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Need for a National Legislation on Refugees in India at 75

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ABSTRACT

In this article the authors highlight the need for a refugee legislation in India, while India celebrates its 75 years of independence. India should have a domestic legislation in order to uniformize legal and conceptual understanding of refugees, to uniformize the procedural standards for all refugees without discrimination, to address increasing influx of refugees due to increase in conflicts in the neighbouring geography like Afghanistan and Myanmar and due to increasing threats of sea-level rise and de-territorialisation.

INTRODUCTION

A need for national refugee laws in India has been reiterated time and now again (Suryanarayan, 2001). The experience of India varies from other countries in Asia as no other country had suffered such massive migration of peoples and had provided for relief and resettlement of refugees in a successful manner (Khan, 1980). Still, India does not have a domestic legal framework for refugees even after 75 years of independence. When it comes to international legal framework, India has regarded the 1951 Convention relating to the Status of Refugees and its 1967 Protocol as a 'partial regime' for refugee protection (Oberoi,2001) . The euro-centricity of the 1951 Convention has been largely inadequate to provide legal foundation or support to India, while India was dealing with its own refugee crisis between 1947 to 1952 (Ramasubramanayam,2018). The 1951 Convention initially did not address the situations faced by developing countries in South Asia like India that faced situations of mass influx of refugees and stateless persons since the time of independence (Chowdhury,2001). In the light of this, Chimni(1997) argues that the 1951 Convention is 'dismantled by the very states which framed the Convention' by their practices which shift the burden to countries that may not always have the means to share the responsibility of refugees.

Regardless, India has continued its commitment to refugee protection, however, the dual system of refugee recognition leads to complexities for asylum seekers in India (Shanker & Vijayaraghanvan,2020). A need for comprehensive domestic legislation covering refugees has been emphasized upon by many scholars for decades. Amongst many reasons that underscore the need, are the contradictory judicial decisions, arbitrary policy measures, and non-existent rights regime(Singh, 2009). Other reasons include the obligation of India to protect human rights under international law, to uphold the principle of non-refoulement, to remove

administrative ambiguities and suspicions, and to establish uniformity in the system protecting refugees in India (Bang, 2012).

Through this article, the authors underscore the need for national legislation for the protection of refugees in 2022. While India celebrates 75 years of glorified history, specifically in the field of protecting refugees, the ancient Indian principle of ‘Vasudeva Kutumbakam’ needs a modern reinstatement more than ever, as national legislation for refugees. The authors state that India needs national legislation concerning refugees (i) to uniformize legal and conceptual understanding of refugees; (ii) to uniformize the Refugee Status Determination (RSD) Procedure; (iii) to address cross-border forced migration due to climate change and sea-level rise; (iv) India’s geographic location makes it a frontline country for refugees in the region; & (v) To allow India to meet its obligations under international law.

2. To Uniformize legal and conceptual understanding of refugees.

The success of the Indian legal system in its support for refugees is difficult to measure because the term refugee has yet to be uniformly defined in India for legal and administrative purposes (Raj, 2020). The lack of a uniform definition of this term is due, in turn, to the lack of legislation on refugees. In 1997, a “model law” was drafted by a committee headed by Justice P N Bhagwati (Bhattacharjee, 2008) in India where he articulated the problem of refugees by stating- “Would the setting up of an appropriate legal structure or framework not help to provide a measure of certainty in the States dealing with the problem of refugees and provide greater protection for the refugees?”. The bill was never tabled in the Indian Parliament.

This lack of definition has not prevented India from defining and protecting refugees in the past. After the partition of the Indian sub-continent, the United Province Land Acquisition (Rehabilitation of Refugees) Act of 1948 allowed refugees to resettle in northern India. This Act defined the term refugee in a geographical context under section 2(7) as ‘any person who was a resident in any place forming part of Pakistan and who, on account of partition or civil disturbances or the fear of such disturbances, has on or after the first day of March 1947 migrated to any place in the U.P. and has been since residing there’ (Act no. 26, 1948).

Another definition from the East Punjab Refugees (Registration of Land, Claims) Act of 1948 also defined refugees by their geography and with the event of partition in 1947 as ‘a landholder in the territories that formed part of the Province of West Punjab, or whose ancestor had migrated as a colonist from Punjab since 1901 to the Provinces of North-West Frontier Province, Sind or Baluchistan or to any State adjacent to any of the aforesaid Provinces that acceding to the Dominion of Pakistan’ (Act no.8,1948).

These definitions determined the status of the people forced to migrate between India and Pakistan after the partition and independence, who were largely ignored by the international community. Similarly, the Constitution of the International Refugee Organization, for example, had defined refugees based on geography and particular violent historic events, including but not limited to victims of the Nazi or fascist regimes, victims of the Falangist regime in Spain, and victims of the second world war. Presently, a 'refugee' is simply defined as any person who flees from his or her country due to a fear of being persecuted on the ground of race, religion, nationality, political opinion, or a particular social group under Article 1 of the 1951 Refugee Convention. Additionally, the 9 core human rights instruments, along with their protocols, some of which have also emerged along with customs, including within their provisions, protection of people also includes protection from return to the country of origin- which threatens the life of a person or puts a person to a risk of torture.

In this context, domestic law will institutionalize the domestic system governing refugees and will take away discretionary powers of the judiciary or the executive which currently determines which group of people to protect or not protect under the national policy, on a case-by-case basis(Sarker,2017). In the past, the government of India introduced Draft bills to protect refugees, which include the Model National Law on Refugees (hereinafter MNLR) of 1997, the Refugees and Asylum Seekers Act, the Asylum Bill of 2015 (Bill No.334, 2015), the National Bill of 2015 (Bill No.342,2015) and the Refugee Bill of 2015 (Bill No.290,2015). None of these draft bills, however, could become a law and the system remains unorganized. Interestingly, these bills were introduced as private members' bills, which means they were not drafted by the Ministry that deals with foreigners and refugees in India showing the ignorance of the government in power. For example, the MNLR was drafted by the Eminent Persons Group in 1997 whereas the Asylum Bill was introduced in the Lok Sabha by Dr. Shashi Tharoor, MP, and drafted in association with the members of Ara Legal Initiative, a center for refugee studies in India and the National Bill was introduced in the Lok Sabha by Feroze Varun Gandhi, MP, the Refugee Bill by Rabindra Kumar Jena, MP (Sarker, 2017).

The National Asylum Bill, 2015 was introduced in the Lok Sabha to provide rules for citizenship for refugees and asylum seekers and mentions in its preamble to acknowledge the right of citizenship without the need for a status determination system at first instance. According to the Bill, an asylee has been defined under section 2(a) as a foreigner who is looking for recognition as a refugee. Interestingly, the bill follows the 1951 Refugee Convention in defining a refugee but excludes persons with no nationality under section 2 (d).

Similarly, the Protection of Refugees and Asylum Seekers Bill, 2015 was introduced to provide an appropriate legal framework to deal with matters relating to forced migration, refugee status determination, non-refoulement, and treatment during the stay in India as per international human rights standards. To achieve the said aim, the definition of refugees under section 3(e)(i) includes provisions similar to the 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in India by including

‘external aggression, occupation, foreign domination, a serious violation of human rights or other events, seriously disrupting public order’ as grounds for leaving the country of origin. In the larger interest, the bill also defines ‘refugee children under section 3 (g) as ‘children below the age of eighteen years who are seeking refuge or where protection is extended by the State to children as per article 22 of the Convention on the Rights of the Child, 1989. In contrast to the progressive and unique inclusion of refugee children, the bill grants discretionary powers to the determination authority to exclude a person from claiming a refugee status if he/she has committed an international crime or non-political crime contrary to the South Asian Association for Regional Cooperation (SAARC) Regional Convention on Suppression of Terrorism. In both of these cases, if there is reason to believe that these acts have been committed, this will be sufficient to exclude the person from refugee status.

Thus, a refugee faces a double uncertainty i.e., the absence of a federal legislative framework and non-uniform policies and practices in India. For example, the legal status of Tibetan refugees in India continues to be determined under The Foreigners Acts of 1939 and 1946, The Passport Act of 1947, and the Statutory Rule and Order 1108 of 1950 (Sanderson, 2015). The Tibetan migrants who arrived in India after 1950 are not known as ‘refugees’ within the meaning of any legislation in India. Under Section 4(2) of the Passport Act 1947, these migrants are, under current legislation, known as ‘people with Tibetan Nationality’ or ‘stateless’. Additionally, like all other non-citizens globally, they are ‘foreigners’ within the meaning of section 3(a) of the Registration of Foreigners Act of 1939 and section 2(a) of the Foreigners Act of 1946. While refugees globally are essentially considered to be persons who flee from his or her country due to a fear of being persecuted on the ground of race, religion, nationality, political opinion, or a particular social group under the 1951 Refugee Convention, even the Tibetans living in Dharmshala, India are recognized as ‘Tibetans in exile (Central Tibetan Administration, 1991) and not as ‘Tibetan-Indians’. Due to these parallel practices, it is difficult to deliberate upon issues of citizenship in India for these Tibetans.

A lack of codified terminology for the protection of ‘Tibetan refugees’ in India does not necessarily mean that the Tibetans residing in India are not considered refugees or are not

protected. The judicial decisions considering Tibetans in India as refugees in the legal sense can be traced back to *Lobsang Khampa & Ors. v. Sunam Ram*, where both the Tibetan petitioners and the Himachal Pradesh High Court recognized that the petitioners were Tibetan refugees. Similarly, in *Sanjiv Prakash & Ors v. N.D.M.C. & Ors.* , the Delhi High Court referred to the Tibetans as refugees who had over courses of years been able to settle and stabilize themselves. The Dalai Lama considers himself to be a refugee in India and has all intention, along with the Tibetan community, to return to Tibet (Stobdan,2017).

3. To uniformize the Refugee Status Determination (RSD) Procedure.

While India has been generous with accepting refugees, their treatment has been differential, largely dependent on the nationality of the refugees and India's political relations with the said nations (Chapparban, 2020). To illustrate, the Tibetan refugees have the right to residence while others like people of the Chakma tribe and Sri Lankans are detained in camps with their free movement limited within their camps(Weiner,1993). On the other hand, Rohingya refugees are not eligible for even the livelihood assistance schemes of the Government due to lack of recognition even during the challenging times of the ongoing pandemic(Saxena, 2007). The treatment of refugees is governed under the principal legislation dealing with the regulation of foreigners is the Foreigners Act 1946 (Act no.31, 1946). In the past, the combination of the Registration of Foreigners Act, 1939 (Act no.16, 1939), The Passport Act, 1962(Act no.15, 1962), and The Citizenship Act, 1955 (Act no. 57,1955) was applied to govern the terms of conditions of living for refugees living in India. These were amended in 2019 (Taiyba, 2020) and are discussed in detail in subsequent sections. Going further, despite the gap due to the lack of national legislation, the judiciary in India has been taking a proactive approach to protecting the refugees and their rights(Vijayakumar,2000). The judiciary has taken a human-rights-based approach protecting the right to life guaranteed under Article 21 of the Constitution combined with Article 14 that forbids discrimination on account of arbitrary action(Bhattacharjee,2008). The implementation of this human-rights-based approach for the protection of refugees hasn't been widely practiced during enforcement.

To illustrate, under section 2 (a) of the Foreigners Act, 1946, a foreigner is defined as a 'person who is not a citizen of India that covers all refugees in absence of a definition of who a refugee is under the municipal legislation. Consequently, an alien who does not fulfill the entry

conditions faces the risk of deportation. These kinds of lacunas are exploited by the executive who has been reactive in dealing with the refugees as opposed to the proactive attitude of the judiciary. In practice, how the executive has dealt with the refugees could be ascertained from the living conditions of the refugees. To illustrate, the first such category is those who receive complete protection by the Government of India, the other category consists of refugees whose presence are only acknowledged by the UNHCR and the final category consists of those whose presence are neither recognized by the Government of India and UNHCR(Suryanarayan,2001). After independence, the resettlement of post-independence refugees in India was conducted successfully (Ghosh & Hazra, 2015), however, not without challenges. One such challenge was addressed in Chief Resettlement Commissioner v. Om Prakash & Ors The Supreme Court of India, in this case, answered if a person who had died before relocating to India, could be considered a refugee by referring to the 1948 Act and notification no. 4892/S of the 1948 Act, and stated that the expression ‘displaced person’ or the word ‘refugee’ has been used in the relevant enactments concerning a person who has migrated to India as a result of disturbances or fear of disturbances or the partition of the country. Thus, if a person had died before the disturbances took place or he had never migrated to India as a result of the disturbances and he died before such migration, he could not come within the meaning of the expression – ‘displaced person’ or the word ‘refugee’ under the relevant statutory enactments.

In a similar vein, through the Om Prakash Case, the Chief Settlement Commissioner of this case had allocated land to the deceased, based on paragraph 17 of the Tarlok Singh’s Manual on Resettlement, which set forth:

‘Even where a displaced landholder in whose name the land stands in the records received from West Punjab has died, the allotment is made in the name of the deceased...(Singh,1952)’

The court rejected the determination by the Chief Settlement Commissioner and any claims that allowed land in India to be allocated to a person, who was considered a refugee and had died before the independence and partition of India. The refugees who arrived in India after independence were treated differently from the Tibetan refugees as the domestic system developed.

The Tibetans arriving in India were required to obtain, by Indian law, a permit from the officer-in-charge of the police post at the Indo-Tibetan border. This permit from the police officer was sufficient and was the only RSD required until 30 May 2003 (Webern, 2013). Since 2003, the UNHCR has been involved with both the Nepali government and the Indian government to create the ‘Special Entry Permits’ system, which has now become the official RSD process for

Tibetans in India. The 'special entry permits are issued after a Tibetan receives a yellow card from the Nepal Tibetan Reception Center.

Yellow cards form the basis of the evaluation of an applicant at the Indian Embassy in Nepal, and entry into India is then given based on the recommendation of the Tibetan Reception Centre or the Central Tibetan Administration. After a Tibetan person enters India and has a valid permit to stay in India, this person is issued an identity certificate or 'registration certificate' under the Passport Act of 1967, which should be renewed regularly. Since 2003, the RSD process for Tibetans seeking refuge includes the following steps: [a] a screening process at a reception center in Kathmandu, Nepal; [b] interviews by the Indian Embassy in Nepal to assess the applicant's origin; and [c] the issuance of a "special entry permit" to enter India (Wabern,2013).

In a 2010 case, the Delhi High Court validated the registration process of Tibetans under Section 4(2) of the Passport Act, and reiterated that 'an identity certificate is issued to stateless persons resident in India, including Tibetan refugees'. Here, India appears to have recognized 'Tibetan refugees' as stateless nationals originating from Tibet. Before the involvement of the UNHCR in the RSD process, India did not have clarity on the RSD of Tibetans, and therefore, not all Tibetans received their due legal status. In a report on 'Tibetan refugees' in India published by the Swiss Federal Office of Migration, the same office conducted a detailed interview with authorities in India and concluded that not all Tibetans who entered India in the 20th century received a Registration Certificate, due to changing policies, especially in the 1990s. Additionally, the local Foreigners Regional Registration Office (FRRO) branches lacked any detailed concrete instructions for the issuance of RCs to Tibetans. Hence, the procedures and prerequisites to obtain an RC may have differed from one district to the next. This report, however, also states that Tibetans-in-exile in India are not at risk of expulsion or refoulement to China and live in a very beneficial socio-economic condition. However, today, Tibetans have voting rights (Gupta,2019) rights to benefit from loan facilities(Ananthachari,2001), etc., which are implemented through the instruction given to the FRRO.

Today India respects UNHCR's mandate related to refugee determination and granting asylum to refugee seekers (UNHCR,2011). Due to the absence of a national legislative and institutional framework of RSD, UNHCR conducts RSDs for people from non-neighboring countries and Myanmar. The UNHCR aims at ensuring 'fair protection processes' in India by improving the standards for registration and profiling of asylum seekers.

In India, the UNHCR conducts the RSD according to the procedure laid down in the UNHCR RSD Handbook(HRLN, 2007). This procedure includes the registration of individual asylum-seekers, followed by an interview of each asylum-seeker and the determination of his or her status. Even though RSD is ‘normally a governmental procedure’, the UNHCR supports a government’s RSD. If the UNHCR gives a negative decision on an application seeking asylum, it supports the right of the applicant to appeal the decision to the UNHCR and aids the applicants as far as possible in that process(UNHCR, 2017). A legislative framework does not exist within India to allow an applicant seeking refuge in India to appeal a negative decision, but most refugees in India enjoy constitutionally guaranteed human rights and benefits designed to give a good standard of living to those who are recognized as refugees in India. Goodwin-Gill and McAdam while analyzing the 1951 Refugee Convention underline that the Convention does not set forth procedures that should be followed for deciding how to determine if a person is a refugee (Goodwin & Mc Adam, 2007). This procedure instead is provided in the UNHCR's 'Handbook on Procedures and Criteria for Determining Refugee Status' (UNHCR,2019). The Handbook only serves as a guide and not as a legally binding procedure under international law. This is crucial to ‘how’ to implement refugee laws domestically because it is clear that the procedural aspect should reflect the domestically available resources and capabilities of a country(GCR, 2018).

In the GCR 2018, the UNHCR committed to establishing an Asylum Capacity Support Group that can be activated at the request of a concerned state. The group is set up to support national authorities to strengthen the fairness, efficiency, adaptability, and integrity of the national asylum system and strengthen the system by sharing good practices between states on all aspects of asylum systems. While a domestic system must have a well-structured, designed, and implemented RSD, no RSD system is free from faults (Simeon,2010).UNHCR’s RSD procedure has been criticized for not being compliant with the international human rights law (Alexander, 1999). Due to these reasons, it is not most appropriate to serve as the model for the RSD procedure.

Going forward, there is a need to understand the provisions that have been laid down about the refugee determination status procedure under the various bills that have been laid down before the parliament. There were proposals to uniformize procedures to determine refugees, however, without any success. E.g., according to MNL, an applicant is permitted to apply for refugee status at the time of entry to India or subsequently and shall be directed or assisted to apply to the Commissioner for Refugees under section 6 (a). Although there remains ambiguity regarding who exactly are the authorities responsible for assisting the applicants and what is

the specific period for filing a subsequent application (Sagar & Ahmed, 2005). On a positive note, the MNLIR does grant certain rights to the refugee or asylum seeker under section 5 (b). Under this section, the refugees and asylum seekers cannot be returned home or expelled from India unless he/she has been convicted of a war crime, crime against peace, or crime against humanity, and there exists reasonable grounds to believe that the concerned person is a threat to the sovereignty and integrity of India.

In the proposed Asylum Bill of 2015, some procedures allowed an asylum seeker to submit an application for protection as a refugee, which would have been determined by the registering authority under section 13. However, the law did not lay down any objective or subjective criteria for the assessment of the application. The most troubling part is that the bill is silent on the legal recourse available to asylees in case of rejection of their application, it is only available when a refugee applies for citizenship under section 4 (1) (b). Like in the above-mentioned bills, certain rights have been granted to the refugees like freedom of religious practice and religious education under section 6 (3).

Under section 2(u) of the Asylum Bill, 2015, a refugee has been defined as a person who has been recognized by the Commission or Appellate Board or who has been classified as a refugee in a situation of mass influx under section 30. It is pertinent to note that the Asylum Bill under section 4 (a) that deals with its determination criteria recognizes the criteria of sex and ethnicity under the ambit of a well-founded fear of persecution. This section also recognizes the dependents of refugees such as the spouse, children, and infirm family members as refugees. In the larger interest, the Asylum Bill has clearly defined what mass influx means under section 2 (o), which was not the case with the MNLIR.

It states that mass influx is “a situation when a considerably large number of people from a specific country or geographical area arrive at, or cross, an international border of India”. Furthermore, it also clearly states the broad provisions regarding exclusion, cessation, and cancellation of refugee status. Some of these provisions include committing international crimes, non-political crimes, and crimes committed in India as grounds for exclusion from protection. These provisions extend to instigating, aiding, or abetting any international crime, non-political crime, or inhumane act. Although these provisions cover a wide ambit at the same time it grants discretionary powers to the executive to remove a refugee under section 9.

Similar to the MNLIR, the Asylum bill proposes establishing the National Commission for Asylum as the authority responsible for the determination, cessation, and cancellation of refugee status. This commission under section 19 shall have the power to regulate its

proceedings and at the same time possess powers of a civil court as granted through the Code of Civil Procedure, 1908. An issue that remains unresolved with the Asylum bill, is not recognizing the right of non-refoulement for asylum seekers under section 8 that was also the case with the MNLR.

TABLE: LIST OF FORMER LAWS & BILLS CONCERNING REFUGEES IN INDIA				
S.No	Name of the Bill/Law	Who brought the bill	Definition of Refugee	Status Determination Procedure
1	Model National Law on Refugees	Eminent Persons Group in 1997	a. any person who owing to external aggression, occupation, foreign domination, serious violation of human rights or other events seriously disrupting public order in either part or whole of his or her country of origin, is compelled to leave his or her place of habitual residence in order to seek refuge in another place outside his or her country of origin.	An applicant is permitted to apply for refugee status at the time of entry to India or subsequently and shall be directed or assisted to apply to the Commissioner for Refugees under section 6 (a).

2	United Province Land Acquisition (Rehabilitation of Refugees) Act of 1948	United Province (Now, Uttar Pradesh)	The term refugee has been defined in a geographical context under section 2(7) as 'any person who was a resident in any place forming part of Pakistan and who, on account of partition or civil disturbances or the fear of such disturbances, has on or after the first day of March 1947 migrated to any place in the U.P. and has been since residing there'	The expression 'displaced person' or the word 'refugee' has been used to refer to a person who as migrated to as a result of disturbances or fear of disturbances or the partition of the country. Thus, if a person had died before the disturbances took place or he had never migrated could not come within the meaning of the terms referred
3	East Punjab Refugees (Registration of Land, Claims) Act of 1948	Punjab	This act also defines the refugees by their geography as 'a landholder in the territories that formed part of the Province of West Punjab, <i>or whose ancestor had migrated as a colonist from Punjab since 1901 to the Provinces of North-West Frontier Province, Sind or Baluchistan or to any State adjacent to any of the aforesaid Provinces that acceding to the Dominion of Pakistan</i> '	Only those who had territories in their names as prescribed or their ancestor who migrated as a result of partition into the territories forming part of Dominion of Pakistan would have any claims to land in India to regarding allocation as refugee.

4	The Protection Of Refugees And Asylum Seekers Bill, 2015	By Lok Sabha Member of Rabindra Kumar Jena, M.P.	It defines refugees under section 3(e)(i) and includes provisions similar to the 1969 Organisation of African Unity_Convention Governing the Specific Aspects of Refugee Problems in India by including 'external aggression, occupation, foreign domination, a serious violation of human rights or other events, seriously disrupting public order' as grounds for leaving the country of origin	The <i>bill grants discretionary powers</i> to the determination authority to exclude a person from claiming a refugee status if he/she has committed an international crime or non-political crime contrary to the <i>South Asian Association for Regional Cooperation (SAARC) Regional Convention on Suppression of Terrorism</i> .
5	The National Asylum Bill, 2015	By Lok Sabha Member of Parliament Feroze Varun Gandhi	<i>An asylee has been defined under section 2(a) as a foreigner who is looking for recognition as a refugee.</i> The bill follows the 1951 Refugee Convention in defining a refugee <i>but excludes persons with no nationality under section 2 (d).</i>	In its preamble to <i>acknowledge the right of citizenship without the need for a status determination system</i> at first instance

6	The Asylum Bill	By Lok Sabha Member of Parliament Dr. Shashi Tharoor, and drafted in association with the members of Ara Legal Initiative, a centre for refugee studies in India	The refugee means an applicant whose application for asylum has been determined to meet the criteria under section 4 by the Commission or the Appellate Board, as the case may be, under the terms of this Act or who has been declared to be a refugee by a notification under section 30.	A person shall be excluded from protection under this Act if— (a) there are serious reasons for considering that— (i) he has committed a crime against peace, a war crime or a crime against humanity, (ii) he has committed a serious non-political crime outside India prior to his entry into the national territory; or (iii) he has committed inhuman acts for any reason whatsoever outside of India; or (iv) he poses a serious threat to the public order or national security of India
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4. To address cross-border forced migration due to climate change and sea-level rise.

Climate change and extreme weather events are likely to cause widespread internal and cross-border displacements (IOM, 2021). It is predicted that by 2050, approximately 200 million climate refugees may be forced out of their countries of origin requiring refugee protection (Lavelle, 2021). The poor regions are likely to face widespread political instability and refugee crisis triggered by global warming, climate change, and continuous extreme weather events (Hartmann, 2010). Bangladesh is particularly vulnerable to climate change and sea-level rise due to which the refugees from this region may be one of the highest (Myers, 2002). A. Panda asserts that ‘climate change might induce a much larger migration from Bangladesh to India in the future (Panda, 2010). Some of the villages in and around the India-

Bangladesh border are inundated permanently and are left inhabitable (Ghosh et. al,2014). In 1991, 374 inhabitants in Lohachara Island became landless after submergence and were forced to migrate to other places. Panda asserts that there is a “need to recognize the problem” and to put ‘appropriate strategies and measures to assist the people displaced by climate change’ (Panda, 2010).

India has been considered a ‘testing ground for policies that internalize climate considerations into development’ (Dubash et. al,2018). Scholars like Myers, support the extension of refugee law protection to environmental migrants (Myers, 2001), however, this proposition has been widely practiced. In 2019, the Brookings Institution Report recommended the integration of climate change measures, policies, and strategies at the domestic level, specifically to protect people migrating due to climate change(Podesta, 2019). In the 2020 decision in the case of *Teitiota v. New Zealand*, the Human Rights Committee recognized that climate change can open pathways for climate refugees in the future and may attract the application of the international law principle of non-refoulement. In the light of this, a comprehensive national legislation also including the aspects of sea-level rise related forced migration across-borders is the need of the hour.

5. India’s geographic location makes it a frontline country for refugees in the region

In the Indian subcontinent, independence and partition took place simultaneously, resulting in an unprecedented population movement between India and Pakistan (Kwaja et.al), accompanied by violence and mass violations of human rights(Bhardwaj & Rinchan, 2008). Additionally, India has been home to several thousand refugees who arrived in India from neighboring countries due to ongoing crises in neighboring countries. To illustrate nearly 20 million people crossed the India- Pakistan borders before and after independence (Visaria, 1969), 10 million East Pakistani refugees came to India before the liberation of Bangladesh (Murshid, 2011); and around 90,000 Tibetan refugees came to India after 1959(Dolma, 2019) and continue to live in different parts of the country. In recent times, about 53,000 people of the Chakma tribe have crossed over to Tripura, Arunachal Pradesh, and other north-eastern states (SAARCLAW & UNHCR, 1997). Currently, India hosts approximately 200,000 refugees, with 95,829 from Sri Lanka; 73,404 from Tibet; 23,592 from Myanmar; 15,916 from Afghanistan and around 4000 from other countries (UNHCR Factsheet, 2021).

India is surrounded by countries that have in the past been associated with the refugee crisis, like Pakistan in 1947 and Bangladesh in 1971 (Schendel,2002). As a result, India has taken

refugees from its neighboring countries like Tibet, Srilanka, Myanmar, Afghanistan, etc. in the past (Ramzy,2015). It implies India has accepted refugees from most of its neighboring countries and refugees enter India from land and coast both. However, their recognition has been a matter of concern. Historically, this kind of arbitrary distinction was experienced by Afghan Refugees who were not granted refugee status in the aftermath of the 1979 Afghanistan invasion. This response was based on geopolitical and diplomatic considerations and not humanitarian ones. Accompanying these considerations were, the national security concerns, in particular the fear that the acceptance of Afghan refugees might lead to creating a base for Pakistan that may threaten the security of the country specifically in Kashmir. While these might be the reasons for refusal in the past, these factors continue to hold relevance in the present times. To illustrate, the aspect of the financial burden that comes with the acceptance of Refugees is something that is significantly affecting the current Afghanistan crisis where the visas of Afghanistan refugees have not been renewed as it would lead to additional responsibility of creating livelihood opportunities. In this light, India's experience during the 1971 war with Pakistan stands as an unpleasant experience where a large number of illegal migrants entered the state of West Bengal that resulting in economic and social pressures. On failure to fulfill such expectations, it attracted international criticism which India would not want in the present situation given that it is not even a party to the 1951 Convention and 1967 Optional Protocol.

These apprehensions exist even though Afghanees has been part of Indian culture since the fourteenth century as conquerors, traders, student, and migrant workers. The core of the issue is the categorization of Afghans as foreigners and not as refugees which trace its roots in the changed territorial structures between the Indian subcontinent and Afghanistan and have since been referred to as the 'Afghan question' by UNHCR. Such treatment of Afghan refugees violates India's international obligation to prevent deprivation of citizenship based on race, color, descent, or national or ethnic origin under the International Covenant on Civil and Political Rights (ICCPR) of which India is a member. It also violates the 1992 Declaration on the Rights of Persons belonging to national or ethnic, religious, and linguistic minorities. Under this declaration, the governments are required to ensure that people belonging to minority groups that include religious minorities can exercise their human rights without discrimination (Gomes, 2019).

6. To allow India to meet its obligations under international law.

India is neither a party to the 1951 Convention on the Status of Refugees nor to the 1967 Protocol relating to the Status of Refugees, the legal regime governing the refugees in India is dependent on the interpretation of the Constitution (Patel, 2016). In the absence of ratification to international instruments and absence of national legislation, there exist various Indian provinces that have been affected due to the Refugee crisis transpiring in the neighboring countries that share borders with these provinces (Dhavan, 2005). As a result, the rights of the refugees entering India have been violated that goes against the obligation to provide equal treatment to all non-citizens with its citizens under ICCPR and ICESCR to which India is a party (Sanderson, 2015). However, on the other hand, in the absence of national legislation, asylum seekers are granted refugee protection based on human rights guaranteed under the Constitution of India (Acharya, 2016). For example, in the National Human Rights Commission v. State of Arunachal Pradesh ('NHRC'), refugees were protected under Article 21 of the Constitution of India, which guarantees the right to life to all humans within India (Dhote, 2021).

India does not have a conventional obligation under the 1951 Refugee Convention (Bang, 2021). However, some other treaties and conventions set forth obligations to protect refugees and apply the principle of non-refoulement to people seeking refugee protection in India (Nair, 2021). The most recent development in this regard happened when The Citizenship (Amendment) Act, 2019 (hereinafter CAA, 2019) was passed on 9th December 2019 that had created social and political turbulence in India and abroad (Waghmore, 2021). As per the amendment, citizenship will be granted based on religion to non-muslim communities from Afghanistan, Bangladesh, and Pakistan who entered India on or before 31st December 2014. The CAA, 2019 (Act no. 47, 2019) exempts the tribal areas of Assam, Meghalaya, Mizoram, and Tripura that are included in the Sixth Schedule of the Constitution. The Act also exempts areas that are part of the Inner Line Permit which includes Arunachal Pradesh, Mizoram, and Nagaland.

In this light, the CAA hits the core of the relationship between a State and its citizens i.e. the Citizenship. It is under Article 11 of the Indian Constitution that the Union government has the power to legislate upon the subject of citizenship and states that 'Nothing in the foregoing provisions of this Part shall derogate from the power of Parliament to make any provision concerning the acquisition and termination of citizenship and all other matters relating to citizenship. Thus, it becomes significant to analyze how citizenship is being granted under the new amendment and how it affects the refugees and those associated with them.

Under the Citizenship Act of 1955, citizenship could be acquired through birth, descent, registration, naturalization, and acquisition of a foreign territory, however, an illegal migrant who enters the territory as per the 2004 amendment, cannot seek citizenship by either registration or naturalization under sections 5 and 6 under the Citizenship Act, 1955. However, this provision is the core of the issue under the 2019 amendment as it allows some religious communities i.e. Hindus, Sikhs, Buddhists, Jains, Parsis, and Christians from Pakistan, Bangladesh, and Afghanistan who entered India illegally before 31st December 2014 fearing religious persecution, and enables them to obtain citizenship by registration or naturalization under section 2 despite their illegal entry into India. What this effectively means is that the members of the non-muslim communities mentioned above who were earlier considered illegal immigrants would now be recognized as Indian citizens from the date they came to India and all legal proceedings qua their status as illegal migrants and their citizenship shall stand dismissed.

While the government justifies the amendment as a step to complete the unfinished work at the time of partition in 1947 by offering the Hindu community a chance to return to their home and states that the reason behind not including Muslims is that they have not faced religious persecution in the Muslim dominated countries of Pakistan, Bangladesh, and Afghanistan and have settled in India as economic migrants. Further, the amendment has been justified in line with the reasoning that the immigrants need to fulfill certain conditions to be granted citizenship such as having lived in India for 6 years before this amendment; to prove they entered before the set date of 31st December 2014; to prove the fact that they moved due to the fear of religious persecution from the countries mentioned in the Act and finally, they must speak a language stated under the Eighth Schedule of the Constitution along with fulfilling the conditions laid down in Schedule III to the Citizenship Act, 1955.

However, the CAA, 2019 has been opposed on grounds that it violates Articles 14 and 15 of the Indian Constitution, which guarantees the right to equality and non-discrimination. It also draws criticism on the point regarding the exclusion of other neighboring countries where religious persecution has taken place in the past. For example, Bhutan whose official religion is Vajrayana Buddhism does not find a place under the Amendment Act. Similarly, Sri Lanka which is a Buddhist Majority country and has a history of persecution of Tamil Hindus has been omitted from the list. Finally, the most controversial exclusion of Myanmar where the killing of a large number of Muslim Rohingyas has taken place and as a result, a large number of them were forced to seek refuge in India also does not find a place (Gauba & Singh, 2017). The implementation of CAA raised doubts about the way India is dealing with refugees in

general (Raj, 2020). It has also affected the position of India as a “refugee-accepting state” to a state that has adopted discriminatory practice against certain group of refugees (Mitra, 2020). The CAA has complicated the already nuanced and uncodified legal framework governing refugees in India, thereby, adding to the need of a national legislation governing refugees in India.

One of the many justifications for the implementation of CAA is “national security concerns” (Rajan, 2020).

The Global Compact on Refugees acknowledges that protection of refugees and national security concerns for the host country goes hand in hand. In fact, it is considered that “historical mishaps, political ignorance, unstable democracies and exaggerated concern over national security” demotivates, almost all the time, any attempt for national legislation (Saxena, 2007). While India needs a national legislation governing refugees, the framework governing national security regime in the context of refugees will also need a structural standing within this legislation.

India’s commitment to protect human rights as prescribed by the international human rights instruments should also be institutionalised in India in the context of refugees (Raj, 2020). In India there are no glaring human rights violations against the refugees (Subramanya, 2004). However, deportation of Rohingya refugees in 2017 questioned the protection of right to life guaranteed by the Constitution of India (Chaudhary, 2017). Additionally, there are reports of arbitrary arrests, detentions and enforced disappearances, which only strengthen the case for a national legislation (Rajan, 2022).

TABLE: LIST OF INTERNATIONAL LAW OBLIGATIONS OF INDIA CONCERNING REFUGEES	
S. No	Nature of Obligation
1	<p>International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)</p> <p><i>Article 5</i></p> <p>States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:</p> <p>(a) The right to equal treatment before the tribunals and all other organs administering justice;</p>

	<p>(b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;</p>
2	<p>International Convention on Civil and Political Rights (ICCPR-1966)</p> <p>Article 13</p> <p>“An alien lawfully in the territory of a state party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.”</p>
3	<p>International Covenant on Economic, Social and Cultural Rights (ICESCR)</p> <p>Article 2</p> <p>The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.</p>
4	<p>Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)</p> <p>Article 2</p> <p>States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake</p> <p>(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;</p>

5	<p>Convention on the Rights of the Child (CRC)</p> <p><i>Article 9</i></p> <p>1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately, and a decision must be made as to the child's place of residence.</p>
6	<p>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)</p> <p>Article 3 of the Torture Convention – 1984 states: “No state party shall expel, return (“refouler”) or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture”..</p>
7	<p>International Convention on Protection of the Rights of All Migrant Workers and Members of Their Families (ICMRW)</p> <p>Article 8</p> <p>1. Migrant workers and members of their families shall be free to leave any State, including their State of origin. This right shall not be subject to any restrictions except those that are provided by law, are necessary to protect national security, public order (ordre public), public health or</p>

	<p>morals or the rights and freedoms of others and are consistent with the other rights recognized in the present part of the Convention.</p>
8	<p>International Convention for the Protection of All Persons from Enforced Disappearances</p> <p><i>Article 12</i></p> <p>1. Each State Party shall ensure that any individual who alleges that a person has been subjected to enforced disappearance has the right to report the facts to the competent authorities, which shall examine the allegation promptly and impartially and, where necessary, undertake without delay a thorough and impartial investigation. Appropriate steps shall be taken, where necessary, to ensure that the complainant, witnesses, relatives of the disappeared person and their defence counsel, as well as persons participating in the investigation, are protected against all ill-treatment or intimidation as a consequence of the complaint or any evidence given.</p>
9	<p>Convention on the Rights of Persons with Disabilities</p> <p>Article 4 -</p> <p>States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties undertake:</p> <p>d) To refrain from engaging in any act or practice that is inconsistent with the present Convention and to ensure that public authorities and institutions act in conformity with the present Convention</p> <p>Customary International Law and General Principles of Law</p>
10	<p>Principle of Non-Refoulement : It is enshrined in Article 33 of the 1951 Convention, which is also binding on States Party to the 1967 Protocol. Article 33(1) of the 1951 Convention provides: No Contracting State shall expel or return (“<i>refouler</i>”) a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be</p>

	threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion.”
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7. Way Forward

Conclusively, the six reasons mentioned above are individually persuasive and collectively powerful factors underscoring the need for a comprehensive national legislation in India. These wide arrays of reasons should push India towards enacting and implementing robust national legislation concerning refugees and uniformly governing substantive, conceptual, and procedural issues arising out of their movement to India, and stay within India. India should work towards straightening its aged old historic practice of protecting people who reach the gates of India, seeking shelter, while protecting its interests and citizens. Given India’s geographic vulnerabilities, India can set up good practices, amidst the ongoing crisis in the region, in Europe (Ukraine-Russia crisis) and global climate change crisis.

Indian Parliament has some of its own previous good practices that it adopted during the partition induced refugee crisis between 1947-1951. Additionally, the Parliament has experience with modern bills on refugee and asylum related framework in India. These can collectively serve as a foundation to the national refugee legislation in India. As a first step, Indian legislation could have a comprehensively conceptualised definition of the term “refugees”. It could either follow a conservative approach of the 1951 Refugee Convention, or could adopt a comprehensive approach by going beyond the 1951 Refugee Convention definition and including “human rights violations” and/or “climate change” as factors causing people to seek asylum in other countries.

As a next step, India could set up procedures and mechanisms to process people claiming to be refugees, to provide them with temporary relief or resettlement as the case maybe and to again

be able to provide justified procedure to asylum seekers on Indian border. A mechanism will promote human right protections of asylum seekers and refugees and is likely to bolster the system by adequately processing all asylum seekers and removing any persons who is or can be a national security threat. The wholistic Indian national legislation concerning refugees, should also balance Indian national security needs, while protect the needs and interests of Indian citizens along with the human rights and needs of asylum seekers on Indian territory. The humanitarian protection to refugees should be according to the international human rights standards and the fair procedures to process and treat asylum seekers and refugees, while India protects its own national security. India is a developing country with a growing population and while it is sharing the responsibility of the refugees, the more resourceful nations can also continue to grow and strengthen their shared responsibility.

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