ASYLUM PRACTICES IN INDIA

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ABSTRACT

This article shall be analyzing the dichotomy between 'migration' which is supposed to be an act of liberation, an act of moving away from the circumstances in lieu of better ones, and the status of seeking asylum the reality of which offers completely different dimension to the individuals migrating. As we will see, the International Conventions form a better way of providing a coherent structure of rights to the immigrants, refugees and asylum seeker, they shall also be addressed in one of the sections, and the repercussions for India as it continues to not be a member party to these conventions.

The article will also reflect upon India's practice of Asylum which ranges from welcoming migrants on an ad hoc basis to extending the citizenship benefits to migrants hailing from a particular set of countries and belonging to a particular set of religions.

INTRODUCTION

One of the most ignored statistics in the world is that of refugees and asylum seekers, that is especially problematic when their status and identity itself, in recent times, has been reduced to a number. While being a liability to their own State of origin and a threat to the countries they often migrate to, these individuals often find themselves at the receiving end of lack of security – physical and psychological, lack of identity – not only with regards to their own cultural and ethnic roots and but even with the cultural and ethnic topographies of the States they are migrating to. This further worsens when the two States (State of origin and the State of migration) refuse to give them any refuge from the circumstances that forced them to migrate in the first place. It pushes them in a vicious vacuum – devoid of rights, devoid of identity, devoid of a safe place they could call their own, the States often meet these displaced people

with a sense of hostility, anxiety and a tumultuous sense of paranoia, especially after the orchestrated and synchronized terrorist activities of September 2001 that took place in New York, Washington D.C. and Pennsylvania that made the international community a lot more hesitant to open their countries to such migrants.

As the mirage of the 'American dream' was threatened, the superpower tightened its grip over the refugee policies, asylum policies and anti-terrorist policies, the result of which was a grave deprivation of human rights on the part of developed nations. This perhaps describes the 2019 statistics that imply that 84% of the refugees are hosted by developing nations[i] rather than by Developed nations. The Developed nations have an over enthused paranoia of protecting their own citizens thereby do not shoulder the burden of taking in and rehabilitating the refugee seeking masses. As a result of this nonchalant attitude, the poor countries and developing nations have come to be the fore runners in taking in refugees, despite the fact that it would burden their economy tremendously. According to a report published by UNHCR (2019), the top ten refugee hosting countries are as follows – Turkey, Jordan, Lebanon, Pakistan, Uganda, Germany, Iran, Ethiopia, Sudan, and Bangladesh[ii]. Although United States hosts the largest number of migrants, close to 51 million (constitutes 19 per cent of the World's total)[iii] its participation towards rehabilitating refugees has been rather pitiful. As the number of people forcefully displaced increases year by year, it becomes the responsibility of the nations to collectively decide the future of these refugees and immigrants. It is imperative to do so in order to protect their basic fundamental human rights, or at least what is left of it. It is imperative that developed countries also take knowledge of the same. As India stands on the bring of being a developed nation, it has a set of very bad examples to follow. Shockingly, the world's wealthiest six nations host only 9 per cent of the total refugees, this includes – Germany, United States, France, China, United Kingdom and Japan[iv].

This article shall be analyzing the dichotomy between 'migration' which is supposed to be an act of liberation, an act of moving away from the circumstances in lieu of better ones, and the status of seeking asylum the reality of which offers completely different dimension to the individuals migrating. As we will see, the International Conventions form a better way of providing a coherent structure of rights to the immigrants, refugees and asylum seeker, they shall also be addressed in one of the sections, and the repercussions for India as it continues to not be a member party to these conventions.

The Article is further divided into the following sections that will be giving us a better idea of the practice of asylums adopted by India. The first section shall be familiarizing the reader with what the research article entails and hopes to achieve by the end of it, providing a foundation to it all. Next, the second chapter shall be dealing with the two protagonists – Migrants and State and how their relationship defines the status of the illegal migrants as refugees or asylum seekers, and how it affects their request to seek refuge in the migrating State. In order to understand the value of anything, one first needs to understand the opportunity cost of that particular step. With reference to our article at hand, the value of India's policies with regards to Refugees and Asylum seekers, one first needs to comprehend the international conventions in place that have been evolved with the international concurrence among countries with regards to dealing with the status and rights of these illegal migrants. This shall involve the provisions in the Universal Declaration of Human Rights, 1948; Refugee Convention, 1951 and lastly the Protocol relating to the status of refugees, 1967. The fourth chapter shall indulge the reader into India's practice of Asylum which ranges from welcoming migrants on an *ad hoc* basis to extending the citizenship benefits to migrants hailing from a particular set of countries and belonging to a particular set of religions. This absurd filtration process is a gift to us by the BJP - ruling Government. Lastly, we shall be looking at the succinct conclusions that can be drawn from the journey embarked upon through this research article.

REFUGEES, ASYLUMS AND THE STATE

Refugee, in common parlance, is described as someone who lacks citizenship. As Wiesel describes the paradoxical nature between refuge and refugee, "*What has been done to the word refuge? In the beginning the word sounded beautiful. A refuge meant 'home'. It welcomed you, protected you, gave you warmth and hospitality. Then we added one single phoneme, one letter, e, and the positive term refuge became refugee, connoting something negative*.[v]" It is ironical to note that while a refuge was a word that was a connotation for home, a connotation for safety and sanctuary, refugee has now come to denote the modern nomads who are in constant search of a refuge, a home, an identity they could call their own. Their social world has been turned inside out, and in search of some semblance of stability from the State of origin, they turn to other States.With an immensely territorial based society, refugees serve as the outliers. In 2019, the number of international migrants reached a shocking number of 272 million[vi], forced displacement in particular has seen a steep increment from 2010 to 2017, with an increase of

13 million over a period of a mere seven years, to 29 million[vii]. However, in order to comprehend the essence of this statistic, one needs to look at the events that lead to it, that lead to such amass denouncement of citizenship of the origin of state.

With 272 million of individuals migrating from their State of origin to other states, it is important to understand that this process of migration is not done in a vacuum. It impacts the social fabric of the world. In order to take the reins of this social displacement, despite their unhappiness to do so, countries have started formalizing the policies with regards to asylum seekers, thereby implying that there had been an increased demand on asylum systems of the State. Now, asylum was essentially this place of refuge, however, it is an end, the means to achieve this end are far more complicated than it looks. In order to apply for asylum, the refugees have to remove themselves from the State of origin, usually a majority of illegal immigrants, originate from places of conflict. Especially since 67 per cent of all the refugees in the world originate from a handful of countries, namely –Syrian Arab Republic, Afghanistan, South Sudan, Myanmar, and Somalia[viii]. Removing oneself from a place of conflict and reach another state for the purposes of seeking refuge, for the sake of self-preservation, for the sake of eluding their persecution, is physically and emotionally exhausting. Usually this move of desperation is motivated by a blatant disregard of human rights by the State of origin.

The steep increase in migrants demands a larger picture to be seen, of growing intolerance among the States, and the State's inability to provide them a safe and secure home as the social contract theory often promises. As these utopian ideas fall short of the demands of the refugees, two primary phenomena appear to be at play –on one hand is the rising number of refugees, while on the other hand are the post 9/11 restrictionism measures adopted by the States[ix]. In situations like these, the solution has to be more therapeutic and political, necessitating an international intervention.

INTERNATIONAL CONVENTIONS

As explained in the previous section, since Migration in its essence is a transborder concern, it becomes imperative to enquire into how this concept has been provided for in the international conventions and how it has been adapted over time. In this section we shall be discussing three international legal instruments that require our understanding. It is also important to note that since the International law requires the States to be parties to these conventions in order to be

applicable to them, a country such as India, that is a party to the Universal Declaration of Human Rights but is not a party to the 1951 Convention or the 1967 Protocol, manifests the international safeguards of Refugees into their domestic law. For the sake of convenience of the reader, these instruments have been discussed briefly in the following section. Broadly classifying there are two modes of asylum that are given.Territorial Asylum is granted by a State on its Territory. The right to grant asylum by a State to a person on its own territory stems from the fact that every State can exercise territorial sovereignty over all individuals, on its territory. The grant of territorial asylum therefore depends upon the discretion of a State. The State is not under a legal obligation to grant asylum to any fugitive, and as such there are no rules for territorial asylum. United Nations General Assembly had called upon the International Law Commission in 1959 to undertake the codification of the principles and rules of international law relating to grant and right of asylum. On 14th December 1967 General Assembly adopted Declaration of Territorial Asylum[x]. However the Declaration specified that the right to seek and enjoy asylum may not be invoked by any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crimes and crimes against humanity or contrary to the purpose and principles of United Nations. This can clearly be seen from that the provisions of the declaration it is clear that State does not have absolute right to grant asylum. Another form of granting asylum is extra territorial asylum. Here protection is given to the individual outside the territory not belonging to the state granting it. Asylum is given at legation, consular premises and warships are the instances of extra-territorial asylum. International law ordinarily does not recognize a right to grant asylum in the premises of legation however on a certain limited number of grounds asylum in legation can be granted for example When an individual who are physically in danger from violence or where there is well established and binding local custom or when there is a special treaty between territorial State and the state of Legation concern. The question whether person taking refuge in the premises of an international institution or organisation would be granted asylum is a cannot be given with certainty as there is absence of any rule and of lack of practice. However, a right to grant temporary refuge in an extreme case of danger to life cannot outruled.

UNIVERSAL DECLARATION OF HUMAN RIGHTS, 1948[xi]

The Universal Declaration of Human Rights (hereinafter referred as 'UDHR') was adopted roughly seventy - two years ago, in 1948, without so much of a dissent in the United Nations. Although UDHR has always had a system that permits being voluntarily being bound by it, its authority as a statute has become unparalleled.Its manifestation in the domestic laws of States in the world itself is the proof of that. If that was not enough, UDHR is also the world's most translated document, in 360 languages[xii]. The UDHR further branches out to two other treaties, namely - the International Covenant on Civil and Political Rights (hereinafter referred as 'ICCPR'), and the International Covenant on Economic, Social and Cultural Rights (hereinafter referred as 'ICESCR'), both of which were adopted by the General Assembly in 1966. These three – UDHR, ICCPR and ICESCR, together form the International Bill of Human Rights.

The UDHR, while primarily protecting human rights, also makes a provision for refugees and asylum seekers in its 13th and 14th Article. Both these articles give the individual the freedom of movement, which also encapsulates the provision of moving away from ones country.The Article 14, is far more explicit when it comes to the rights of a refugee, the same has been extracted below for the purpose of convenience –

"Article 14:

(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.
(2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations."[xiii]

REFUGEE CONVENTION, 1951 AND PROTOCOL RELATING TO THE STATUS OF REFUGEES, 1967

While the UDHR, laid down the cornerstone of the protection of rights of the refugees, the primary international instruments that direct the States with regards to the treatment of refugees were – the '*1951 Convention'* and '*1967 Protocol'*. While the 1951 is supposed to present a sense of comprehensive codification of the rights of the refugees and also unlike its predecessors which targeted a different set of refugees, the convention offers a uniform definition for all the walks of refugees. The problem however, here was twofold. First, the

Convention was observed only by a mere 28 States. Secondly, the convention defined a refugee as –

"For the purposes of the present Convention, the term "refugee" shall apply to any person who:

(1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization; Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of paragraph 2 of this section;

(2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason basedon well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national."[xiv]

Since the Convention offered a definition that was primarily directed at the individuals fleeing post the Second World War, the Protocol relaxed the definition a bit further –

> *"For the purpose of the present Protocol, the term "refugee" shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article 1 of the Convention as if the words "As a result of events occurring before 1 January 1951 and ..." "and the words"... "a result of such events", in article 1 A (2) were omitted."*[xv]

From a bare perusal of the above definition, it is clear the convention and further even the protocol offer a rather vague definition of a refugee, further, 'asylum' barely finds mention in

both the instruments much rather create it as a rights[xvi]. However, they do put in place certain safeguards for the rights of the refugees, thereby establishing the tone of relationship between the refugees and the States they are migrating to and their State of origin, Principle of non-refoulement being an important one. One can also imply that this hiccup of not being able to provide an individual's right to asylum in the state of refuge is perhaps rooted in the desire to retain the states' historically acknowledged sovereign prerogative to maintain exclusive control over their individual territories and people present in them[xvii].

INDIA'S PRACTICE OF ASYLUM

Now that we have an idea as to how the international conventions have set the tone to substantiate the relationship between the Refugees and the States they are migrating to, or/and migrating from, in this section we shall be looking at India and the way it has dealt with the refugees and how much of a burden does this country carry along with other developing and poor countries with regards to the World's refugees. This becomes important to understand, as India does not fare well on the human rights index and since human rights and refugee rights overlap each other, it is obvious to presume that the effect of one spill over to the other as well.India is always a country who believes in humanitarian philosophy as quoted by Justice V. R. Krishna Iyer basing his view on the ideas thrusted from Buddha to:

"The Indian perception is informed by a profound regard for personhood and a deep sentiment to prevent suffering. Ancient India's cultural vision has recognized this veneration for the individual. The Manusmriti deals elaborately with Dharma even amidst the clash of arms. The deeper springs of humanitarian law has distinguished the people of India by the very that Dharma Yudha of the humanitarian regulation of the warfare, is in the very blood of Indian history. In the Mahabhartha and Ramayana, the great epics of India, we find inviolable rules of ethics and kindness to be observed even by warring rulers in battlefield. One may conclude that Indian Constitution in enacting fundamental duties in Article 51-A has cast on every citizen the duty to promote harmony among all people of India, to have compassion for living creatures and to develop humanism and abjure violence. Thus, humanitarian legality and concern for refugee status are writ large in the Indian ethos."[xviii]

THE REFUGEES AND FOREIGNERS: SYNONYMOUS?

For the longest time now, India has been unable to differentiate the two concepts of Foreigners and refugees from each other, thereby this indifference of treating them both the same way has created a lot of problems for India and more so for these refugees. Following are the domestic statutes that govern the laws with regards to foreigners/refugees:

(i) Passport (Entry into India) Act, 1920.
(ii) Passport Act, 1967.
(iii) Registration of Foreigners Act, 1939.
(iv) Foreigners Act, 1946.
(v) Foreigners Order, 1948.

AD HOC SYSTEM

Since India has not ratified the 1951 Convention and 1967 Protocol, the refugee policies of India thus are more dependent on political and electoral arithmetic, most of the times. Although, as on 2016, around 144 countries had grown to ratify the Convention of 1951, India, despite being a host to millions of refugees, refuses to be in consonance with what the convention entails. The reason for doing so rests on four pillars, as mentioned by Acharya[xix] – Firstly, as are most of the International conventions proposed by UN, Convention of 1951 was far more Eurocentric. India's participation and contribution in drafting process was ignored and when the objections to this essence eurocentrism were put forth by India, the same were dismissed[xx]. Secondly, the country has seen large influx of refugees that have migrated to India in search of refuge, however, the Convention fails to address such a possibility and sticks with its idea of refugee individualism which essentially does not solve India's problem of hosting refugees and hence it redundant. Thirdly, India has had a rather heterogeneous set of migrants that included refugees, asylum seekers, economic migrants, environmental migrants, basically there was no homogeneity in the underlying reasons of what motivated them to migrate to India, Convention of 1951, again failed to address such a situation. Lastly, India was of the opinion that the Countries of the *Global South*which as mentioned earlier, host a majority of the refugees and asylum seekers, were not consulted at all while constructing such an international instrument that concerns the rights of the refugees and determines the relationship of the refugees with the states they have migrated to. While the *Global North*very conveniently

constructs a system that would prevent the osmosis of migrants into their borders, affecting their economy.

VARIOUS ORGANIZATIONS AND THEIR WORK WITH REFUGEES IN INDIA

As mentioned in the preceding section, for the longest time, India has had a rather ad hoc system of hosting refugees, which was rather abstract due to lack of domestic laws in place to regulate the same. In order to provide a better structure to such efforts, many organizations have come up in order to safeguard the interest of refugees in India. We shall be primarily dealing with two of them –UNHCR and NHRC.

UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

The UNHCR was created in 1950 in order to safeguard the rights of the individuals who were forcefully displaced after the Second World War and thereby further the intent laid down in the Convention 1951. It is a refugee agency of United Nations which operates in more than 134 countries in the world[xxi].India, being an executive member of the same since 1995, has also been availing the benefits of UNHCR for over 25 years now.

UNHCR through its network of volunteers and interns try to provide smooth integration of the refugees, stateless communities, and forcefully displaced individuals into the State of migration. The organization ensures that all of these displaced individuals can be rehabilitated and can exercise their right to seek asylum in other countries. Therefore, all the problems faced by the refugees (except the Palestinian refugees which are addressed by another UN agency) are addressed by the UNHCR.

However, this agency has pre-determined loopholes to work around with in India. Since the inception and reach of UNHCR's efforts depends heavily on the Central Government, that is because India has still not ratified the Convention of 1951.

NATIONAL HUMAN RIGHTS COMMISSION

As mentioned earlier, Rights of refugees form a branch of Human Rights, the two complement each other and therefore most of the countries do not feel the need of advocating a separate

body for safeguarding the interests of refugees. India is one of those countries. Under the Human Rights Act 1993, several commissions and courts were set up to promote efficient adjudication of those whose human rights have been violates which included – National Human Rights Commission (hereinafter referred as 'NHRC') , State Human Rights Commission. The NHRC also boasts of addressing the rights of categories of persons like women's rights, children's rights, the rights of refugees and internally displaced persons, and the rights of national, linguistic, or sexual minorities[xxii] within its ambit. In the report of 2000 annual report submitted by the NHRC, proposed a model law for refugees under the guidance of Justice PN Bhagwati that contemplated certain safeguards for the refugees, however, they were barely undertaken by the Government of India, let alone enforce it. It also proposed changes in the outdated Foreigners Act, 1946 which deprives refugees' rights as guaranteed under the Geneva convention, refugee convention and additional protocol of 196744. Currently we only have the Refugee and Asylum (Protection) Bill, 200945[xxiii].

CITIZENSHIP AMENDMENT ACT, 2019 AND WHAT IT ENTAILS?

India has a very paradoxical and ironical take on the situation of migrants and refugees and asylum seekers. While on one hand, it continues to be a country with the most porous borders allowing migrants to seek refuge in the country, on the other hand, it refuses to put in place any semblance of law to regulate such large numbers of migrants that have found themselves on this side of the border. The situation worsens, as instead of addressing the shortcomings of India's domestic laws on the subject, the Home Minister decided to take a rather aggressive stand by tabling the Citizenship Amendment Bill, 2019 (hereinafter referred as the 'CAB') in December, last year. The purpose of the Bill seems to be window dressed as an innocuous one that is to fast forward the process of granting citizenship to a particular set of illegal migrants. However, as it was popularly conceived, the CAA was come to be known as the modern world's first "refugee legislation" to be subsumed by hate and discrimination[xxiv]. Therefore, it is a rather surprising and an unexpected stance to take a stand such as that of CAA when the nation's credentials have been not so bad with regards to hosting such a variety of migrants over the years. This then clearly points to the ruling party of BJP and alignment of the refugee regulations in accordance to their party propagandas. The Bill, subsequently, the Act, proposed to grant a fast-forward citizenship to a certain set of people. These individuals however were

targeted on the basis of a threefold criteria - religion, country they were migrating from, and the reason they are migrating to India.

The Act then gives an exhaustive list of acceptable religions, acceptable countries, and a particular acceptable reason as to why they are migrating and that is exactly where this act goes downhill.

In order to understand this better, with regards to the acceptable countries, the Act proposes that illegal immigrants from the countries of Pakistan, Bangladesh and Afghanistan will be offered benefits of fast-forwarded citizenship. With regards to acceptable religions, the Act specifically includes "persons belonging to minority communities, namely, Hindus, Sikhs, Buddhists, Jains, Parsis and Christians" who would benefit from the fast forward citizenship, thereby targeting the Muslims who would have to bear the brunt of not being included. Lastly, the Act would mandate that such people should be migrating only due to religious persecution, or otherwise they would be not be allowed to benefit from the citizenship laws in India.

The fast forward citizenship, as we have been addressing it up until now refers to the following - with regards to a particular set of illegal migrants hailing from a particular set of countries, the number of years of residency was relaxed to five years from 11 years. Therefore, although the members of the Muslim community have not been banned from applying for citizenship in India, they have to wait for 11 years to get one, until then they shall be devoid of any refugee rights as well, since India does not have any domestic law in place that could protect their rights, this clearly then becomes a huge disincentivizing factor for the members of the Muslim community. Another community that was angered by this stunt was the Assamese community. As mentioned in an earlier section, a majority of migrants come from a handful of countries, Myanmar, previously known as Burma, is one of those top five countries that contribute to this. They often come to India in the garb of economic migration, this large influx of migrants from Myanmar to the north eastern states has actually endangered their culture. Instead of addressing their assuages, BJP ruling government seems to be preoccupied with their agenda of forcing down Hinduism in everyone's throats.

CONCLUSION AND SUGGESTIONS

As we come to the end of this article, one can see the need of addressing this large vacuum that is there in place of an efficient legislative instrument that could regulate the asylum seekers and refugees in India. With migrant numbers that keep increasing every year, India right now stands at a pitiful number 195,891 refugees who have been granted Asylum[xxv] in the country as of 2018, which has been the lowest in the past 6 years. With the implementation of CAA, these numbers are just going to go down further.

Suggestions for India to burden the shoulder of refugees over the world:

- India desperately needs a Domestic law in place, especially if it shall continue to vehemently take its stand against the ratification of the convention of 1951. This legislative instrument has to be with regards to the rehabilitation of the refugees, their employment and housing. Instead of synonymously addressing them under the laws that have been made for the foreigners, the needs of the refugees are far graver to be acknowledged by the State.
- This domestic law needs to address the migrants from other nations and also the intra-country migration that takes place in India, be it due to natural calamities or conflict areas such as Jammu and Kashmir.
- If India continues to not be a part of the Convention of 1951 and the Protocol of 1967, it should at the very least take the initiative of drafting a refugee convention tailor made for the needs of non-European countries, or specifically for the betterment of South Asian countries.
- The legislative acknowledgement of rights is important, especially since time and again, the judiciary has taken a distinct stand that undocumented migrants who claim refugee status have certain important procedural and substantive rights which cannot be denied, these include the following:
    - the right to be considered as a persecuted refugee,
    - the right not to be deported while the case is being considered,
    - the right to asylum if the case is proved,
    - the right to move to a haven country which offers to take the refugee,
    - the right to fair treatment throughout this process[xxvi].

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