:

International conventions and human rights treaties and declarations are like wine bottles, if rested too long without opening they turn sour, they need to be aired with human experience and should be discussed, debated and amended.<sup>126</sup> The Convention of refugees did not appeal to India's interest because it was prejudiced from its inception and therefore India refrained from ratifying or later acceding. I totally agree with India's stand on this, but what I do not agree on is that we do not have a coherent and comprehensive legislation, which deals with asylum seekers and refugees.

With the dawn of 9/11 the western world saw the terrible face of terrorism, which India had seen a decade ago has created a new angel for the refugee for the long prevailing refugee problems. Due to this the refugees are looked at with more suspicion and distrust, especially refugees who are Muslims. The best example is that of the Rohingyas fleeing persecution in Myanmar. "Refugee" and "asylum seeker" have become filthy words, and people seeking it have been treated in the most inhuman manner possible. The states have become more sensitive about national security and the most vulnerable people fleeing persecution are getting affected. The International law is also silent on the rights of the internally displaced people, because

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<sup>124</sup> Ibid, para 5.

<sup>125</sup> AIR 1997 SC 3011.

<sup>126</sup> Nariman, Fali S. "Refugee Protection." ISIL Year Book of International Humanitarian and Refugee Law 2 (2002), pg 7.



refuge is the security you entitled to enjoy in another country, but the irony is that you cannot enjoy this right in your own country.

Through this essay I want press the need for India to pass the Asylum Bill. It is difficult to develop a very altruistic legislation because politics has a major role to play in every country. The Asylum bill 2015 has some evident flaws, but if this bill is passed, the situation will be much better and comprehensible than what it is in present. Its is simple that people do not like “foreigners” to live on their land, use their resources and share their happiness. The attitude of Indians and people all the around the world towards refugees has to be changed, and this can be done if we enact a law that gives them rights and makes a legal space for them. Lawyers and the judiciary have a very important role in this. India has a very independent judiciary and promising separation of powers. So once the act is passed the judiciary and the lawyers have a combined responsibility to further bridge the gap between the new legislature and what it ought to be.

