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# **JSS Journal for Legal Studies and Research**

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## EDITORIAL NOTE

Welcome to Volume 10, Issue 1 (January to June 2024) of JSS Journal for Legal Studies and Research [ISSN 2321-4171]. As we commence the tenth volume of the JSS Journal for Legal Studies and Research, we celebrate a decade of scholarly contributions and critical discourse in the field of law. This issue features a diverse array of articles that address pressing legal issues within the Indian context, reflecting both contemporary challenges and emerging areas of research. Our lead article, "Legal Implications of Tax Securitization Transactions in India" by **Mr. Jackson Simango Magoge**, delves into the complex landscape of debt and asset securitization—a financial mechanism gaining traction in India. The article provides a normative legal analysis of taxation issues associated with these transactions, illuminating the gaps in existing tax laws and regulations from the Reserve Bank of India and the Securities and Exchange Board of India. This examination is timely, as the need for clear tax guidelines becomes increasingly critical for financial institutions navigating securitization in a dynamic market.

In "Navigating the Intricacies of Fair Use, Disclaimers, and Copyright in the Film Industry," **Smt. Kavitha L** offers a critical exploration of the ethical and legal challenges faced by filmmakers, particularly in biographical narratives. The article raises essential questions about the efficacy of disclaimers and their potential misuse to evade accountability, prompting a much-needed dialogue about transparency in the film industry.

The protection of refugee rights in India is further scrutinized through two significant contributions. **Mr. Mihir Umesh Inamdar and Dr. Abhijeet Ramkrishna Dhere** present a thorough analysis of India's refugee protection framework in "Protection of Refugee's Rights in India: Legal Perspective," highlighting the discrepancies between national policies and international standards. This analysis is complemented by **Balasubramanian K.V. and Aravind Raj's** exploration of statelessness and its implications for refugee rights. Their paper addresses the critical intersection between statelessness and forced migration, offering recommendations to enhance protections for marginalized groups.

Lastly, **Anita Verma's** piece, "Examining Refugee Rights Under the Human Rights Framework," further enriches our understanding of the obstacles refugees face in accessing their rights. This comprehensive examination calls for collective action from governments, international bodies, and civil society to create a more inclusive environment for refugees.

As we engage with these articles, we are reminded of the importance of continued research and discourse in the legal field. We encourage our readers to reflect on these contributions,

fostering dialogue that promotes legal clarity, human rights, and social justice. Thank you for being a part of this academic journey.

Sincerely,

Happy reading!

Editor-in-Chief

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## LEGAL IMPLICATIONS OF TAX SECURITIZATION TRANSACTIONS IN INDIA

Jackson Simango Magoge<sup>1</sup>

### Abstract

*One of the most recent tactics to hit the financial markets in India is debt or asset securitization. Under asset securitization, a financial institution pools and packages individual loans and receivables creates securities against them, gets them rated, and sells them to the investors in the market, while the transactions involved during securitization attract taxation. Taxation issues surrounding securitization transactions have not been clearly clarified in the relevant tax laws in so far as regulations of securitizations are concerned (i.e., securitization transactions governed by RBI regulations or regulations of the Securities and Exchange Board of India (SEBI), the capital markets regulator). For instance, a lack of clarity in taxation provisions with respect to investment in the Security receipt (SRs) issued by the Asset Reconstruction Company (ARCs) is among the challenges. Moreover, Under the income-tax law, no specific tax rate is mentioned for the taxability of interest income or upside received by FPIs from their investment in the SRs. Thus, this study is a normative legal study that employs normative methods and looks for the provisions regarding the taxation of securitization transactions and its legal implications under Indian taxation regimes. Whereas provisions of tax statutes like the Income Tax Act and Stamp Duty Act are examined and analyzed in relation to other laws that govern securitization in India.*

**Keywords:** *Taxation of Securitization transactions, Asset Reconstruction Company, securitization trust, Income tax, Special-purpose Vehicle, investors, financial institutions.*

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## 1.0 INTRODUCTION

“Securitisation” in its widest sense implies every such process that converts a financial relation into a transaction, more specifically, into a capital market instrument or security<sup>2</sup>. Debt or asset reconstruction is one of the latest techniques that financial markets have been witnessing. Under asset securitization, a financial institution pools and packages individual loans and receivables creates securities against them, gets them rated, and sells them to investors in the market. Thus, asset securitization is nothing but a process of simulating assets into securities and securities into liquidity on an ongoing basis, increasing thereby turnover of business and profits, while also providing for flexibility in yield, pricing, pattern, risk, size, and marketability of instruments. In India income of Securitization trusts are exempted under the Income statute while it is taxable in the hands of investors. The tax laws that govern the taxation of private trusts, the most commonly used securitization vehicle in India, provide pass-through tax treatment to such vehicles, so long as the faith is not seen to be doing business. Taxation issues surrounding securitization transactions have not been clearly clarified in the relevant tax laws in so far as regulations of securitizations are concerned (i.e., securitization transactions governed by RBI regulations or regulations of the Securities and Exchange Board of India (SEBI), the capital markets regulator).

### **Methodology**

This study is a normative legal study; it reviews some of the pieces of literature to gather the necessary information concerning the concept of the “taxation of securitization” by utilizing normative methods. Secondary data consisting of primary such as case laws, and legal instruments are gathered and utilized in this study.

### ***1.2 Briefly development of securitization***

The first structured asset securitization occurred in 1970 in the United States when the newly created Government National Mortgage Association began publicly trading in securities backed by a pool of mortgage loans. These securities, known as “mortgage pass-through securities”, facilitated the investors to purchase a fractional undivided interest in a pool of mortgage loans by providing for a share in the interest income and in the principal payments generated by the underlying mortgage. In creating a pool of mortgages, the lenders were very careful to put together those assets with similar characteristics in regard to quality, term, and

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<sup>2</sup> Vinod Kothari: Securitization, Asset Reconstruction and Enforcement of Security Interests, 5th ed

interest rate. The pool of mortgages placed with trust was actually sold in the form of certificates to investors, either directly or through private placement.

Securitization has existed in India since the early 1990s. Citibank earned Rs.16 crores from GIC Mutual Fund by securitizing part of its auto loans in 1991, making it the first securitization transaction. Since then, a number of transactions have taken place. During this time there was no specific law pertaining to securitization. Until 2002, The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interests Act (SARFAESI) was passed. The goal of its passage was to encourage banks and financial institutions to sell or securitize non-performing loans (NPLs) in favor of Assets Reconstruction Companies (ARCs) established with the Reserve Bank of India (RBI) under SARFAESI. However, a huge development of securitization in India was made in the case of **Mardia Chemicals Ltd v. Union of India**<sup>3</sup> where the validity of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interests Act (SARFAESI) was challenged. The constitutional validity of SARFAESI was assailed, in particular Sections 13, 15, 17, 34 on the basis that these sections are unreasonable and arbitrary. However, the court held that the SARFAESI Act is valid.

Up to now, several amendments have been made as well as many guidelines have been issued to regulate securitization in India. The amendments and guidelines are intended to have a wide-ranging influence on a variety of concerns, facilitating the establishment of a dynamic and healthy securitization market in India.

### ***1.1 Challenges***

One of the most recent tactics to hit the financial markets is debt or asset securitization. Under asset securitization, a financial institution pools and packages individual loans and receivables; creates securities against them, gets them rated, and sells them to the investors in the market, while the transactions involved during securitization attract taxation. In India income of Securitization trusts are exempted under the Income statute while it is taxable in the hands of investors. The tax laws that govern the taxation of private trusts, the most commonly used securitization vehicle in India, provide pass-through tax treatment to such vehicles, so long as the trust is not seen to be doing business. Taxation issues surrounding securitization transactions have not been clearly clarified in the relevant tax laws in so far as

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<sup>3</sup> (2004) 4 SCC 311; (2004) 2 SLT 991; (2004) 2 BC 397; (2004) 110 DLT 665; AIR 2004 SC2371

regulations of securitizations are concerned (i.e., securitization transactions governed by RBI regulations or regulations of the Securities and Exchange Board of India (SEBI), the capital markets regulator). For instance, a lack of clarity in taxation provisions with respect to investment in the Security receipt (SRs) issued by the Asset Reconstruction Company (ARCs) is among the challenges. Also, one of the issues is the pass-through regime for Alternative Investment Fund (AIF) income from SR investments. AIFs, in their capacity as Qualified Buyers (QBs), invest in security receipts issued by ARC trusts. Under the income-tax law, the ARC trusts enjoy a complete pass-through status, and the income is taxable in the hands of the investors based on the characterization that is determined by the ARC trust. The income is typically classified as 'business income by the ARC trust. The AIF loses its tax transparent status if it earns a business income, and such income is taxed at the AIF level at the maximum marginal rate, which is a deterrent for the investment to flow into ARC trusts. Moreover, Under the income-tax law, no specific tax rate is mentioned for the taxability of interest income or upside received by FPIs from their investment in the SRs. Thus, this study looks for the provisions regarding taxation of securitization transactions and its legal implications under Indian taxation regimes. Whereas, provisions of tax statutes like the Income Tax Act and Stamp Duty Act are examined and analyzed in relation to other laws that govern securitization in India.

### ***1.3 Major Parties involved in Securitization***

#### **1.3.1 Originator**

The originator may be a financial institution or bank which decides to its select pool of securitized loans and receivables with a view to creating liquidity. It identifies the loans and receivables from its portfolios to form a basket or pool of homogeneous assets for securitization. In India, this is typically a bank, an NBFC, or a housing finance company<sup>4</sup>.

#### **1.3.2 The Borrower (alternatively called the Obligor)**

is the individual (or an enterprise) that has taken a loan from the originator and entered into a contractual agreement with the originator to repay the interest and the principal. In the case of secured loans, the Borrower also provides collateral (a physical asset) as a security for the

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<sup>4</sup> Jennifer Romero Torres and others, *Securitization in India: Managing Capital Constraints and Creating Liquidity to Fund Infrastructure Assets*, Asian Department ,2017

loan. In the case of housing loans, the house that is bought with the loan is typically the collateral<sup>5</sup>.

### **1.3.3 Investor**

It is an entity that wants to purchase the assets or receivables of the Originator. The investor makes his profit by receiving fixed or floating payments from the SPV or the trustee created in the process. In India, investors are typically banks, insurance funds, and mutual funds.

**1.3.4 Trustees (of the SPV Trust)** oversee the performance of all the parties and supervise the distribution of cash to the investor<sup>6</sup>.

### **1.3.5 Special Purpose vehicles**

This is the intermediary who holds the assets transferred by the Originator on behalf of the end investor and it is the function of this entity to issue marketable securities to the investor in place of the assets taken up by it. The SPV is normally an organization distinct from the originator. Its main task is structuring. These agencies assess the risks connected with each transaction, impose credit enhancements corresponding with the PTCs' ratings, monitor transaction performance until maturity, and take necessary rating measures.

## **2.0 BRIEF MODUS OPERANDI OF SECURITIZATION**

Securitization of assets involves a lending institution, termed as the originator, whose loans and receivables will be converted into securities, and a trust or a Special Purpose Vehicle (SPV), through which the former will qualify its assets. The originator, in fact, picks up a pool of assets of homogeneous nature, lifts them from its balance sheet, and passes them on to the SPV through a “pass-through transaction”. The latter in turn converts them into the appropriate form of marketable securities for investment. The resultant of cash flow SPV to the originator would enable the latter to create further assets, while the periodical cash flows from the underlying collaterals by way of repayment of loans and interest payment will enable the SPV to pay off its obligations of principal and interest to its debtors<sup>7</sup>.

## **3.0 TAXATION OF SECURITIZATION AND LEGAL IMPLICATIONS**

In this part, crucial and important provisions governing the taxation of securitization in India are examined by looking at the provisions of the Income Tax Act, as well as the legal implications that have been pointed out and analyzed.

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<sup>5</sup> Report of the Committee on the development of Housing Finance Securitization Market System 2019 pg 20

<sup>6</sup> Ibid

<sup>7</sup> OECD publication titled Trends and Developments in Securitisation, Financial Market Trends, No. 74, October 1999. Refer to, <http://www.oecd.org/finance/financial-markets/2752197.pdf> (last accessed in 28th February 2022)

### **3.1 Incomes not included in total income**

#### **Section 10(23DA)**

The section provides an exemption of the income of securitization trust from the activity of securitization. Furthermore, the section provides the meaning of securitizations for tax purposes and securitization trust where the section<sup>8</sup> provides that;

**(23DA)** any income of a securitization trust from the activity of securitization.

*Explanation.* —For the purposes of this clause, —

( a ) “securitization” shall have the same meaning as assigned to it,—

(i) in clause ( r ) of sub-regulation ( 1 ) of regulation 2 of the Securities and Exchange Board of India (Public Offer and Listing of Securitised Debt Instruments) Regulations, 2008 made under the Securities and Exchange Board of India Act, 1992 and the Securities Contracts (Regulation) Act, 1956; or

(ia) in clause (z) of sub-section (1) of section 2 of the Securitisation and Reconstruction of Financial Assets

(ii) under the guidelines on securitisation of standard assets issued by the Reserve Bank of India; and Enforcement of Security Interest Act, 2002; or

( b ) “securitization trust” shall have the meaning assigned to it in the Explanation below section 115TC;

### **3.2 Meaning of securitization for the tax purpose**

Under Section 10 (23DA) the meaning of securitization has been defined in the explanation where it encompasses the definitions in Regulation 2(1)(r) of Securities and Exchange Board of India (Public Offer and Listing of Securitised Debt Instruments) Regulations, 2008 (hereinafter referred as “the Regulations”), or under the Guidelines on Securitisation of Standard Assets, issued by the RBI (hereinafter referred as “RBI Guidelines”). And the definition in clause (z) of sub-section (1) of section 2 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002) (hereinafter referred to as “SARFAESI Act”).

#### **3.2.1 The Regulations**

Regulation 2(1)(r) of the Regulations defines “securitization” to mean the acquisition of debt or receivables by any special purpose distinct entity from any originator or originators for the

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<sup>8</sup> As Ins. by The Finance Act, 2016 in the Explanation to clause 10(23DA), effective from 1-4-2017

purpose of issuance of securitized debt instruments to investors based on such debt or receivables and such issuance. The Regulations provide qualifications to be met for the securitization transaction in the definition. The regulations provide the meaning of “issue” to mean an offer of *securitized debt instruments* by a *special purpose distinct entity* or under any scheme of such entity to the public or to any person(s), which is *proposed to be listed on a recognized stock exchange*; or offer of *security receipts* by a *trust set up by an asset reconstruction company* or under any scheme of such trust to the qualified buyers, which are *proposed to be listed on a recognized stock exchange*. Thus, only the securitization transactions, where the securitized debt instruments or security receipts are proposed to be listed on a recognized stock exchange by the special distinct entity or trust set up by asset reconstruction company respectively will qualify under Explanation (a)(i) to clause (23DA) of the Income Tax.

### 3.2.2 The RBI Guidelines (Directions)

The Master Direction – Reserve Bank of India (Securitisation of Standard Assets) Directions, 2021<sup>9</sup> defined securitization as follows;

*Securitization” means a structure where a pool of assets are transferred by an originator to a SPE and the cash flow from this pool of assets is used to service securitization exposures of at least two different tranches reflecting different degrees of credit risk, where payments to the investors depend upon the performance of the specified underlying exposures, as opposed to being derived from an obligation of the originator;*

*Provided that the pool containing a single asset eligible to be securitized is also permitted.*

*Provided further that a securitization structure may have tranches with different maturities*

Hence, a securitization transaction has to fulfill the conditions as given in the Master Direction – Reserve Bank of India (Securitisation of Standard Assets) Directions, 2021 whereby a pool of assets is used only to service securitization exposure. The directions define the term securitization exposure to include but are not restricted to exposures to

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<sup>9</sup> Final guideline available at <https://rbidocs.rbi.org.in/rdocs/notification/PDFs/85MDSTANDARDASSETSBE149B86CD3A4B368A5D24471DAD2300.PDF> (last accessed in March 2022)

securitization notes issued by the special purpose entity including asset-backed securities and mortgage-backed securities, credit enhancements, underwriting commitments, liquidity facilities, interest rate or currency swaps, credit derivatives, and tranching cover, as well as Reserve accounts, such as cash collateral accounts, which is earmarked to absorb credit losses arising from the securitization and is recorded as an asset by the originator.

### ***3.2.3 SARFAESI Act***

Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 defines securitization to mean the acquisition of financial assets by any [asset reconstruction company] from any originator, whether by raising of funds by such [asset reconstruction company] from [qualified buyers] by the issue of security receipts representing undivided interest in such financial assets or otherwise.

Therefore, when interpreting the meaning of securitization for the tax purpose, it should be noted that the meaning of “originator” is assigned a different meaning in the Regulations compared to the meaning of “originator” under the SARFAESI Act as well as in the Master Direction – Reserve Bank of India (Securitisation of Standard Assets) Directions, 2021. Furthermore, the meaning of securitization provided under the Regulations, RBI Guidelines and SARFAESI Act tries to distinguish a Specific Purpose District Entity (trust), company, and trust set up by an asset construction company. However, any securitization transactions that fall under the definitions of the Regulations, RBI Guidelines, and SARFAESI Act are covered under Section 10(23DA) of the Income Tax Act.

## ***3.3 Special Provisions Relating to Tax on Distributed Income by Securitisation Trusts***

### ***3.3.1 The exemption of income under section 10 (35A)***

#### **Section 10(35A)**

Section 10(35A) of the Income Tax Act provides for the exemption of tax of any income by way of distributed income referred to in section 115TA received from a securitization trust by any person being an investor of the said trust. The section provides as follows;

*(35A) any income by way of distributed income referred to in section 115TA received from a securitisation trust by any person being an investor of the said trust.*



*Provided that nothing contained in this clause shall apply to any income by way of distributed income referred to in the said section, received on or after the 1st day of June, 2016.*

*Explanation. —For the purposes of this clause, the expressions —investor<sup>11</sup> and —securitisation trust shall have the meanings respectively assigned to them in the Explanation below [section 115TCA].*

The aforementioned exemption intended that income received in the hands of the investors (other than the exempt category investors such as mutual funds) from the securitization trusts would be exempt income. This is due to the fact that the income was subject to distribution tax by the securitization trusts, the income in the hands of the investors was exempt. Exemption under section 10(35A) also means that the expenditure pertaining to the exempt income would be disallowed under section 14A of the Income Tax Act. Though, in 2016 the Finance Act<sup>10</sup>, brought in amendments to the aforesaid clause as securitization trusts had moved from the applicability of distribution tax to being pass-through vehicles. Therefore, the exemption of income under section 10 (35A) was withdrawn.

### **3.3.2 Definition of key terms under current tax regime**

In India income of Securitization trusts are exempted under the Income statute while it is taxable in the hands of investors where taxation is governed under Chapter XII EA of the Income Tax Act. The Chapter provides for the meaning of key terms in the explanation for the purposes of taxation of securitization transactions. The definition of key terms can be defined and explained as follows;

**Explanation.** —*For the purposes of this Chapter,—*

(a) ” **investor** ” means a person who is holder of any securitised debt instrument or securities [or security receipt] issued by the securitisation trust;

The definition of “investor” is dependent on the definition of “securitized debt instrument”, “securities”, security receipt, and “securitization trust”. Hence, a person will qualify as an investor only if the defined conditions of the given terms are satisfied.

a. “**securities**” means debt securities issued by a Special Purpose Vehicle as referred to in the guidelines on securitisation of standard assets issued by the Reserve Bank of India;

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<sup>10</sup> The Finance Act, 2016 (28 of 2016)

For the tax purpose, this definition refers to the meaning of securities to mean debt securities issued by an SPV as referred in the guidelines on the securitization of standard assets issued by the Reserve Bank of India. However, the term “Debt securities” has not been defined in the current Master Direction – Reserve Bank of India (Securitisatio n of Standard Assets) Directions, 2021. As a result, this cause the rise of ambiguous of the term “securities” for tax purposes as far taxation of securitization transactions is concerned. Though, under SARFAESI Act the term “Debt securities” is defined and referred to the meaning debt securities listed in accordance with the regulations made by the Board under the Securities and Exchange Board of India Act.

*c) “**securitized debt instrument**” shall have the same meaning as assigned to it in clause (s) of sub-regulation (1) of regulation 2 of the Securities and Exchange Board of India (Public Offer and Listing of Securitised Debt Instruments) Regulations, 2008 made under the Securities and Exchange Board of India Act, 1992 (15 of 1992) and the Securities Contracts (Regulation) Act, 1956 (42 of 1956);*

The meaning of “securitized debt instrument” has to be derived from Regulation 2(1)(s) of the Regulations. Regulation 2(1)(s) makes reference to Regulation 2(1)(h) which provides that with respect to “securities debt instrument” means any person holding any securitized debt instrument which acknowledges the interest of such person in the debt or receivables assigned to the special purpose distinct entity.

*(d) “**securitisation trust**” means a trust, being a—*

*(i) “**special purpose distinct entity**” as defined in clause (u) of sub-regulation (1) of regulation 2 of the Securities and Exchange Board of India (Public Offer and Listing of Securitised Debt Instruments) Regulations, 2008 made under the Securities and Exchange Board of India Act, 1992 (15 of 1992) and the Securities Contracts (Regulation) Act, 1956 (42 of 1956), and regulated under the said regulations; or*

*(ii) “**Special Purpose Vehicle**” as defined in, and regulated by, the guidelines on securitisation of standard assets issued by the Reserve Bank of India; [or]*

*(iii) **trust set-up by a securitisation company or a reconstruction company** formed, for the purposes of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002), or in pursuance of any guidelines or directions issued for the said purposes by the Reserve Bank of India which fulfills such conditions, as may be prescribed.*

The key elements of this definition are constitutional. Special purpose distinct entity is a trust, and it raises funds by issue of securitized debt instruments and acquires debt or receivables with such funds. SPDE also includes any trust set up by the National Housing Bank under the National Housing Bank Act, 1987 (53 of 1987) or by the National Bank for Agriculture and Rural Development under the National Bank for Agriculture and Rural Development Act, 1981 (61 of 1981).

The income Tax Act refers to the definition of SPV as defined and regulated by the guidelines on the securitization of standard assets issued by the Reserve Bank of India. However, it should be noted that the current Master Direction – Reserve Bank of India (Securitisations of Standard Assets) Directions, 2021 does not provide specifically the meaning of Special Purpose Vehicle but it contains the definition of Special Purpose Distinct Entity. Hence, there is an inconsistency between the Income Tax Act and the Master Direction – Reserve Bank of India (Securitisations of Standard Assets) Directions, 2021 as to the definition of SPV.

*(e) “security receipt” shall have the same meaning as assigned to it in clause (zg) of sub-section (1) of section 2 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002).*

The meaning of security receipt has been referred to SARFAESI Act, security receipts are used in the acquisition of non-performing assets by asset reconstruction companies, which usually acquire them on the books of a trust, by issuing security receipts to the investors.

### ***3.4.1 Tax on distributed income to investors***

Chapter XII-EA (containing sections 115TA, 115TB, and 115TC) was inserted by the Finance Act, 2013 (17 of 2013), s. 33 (w. e. f. 1-6-2013) but the provisions of these sections currently are not operative when the Finance Act of 2016<sup>11</sup> was implemented. The most fascinating thing is that the provisions were not repealed but were excluded from the application.

***115TA. Tax on distributed income to investors. — (1) Notwithstanding anything contained in any other provisions of the Act, any amount of income distributed by the securitisation trust to its investors shall be chargeable to tax and such***

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<sup>11</sup> The Finance Act, 2016 (28 of 2016)

*securitisation trust shall be liable to pay additional income-tax on such distributed income at the rate of—*

*(i) twenty-five percent. on income distributed to any person being an individual or a Hindu undivided family;*

*(ii) thirty percent. on income distributed to any other person:*

*Provided that nothing contained in this sub-section shall apply in respect of any income distributed by the securitisation trust to any person in whose case income, irrespective of its nature and source, is not chargeable to tax under the Act.*

All incomes received by investors from securitization is taxable in the hand of the investor. However, in order to apply section 115TA (1), there are two prerequisites that must be fulfilled. Firstly, the amount has to be “income”, Secondly, the amount has to be “distributed. This means that there is no tax if what is delivered is not income, the same there is no tax if revenue is not distributed. The tax is on distribution, which is comparable to dividends. For instance, any distribution of principal will not be liable to tax under section 115TA since the principal is not income. Furthermore, the Section imposes tax liability to the securitization trust whereby securitization trust shall be liable to pay additional income tax on such distributed income at the rate of twenty-five percent on income distributed to any person being an individual or a Hindu undivided family, and thirty percent. on income distributed to any other person.

*(2) The person responsible for making payment of the income distributed by the securitization trust shall be liable to pay tax to the credit of the Central Government within fourteen days from the date of distribution or payment of such income, whichever is earlier.*

Section 115TA (2) covers the circumstances where the duty of making payments of the income distributed by the securitization trust is made by another person, is required to pay tax to the credit of the central government. The provision is applicable where the securitization trusts were required to pay distribution tax and the responsibility was upon the “person responsible for distribution by the trust”, ie, the trustee. This means that a servicer doing distributions on behalf of the SPV is required to pay tax to the credit of the central government.

*(3) omitted by Act 25 of 2014, s. 43 (w.e.f. 1-4-2015)*

*(4) No deduction under any other provisions of this Act shall be allowed to the securitization trust in respect of the income which has been charged to tax under sub-section (1)*

Section 115TA (4) provides for the prohibition of any deduction to the securitization trust in respect of the income which has been charged to tax under sub-section (1). This means that expenses such as servicing fees, legal costs, and trustee fees are prohibited from the deduction hence, tax is imposed on gross income. In fact, this Sub-clause is superfluous because trust only distributes the “income” that leftovers henceforth, there is no disallowance of expenses.

*(5) Nothing contained in this section shall apply in respect of any income distributed by a securitization trust to its investors on or after the 1st day of June 2016.]*

Section 115TA (5) states that the provisions of distribution tax as provided for in section 115TA shall not be applicable for income distributed by the trust to its investors on or after 1 June 2016. For that reason, moving to the pass-through regime for securitization trusts.

#### **3.4.2 Interest payable for non-payment of tax**

**115TB.** *Interest payable for non-payment of tax. —Where the person responsible for making payment of the income distributed by the securitisation trust and the securitisation trust fails to pay the whole or any part of the tax referred to in sub-section (1) of section 115TA, within the time allowed under sub-section (2) of that section, he or it shall be liable to pay simple interest at the rate of one percent. every month or part thereof on the amount of such tax for the period beginning on the date immediately after the last date on which such tax was payable and ending with the date on which the tax is actually paid.*

Section 115TB provides that if tax is not paid within 14 days, the person responsible is obliged to pay interest at 1% per month or portion thereof on the amount of tax. Given that the liability to deduct distribution tax is no longer applicable as of 1 June 2016, the penalties for late payment of taxes also lose significance.

#### **3.4.3 Securitisation trust to be an assessee in default**

**115TC.** *Securitisation trust to be assessee in default. —If any person responsible for making payment of the income distributed by the securitisation trust and the securitisation trust does not pay tax, as referred to in sub-section (1) of section 115TA, then, he or it shall be deemed to be an assessee in default in respect of the*

*amount of tax payable by him or it and all the provisions of this Act for the collection and recovery of income-tax shall apply.*

Section 115TC discusses two types of default which are; first, default in making payment of income distributed by the securitisation trust<sup>12</sup>. This means that the person responsible for making the payment is a trustee as provided under Section 115TA, hence, the trustee is deemed to be an “assessee in default”. Second, default in payment of tax by the securitisation. Thus, the securitisation trust is deemed to be the assessee in default. Similarly, the section has become inoperative.

### **3.5 TAX ON INCOME FROM SECURITISATION TRUSTS**

With the implementation of Section 115TCA, securitisation transactions gained comprehensive tax transparency. The newly introduced provisions provide that the investors have obligation to pay tax on the income obtained, furthermore the securitization trust or the SPV has exempted in paying tax<sup>13</sup>.

#### **3.5.1 Taxability of income from securitization trust in the hand of the investor**

**115TCA.** *Tax on income from securitization trusts. — (1) Notwithstanding anything contained in this Act, any income accruing or arising to, or received by, a person, being an investor of a securitization trust, out of investments made in the securitization trust, shall be chargeable to income-tax in the same manner as if it were the income accruing or arising to, or received by, such person had the investments by the securitization trust been made directly by him.*

Thus, Section 115TCA (1) clearly grants complete pass-through status to the securitization trusts and imposes taxation of any income accruing, arising or received by investors. Sub-section 1 overrides any other provision in the Act contrary to the provisions specified in the section.

#### **3.5.2 Nature of income paid or credited by securitization trust in the hand of investor**

*(2) The income paid or credited by the securitization trust shall be deemed to be of the same nature and in the same proportion in the hands of the person referred to in subsection (1), as if it had been received by, or had accrued or arisen to, the securitization trust during the previous year.*

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<sup>12</sup> Kanga & Palkhivala: The Law and Practice of Income Tax, 11th ed, 2 Vols

<sup>13</sup> Chaturvedi & Pithisaria's: Income Tax Law, 7th ed, Vol 5

This sub-section provides for the nature of income or credit by securitization in the hand of investors. This means that the nature of income, for example, business profits or capital gains, in the hands of the investors is deemed to be the same as the nature of income in the hands of the SPV.

### **3.5.3 Deemed Credit to investor**

*(3) The income accruing or arising to, or received by, the securitization trust, during a previous year, if not paid or credited to the person referred to in sub-section (1), shall be deemed to have been credited to the account of the said person on the last day of the previous year in the same proportion in which such person would have been entitled to receive the income had it been paid in the previous year.*

The income is taxed at the moment it is distributed, or, if the income is accumulated (not distributed), then, at the time of crediting the income to the credit of the investor. Further, income remaining undistributed is deemed credited to the investors in accordance with the respective investors' entitlement. That is to say, there is no leeway of using the securitization SPV as a tax shelter.

### **3.5.4 A statement specifying the details of the nature of income to be furnished to investors and prescribed income-tax authority.**

*(4) The person responsible for crediting or making payment of the income on behalf of securitisation trust and the securitisation trust shall furnish, within such period, as may be prescribed, to the person who is liable to tax in respect of such income and to the prescribed income-tax authority, a statement in such form and verified in such manner, giving details of the nature of the income paid or credited during the previous year and such other relevant details, as may be prescribed.*

This Sub-section 4 requires that the person who is responsible for distributing the income, i.e., the trustee on behalf of the securitisation trusts are required to furnish a statement<sup>14</sup> to the income tax authority with respect to the income accrued, credited, or arisen during the previous year to validate the income falling due in the hands of the investors<sup>15</sup>. The procedures are provided under Rule 12CC of the Income Tax Rules.

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<sup>14</sup> Form 64E, Statement of income paid or credited by a securitisation trust to be furnished under section 115TCA of the Income-tax Act, 1961

<sup>15</sup> Form 64F, Statement of income distributed by a securitisation trust to be provided to the investor under section 115TCA of the Income-tax Act, 1961

### 3.5.5 Income taxed in the year of accrued not taxable again in the year of payment

*(5) Any income which has been included in the total income of the person referred to in sub-section (1), in a previous year, on account of it having accrued or arisen in the said previous year, shall not be included in the total income of such person in the previous year in which such income is actually paid to him by the securitisation trust.*

The sub-clause 5 states that income is taxed whether or not it is distributed, even if it is credited or accrued in the investor's favor. This sub-clause ensures that the income is not double-counted in the total income of the investor in the sense that once income is credited but not paid has been included in the total income of the investor in a particular year, it shall not be again included in the total income of the investor in the year the income is actually paid/ distributed to the investor.

### 3.6 INCOME IN RESPECT OF INVESTMENT IN SECURITIZATION TRUST

**194LBC.***Income in respect of investment in securitization trust.—(1) Where any income is payable to an investor, being a resident, in respect of an investment in a securitisation trust specified in clause (d) of the Explanation occurring after section 115TCA, the person responsible for making the payment shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon, at the rate of—*

- (i) twenty-five per cent., if the payee is an individual or a Hindu undivided family;*
- (ii) (ii) thirty per cent., if the payee is any other person.*

*(2) Where any income is payable to an investor, being a non-resident (not being a company) or a foreign company, in respect of an investment in securitization trust specified in clause (d) of the Explanation occurring after section 115TCA, the person responsible for making the payment shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon, at the rates in force.*

*Explanation.—For the purposes of this section,—*



- (a) —investor<sup>l</sup> shall have the meaning assigned to it in clause (a) of the Explanation occurring after section 115TCA
- (b) where any income as aforesaid is credited to any account, whether called —suspense account or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be the credit of such income to the account of the payee, and the provisions of this section shall apply accordingly.

The aforementioned provision states that the income payable to Resident investors by a securitization trust is subject to TDS at the rate of 25% for individuals or HUFs, and 30% for any other person. Moreover, in the case of a non-resident investor or a foreign company, the rates in force shall apply. While the income is subject to TDS, the investor can be able to get full credit for tax paid. In the case of tax-exempt, investors such as mutual funds<sup>16</sup>, or other investors not likely to have as much tax liability, the investors can apply to the assessing officer of relevant jurisdiction for certification at NIL rate of deduction of tax at source or deduction of income tax at a lower rate under section 197<sup>17</sup>. When compared to tax withholding on interest payments on corporate bonds or other debt, the rate of withholding is quite high. Interest on debt is generally subject to a 10% withholding tax; however, no tax withholding duties apply to interest payments on listed corporate bonds made to resident taxpayers. Hence, The high rate of tax withholding<sup>18</sup> makes PTC investment unappealing<sup>18</sup>.

#### **4.0 TAXATION UNDER THE INDIAN STAMP DUTY ACT 1899**

Agreement or document for transfer or assignment of rights or interest in financial assets is exempt from the stamp duty tax. Section 8F of the Indian Stamp Duty Act of 1899 provides that

*notwithstanding anything contained in this Act or any other law for the time being in force, any agreement or other document for transfer or assignment of rights or interest in financial assets of banks or financial institutions under section 5 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, in favor of any asset reconstruction company, as defined in clause*

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<sup>16</sup> Section 196 of Income Tax Act provides that “no TDS on income distributed to the Mutual funds specified under clause (23D) of section 10.

<sup>17</sup> Chaturvedi & Pithisaria's: Income Tax Law, 7th ed, Vol 7(Sections 182 to 194LD)

<sup>18</sup> Report of the Committee on the Development of Housing Finance Securitization Market System 2019, pg 62

*(ba) of sub-section (1) of section 2 of that Act, shall not be liable to duty under this Act.*

The Act provides for exemption of tax to asset reconstruction companies as defined in clause (ba) of sub-section (1) of Section 2 of the SARFAESI Act as well as makes reference to section 5 (1A). The SARFAESI Act provides the same where it states that any document executed by any bank or a financial institution under sub-section (1) in favor of the asset reconstruction company acquiring financial assets for the purposes of asset reconstruction or securitization shall be exempted from stamp duty in accordance with the provisions of section 8F of the Indian Stamp Act, 1899 (2 of 1899).

Furthermore, the Section under the proviso provides that the provisions of the sub-section 5(1A) shall not apply where the acquisition of the financial assets by the asset reconstruction company is for purposes other than asset reconstruction or securitization. The Indian Stamp Duty Act does not provide clarity for tax purposes as to the agreements and documents executed by the securitization trust as defined under Explanation (d) under Chapter XIIEA of the Income Tax Act. It should be noted that only Assets reconstruction companies can act as SPV in India as provided by the SARFAESI Act.

## **5.0 TAX IMPLICATIONS ANALYZED BY COMMITTEE TO REVIEW THE WORKING OF ARCS OF 2021**

Given the issues affecting the ARC Sector's performance, the Committee to Review the Working of Asset Reconstruction Companies was formed to conduct a comprehensive review of ARC operations and it came with its reports on September 2021. The following are the tax implications noted by the committee<sup>19</sup>;

### ***5.1 The pass-through regime for AIF income from investment in SRs***

AIFs, in their capacity as QBs, invest in security receipts issued by ARC trusts. The ARC trusts have complete pass-through status under income-tax legislation, and the income is taxable in the hands of the investors depending on the classification set by the ARC trust. The revenue is often classified as 'business income' by the ARC trust. If the AIF produces a business income and that revenue is taxed at the AIF level at the maximum marginal rate, the AIF loses its otherwise tax transparent status, resulting in an effective tax rate of 42.74 percent. The Committee proposes that all income from investment in SRs issued by ARC

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<sup>19</sup> Chapter F.5 of the Report of the Committee to Review the Working of Asset Reconstruction Companies, 2021

trusts earned by an AIF should also be considered as pass-through and taxable in the hands of the investors of the AIF. The likelihood of a 42.74 percent tax at the AIF level discourages this investment from flowing into ARC trusts. As a result, a pass-through regime for AIF revenue from SRs issued by an ARC Trust is crucial to the viability of a competitive market for these NPAs and the maximizing of recovery for the ARC.

### ***5.2 Clarity on the tax rate applicable to FPIs when they invest in the SRs issued by ARC trusts***

There is no precise tax rate specified in the income-tax legislation for the taxability of interest income or upside obtained by FPIs from their investment in SRs. Presently, a concessional tax regime of 5% exists for taxability of income arising to FPIs and other non-residents (on Government securities, corporate bonds, ECB, etc.), subject to satisfaction of certain conditions. Interest income received by FPIs from investments in SRs may be subject to similar tax treatment. Furthermore, any upside resulting as business income may be taxed at a rate of 20% (since it is in the nature of income in relation to securities under Section 115AD of the Income Tax Act). The suggested modifications will encourage FPI investment in SRs and aid in the settlement of bad loans.

## **6.0 CONCLUSION**

To summarize, securitization is an intriguing financial mechanism that has become an indelible worldwide phenomenon, especially in India. However, there is little doubt that this growth has created significant hurdles for all parties involved, including investors, regulators, and banks such as taxation of securitization transactions. To aid the securitization process in India, a special taxation system has been established in respect of the taxation of income derived from the activity of securitization by securitization entities set up as trusts. Due to the enactment of The Finance Act, 2016 (28 of 2016) and The Finance Act, 2013 (17 of 2013), Section 10 of the Income-tax Act has been altered, and a new Chapter XII-EA has been added to provide a specific tax system. This is because entities set up in the form of trust to undertake securitization activities were facing problems due to lack of special dispensation in respect of taxation under the Income-tax Act. However, the new tax regime still is facing some legal challenges as discussed and indicated when analyzing the provisions of the Income Tax Act. For instance, Securitization trusts have a pass-through. Any income credited to the investor by the securitisation trusts, on the other hand, is subject to tax deduction at

source under section 194LBC of the Income Tax Act. Though the income is subject to tax deduction at source, the investor will be able to get full credit for tax paid. In the event of tax-exempt investors, such as mutual funds, or other investors who are unlikely to have a large tax obligation, the investors may apply to the tax officer of the relevant jurisdiction for certification at the NIL rate of tax deduction at source. Thus, there is a need to reform the tax statutes and provide more clarity on the provisions of tax statutes dealing with the taxation of securitization transactions as was recommended by the Committee to Review the Working of Asset Reconstruction Companies, 2021.

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## NAVIGATING THE INTRICACIES OF FAIR USE, DISCLAIMERS, AND COPYRIGHT IN THE FILM INDUSTRY

Kavitha L<sup>1</sup>

### ABSTRACT

*Filmmakers and audiences alike exhibit a profound fascination with narratives rooted in reality, particularly those involving real individuals. Biographical films, or biopics, cater to this inherent curiosity. However, the depiction of actual lives inevitably invites the specter of defamation. Consequently, the film certification authority mandates that creators of biopics incorporate disclaimers, ostensibly to mitigate legal repercussions and prevent the "hurt of sentiments." While these disclaimers serve a valid function in demarcating fact from fiction, their potential exploitation to circumvent legal liabilities or suppress dissent raises alarming concerns. The case of "The Dirty Picture" exemplifies such misuse, wherein the filmmakers strategically employ disclaimers to insulate themselves from legal scrutiny and silence critical voices. This scenario underscores an urgent need for transparency, accountability, and equitable treatment within the certification framework, ensuring that disclaimers are not weaponized to distort narratives or evade responsibility. This study adopts a doctrinal research methodology, drawing upon both primary and secondary sources, particularly critiques of "The Dirty Picture." It scrutinizes the filmmakers' assertions denying the film's status as a biopic of Silk Smitha, despite evident parallels to her life, thus provoking inquiries into the filmmakers' intentions and the potential for disclaimers to serve as a shield against accountability.*

**Keywords:** *Biopic, Copyright, Defamation, Disclaimer Fair use, Film Maker*

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### 1.0 INTRODUCTION

The utilization of copyright disclaimers within the realm of biographical films has emerged as a multifaceted and contentious issue, particularly in relation to defamation and the

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safeguarding of sentiments. While these disclaimers ostensibly serve to delineate between fictionalized components and actual individuals, their application becomes problematic when employed as a protective veneer to elude legal ramifications or suppress dissenting perspectives. This predicament is vividly illustrated in the film "The Dirty Picture," which asserts that its characters are fictitious and that any resemblance to real individuals is entirely coincidental and unintentional. Despite the filmmakers' adamant disavowal of the film as a biopic of Silk Smitha, the narrative bears undeniable parallels to her life, thereby prompting inquiries into the filmmakers' motivations. This scenario underscores the potential for disclaimers to be misappropriated as a mechanism for leveraging artistic license while simultaneously evading accountability. In this context, copyright disclaimers assume a pivotal role, signifying that the user of copyrighted material acknowledges the ownership of such rights and engages with the material either within the parameters of fair use or with explicit permission from the copyright holder.<sup>2</sup> In India, the doctrine of fair use regarding copyrighted material is delineated under Section 52 of the Copyright Act of 1957. Although the Act does not explicitly articulate the concept of copyright disclaimers, individuals or organizations may opt to incorporate them as a means to assert ownership over works protected by copyright or to elucidate permissible applications of said works. A copyright disclaimer typically encompasses the copyright symbol or the term "Copyright," the designation of the copyright proprietor, and a statement delineating the terms under which the work may be utilized.

Within the domain of biographical films, disclaimers are imperative for elucidating the film's nexus to factual occurrences and fictional elements, thus safeguarding against potential defamation and mitigating the risk of offending public sentiments. Nevertheless, the deployment of disclaimers may evoke trepidation when filmmakers wield them as a facile labeling mechanism to secure legal immunity and stifle dissenting viewpoints.

The instance of "The Dirty Picture" starkly illustrates the tension between the filmmakers' assertion that the film is entirely fictitious and the narrative's evident parallels to the life of Silk Smitha. The conscious repudiation of any connection to Silk Smitha, despite manifest similarities, may be perceived as disingenuous, reflecting an attempt to circumvent legal repercussions or allegations of defamation. This situation engenders critical inquiries into the

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<sup>2</sup> Leanne Stendell, 'Fanfic and Fan Fact: How Current Copyright Law Ignores the Reality of Copyright Owner and Consumer Interests in Fan Fiction' 58 SMU LAW REVIEW.

impartiality of the film certification process and raises concerns regarding the possible influence of political agendas or personal biases on the granting of certification and the protection afforded to filmmakers.

While copyright disclaimers are not universally mandated across all jurisdictions, several nations, including the United States, the United Kingdom, and Australia, possess legal frameworks that acknowledge or endorse their utilization. Provisions about fair use, exemplified in Section 107 of the United States Copyright Act, permit the limited appropriation of copyrighted material without the necessity of securing permission from the copyright holder. However, the adjudication of fair use is inherently contingent upon a case-by-case analysis, taking into account various factors such as the purpose and nature of the usage, the quantity of material employed, and the potential ramifications for the market about the copyrighted work.

The marketing strategy employed for "The Blair Witch Project" adeptly utilized a disclaimer to cultivate an ambience of realism, leading numerous viewers to erroneously perceive the events depicted as authentic.<sup>3</sup> This engendered a significant number of audience members to feel deceived, prompting them to admonish the directors for their failure to delineate the film as a work of fiction. The ensuing discourse illuminated the responsibilities incumbent upon filmmakers in the presentation of fictional narratives and underscored the critical importance of unambiguous disclaimers to obviate misunderstandings.<sup>4</sup> In the aftermath of this controversy, filmmakers have adopted a more prudent approach, frequently incorporating explicit disclaimers to mitigate potential backlash from viewers. Henceforth, copyright disclaimers serve to establish ownership and enable the use of copyrighted material within the boundaries of fair use. However, in the context of biopics, the use of disclaimers can be contentious, particularly when they are employed to avoid legal consequences or silence dissent. The case of "The Dirty Picture" exemplifies the potential misuse of disclaimers and raises concerns about the integrity of the film certification process and the protection of public interest.

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<sup>3</sup> *The Blair Witch Project* (Directed by Daniel Myrick and Eduardo Sánchez, Haxan Films 1999).

<sup>4</sup> Sayed Qudrat Hashimy, 'Comparative Insights into Copyright Disclaimers of the United States and India' (2024) 1 Annual International Journal of Vaikunta Baliga College of Law (AIJVBCL) 1.

## 2.0 COPYRIGHT LAW

In India, the principle of fair use regarding copyrighted material is enshrined in Section 52 of the Copyright Act of 1957.<sup>5</sup> This provision allows for the utilization and reproduction of copyrighted works without transgressing the rights of the copyright holder, contingent upon the inclusion of a copyright disclaimer. Fair use is sanctioned for purposes such as personal or private use, scholarly research, critique, review, and reporting on current events. By employing a copyright disclaimer, one may legally reproduce a copyrighted work. Conversely, the omission of such a disclaimer during the utilization of copyrighted material may result in infringement. The copyright disclaimer is pivotal in safeguarding the rights of authors and artists, as it facilitates the utilization of their works within the parameters of fair use.<sup>6</sup> A copyright disclaimer serves dual purposes: asserting ownership of original content and disclosing the application of copyrighted material under the aegis of "fair use." It assists in establishing ownership while deterring unauthorized appropriation. Disclaimers may take two forms: one for original works and another for content that incorporates copyrighted material. While a disclaimer can be beneficial, it does not guarantee absolute legal protection; thus, consulting a legal professional is prudent. Notably, the Indian Copyright Act of 1957 does not explicitly reference copyright disclaimers. Instead, the Act primarily concentrates on copyright protection, the rights of copyright owners, and the stipulations and exceptions pertinent to those rights. It encompasses clauses on copyright registration, infringement, fair use, and remedies for violations.<sup>7</sup> Although the Act does not mandate a copyright disclaimer, individuals or organizations may opt to include one to assert ownership of copyrighted works or to delineate permissible uses. The objectives of such a notice are to alert potential infringers to the rights of the copyright owner and to notify others of their existence. A copyright disclaimer typically encompasses several critical components: the copyright symbol © or the term "Copyright," which signifies that the work is protected under copyright law; the name of the copyright holder, identifying the individual or entity that possesses the copyright; a declaration of ownership, asserting that the copyright proprietor is the sole owner of the content in question; and a permission statement, elucidating whether the copyright holder has authorized the use of the work. Should the usage fall within the ambit of the fair use doctrine a legal tenet that permits limited appropriations of copyrighted material without

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<sup>5</sup> 'Section 52 in the Copyright Act, 1957' <<https://indiankanoon.org/doc/1013176/>> accessed 10 May 2023.

<sup>6</sup> Hashimy (n 4).

<sup>7</sup> Sayed Qudrat Hashimy, 'Copyright or Copyleft: Copyright or Copywrong: What Is the Dichotomy?' (2023) 1 Intellectual Property and Corporate Law Review 1.



the owner's consent such utilization is thereby legitimized. Ultimately, a copyright disclaimer serves as a formal assertion by the copyright owner, establishing their claim to the original content. In the context of disclaimers within "The Dirty Picture," the legal quandary of ownership arises: who possesses the rights? In instances where an artistic or literary work is created under an employment contract, the employer typically retains rights over the original work. It is crucial to note that a copyright disclaimer does not in itself confer permission for the use of copyrighted material. The creator of an original work possesses the option to secure copyright protection through the appropriate copyright office, thereby safeguarding their creation. Copyright serves as the official mechanism to protect one's unique creative output, endowing the copyright owner with exclusive authority to utilize the work. The author of an original work retains the capacity to shield it from unauthorized use.

The primary function of a copyright disclaimer is to clarify that the individual utilizing the material does not own the copyright but is engaging with it within the confines of fair use as delineated by copyright law. Fair use is a legal doctrine that allows for the appropriation of copyrighted material for purposes such as criticism, commentary, news reporting, education, scholarship, or research. A copyright disclaimer is commonly invoked when one incorporates copyrighted material be it artwork, images from films or television, or excerpts from literary works into their creation. By appending a fair use copyright disclaimer, the individual aims to communicate that their use of the copyrighted material is undertaken in good faith and for legitimate purposes, adhering to the parameters of fair use.

It is imperative to recognize, however, that the determination of whether a specific use qualifies as fair use is conducted on a case-by-case basis, taking into account various factors such as the purpose and nature of the use, the quantity and significance of the portion utilized, and the potential impact on the market for the copyrighted work. If one intends to utilize copyrighted material while relying on the fair use doctrine, it is advisable to seek legal counsel to assess the particular circumstances and ensure adherence to copyright law.

Copyright disclaimer requirements vary across jurisdictions. While many countries do not mandate copyright disclaimers, some, such as the United States, United Kingdom,<sup>8</sup> and Australia,<sup>9</sup> have legal frameworks allowing their use. In the United States, a copyright disclaimer can be utilized alongside fair use provisions under Section 107 of the Copyright

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<sup>8</sup> 'How Copyright Protects Your Work' (*GOV.UK*) <<https://www.gov.uk/copyright>> accessed 10 May 2023.

<sup>9</sup> 'Copyright Basics' (*Attorney-General's Department*) <<https://www.ag.gov.au/rights-and-protections/copyright/copyright-basics>> accessed 10 May 2023.

Act.<sup>10</sup> In the UK, disclaimers are not necessary but can be included in contracts due to the recognition of fair dealing.<sup>11</sup> Australian copyright law includes fair dealing provisions, and while disclaimers are not obligatory, they are permitted. To ensure compliance with local regulations, it is prudent to consult the specific copyright laws pertinent to a jurisdiction or to seek legal counsel regarding the requisite practices and requirements for copyright disclaimers. Under Section 107 of the Copyright Act, the fair use of copyrighted material is sanctioned for several designated purposes: education and research, scholarship, criticism, news reporting, commentary, and teaching. These categories facilitate the limited appropriation of copyrighted material without necessitating prior permission from the copyright owner. Nevertheless, it remains imperative to scrutinize the particular circumstances and relevant factors involved in assessing whether a given use qualifies as fair use. A copyright disclaimer serves to legally incorporate copyrighted material into the oeuvre of another author, establishing a framework that delineates the boundaries of permissible use. The determination of fair use hinges upon a confluence of factors, including the purpose and character of the use, the amount of material appropriated, and the resultant impact on the market for the original work. Such disclaimers elucidate non-infringement and are prevalent in various contexts, including blogs, websites, and other digital platforms.<sup>12</sup>

The salient features of a copyright disclaimer encompass source attribution, the protection of rights, the specification of obligations, and the safeguarding of creative endeavours. Disclaimers can be categorized into several types: warranty disclaimers, investment disclaimers, confidentiality disclaimers, no-responsibility disclaimers, views-expressed disclaimers, and fair use disclaimers. The incorporation of a disclaimer necessitates the explicit mention of the year of publication and the author's name, the utilization of the copyright symbol, the strategic placement of the disclaimer in a conspicuous location, and the inclusion of the fair use clause. In the realm of film, the application of copyright disclaimers is imbued with numerous legal complexities:

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<sup>10</sup> '17 U.S. Code § 107 - Limitations on Exclusive Rights: Fair Use' (*LII / Legal Information Institute*) <<https://www.law.cornell.edu/uscode/text/17/107>> accessed 10 May 2023.

<sup>11</sup> 'Disclaimer and Copyright Page' <<https://www.citizensadvice1066.co.uk/disclaimer-copyright>> accessed 10 May 2023.

<sup>12</sup> Sayed Quadrat Hashimy and MS Benjamin, 'The Convolution of Artificial Intelligence and Intellectual Property Rights' (2023) 6 *International Journal of Law Management and Humanities*, 2891.

## 2.1 *Ownership*

Films have multiple creative elements, and understanding copyright ownership is crucial to obtain necessary permissions and licenses. Ownership in the film industry involves rights and control over a film and its elements. Key points include copyright ownership, work-for-hire agreements, collaboration and joint ownership, chain of title, distribution and licensing rights, assignment and transfer of rights, and co-production agreements. Consulting legal professionals ensures compliance and protects the film's rights.

## 2.2 *Clearance and Licensing*

Obtaining clearances and licenses for copyrighted materials used in films is essential, including music, images, artwork, and clips from other films. Clearance and licensing are crucial in the film industry to ensure legal compliance and obtain permissions for copyrighted materials and intellectual property. Key points include conducting thorough research, identifying rights holders, negotiating license agreements, acquiring music licenses,<sup>13</sup> obtaining location and property releases, considering trademarks and branding, understanding fair use and public domain, and seeking legal advice. These processes protect the film's integrity and help avoid infringement and legal disputes.

## 2.3 *Fair Use*

Filmmakers may rely on fair use, but fair use in the case of the United States depends on the following factors:<sup>14</sup>

- i. **Purpose and Character:** Nonprofit educational uses and transformative works are more likely to be considered fair use.
- ii. **Nature of the Work:** Fair use applies more broadly to nonfiction and less to creative works or those commercially available for educational purposes.
- iii. **Amount Used:** The less used, the more likely it's fair use. Using the main content excessively may not qualify.
- iv. **Effect on the Market:** If the use of substitutes for purchasing the original work, it weighs against fair use.

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<sup>13</sup> Hashimy (n 7).

<sup>14</sup> Leon R. Yankwich, 'What Is Fair Use?' (1954) 22 The University of Chicago Law Review 203.

Fair use is evaluated case-by-case, considering these factors. No precise limits exist, and courts assess the specific circumstances. Fair use is a legal defence, but its application is complex and subjective.

Whereas in the case of India Fair dealing in Indian copyright law (Section 52) allows certain uses of copyrighted works without permission. It applies to private use, research, criticism, and review. Fair dealing distinguishes legitimate uses from copying and upholds freedom of expression. The court determines fair dealing based on the extent of use and purpose. There are no fixed limits; the court's discretion considers the public interest.<sup>15</sup>

#### **2.4 *Publicity and Personality Rights***

Obtaining permissions or releases is necessary when using the likeness of recognisable individuals in films, considering jurisdiction-specific laws. Publicity rights safeguard an individual's authority over the commercial utilisation of their name, image, or parity. It is crucial to obtain consent and release from individuals featured in films, particularly public figures or recognisable individuals.<sup>16</sup> Unauthorised commercial use of someone's likeness can result in legal consequences and potential liability. While transformative use, like in documentaries or fictional works, may be protected, the specifics of laws and exceptions differ by jurisdiction. Filmmakers should exercise caution to prevent defamation or false endorsement and accurately portray individuals. Given the variations in publicity and personality rights laws across countries, understanding and adhering to local regulations is vital. Consulting with an entertainment lawyer aids in navigating these intricacies and ensuring compliance with applicable laws and regulations. Ultimately, respecting individuals' rights is essential to steer clear of legal disputes and maintain ethical standards in filmmaking.

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<sup>15</sup> Lydia Pallas Loren, *Fixation as Notice In Copyright Law*, 96 BOSTON UNIV. W REV. (2013).

<sup>16</sup> Melville B Nimmer, 'Copyright Publication' (2016) 56 COLUMBIA LAW REVIEW 186.

## 2.5 *International Considerations*

Copyright laws vary across countries, so filmmakers must know the regulations and obtain licenses or permissions for international distribution.<sup>17</sup> Dealing with international copyright issues requires careful consideration.<sup>18</sup> Here are some practical tips to navigate these challenges:

- a) Understand local copyright laws
- b) International treaties and agreements
- c) Copyright Registration
- d) Obtain permissions and licenses
- e) Use copyright notices
- f) Monitor and enforce copyrights
- g) Utilize international resources

## 2.6 *Indemnification and Liability*

Including a copyright disclaimer is beneficial, but it does not absolve filmmakers from liability. Obtaining clearances, licenses, and proper documentation is crucial. It is essential to ensure that all necessary permissions, licenses, and clearances are obtained to comply with copyright laws. This helps minimise the risk of infringement claims and associated liabilities.

### **3.0 DISCLAIMERS AND IDENTITY IN BIOPICS**

The audiences are inquisitive about the hushed-up life of actual persons, especially of the transgressors. Biopics cater to this fascination of the audience. Biopics are films that are based on the life of real people. It is mandatory for the biopic to carry a standard disclaimer: “All the characters and events depicted are fictitious. Any resemblance to a person living or dead is purely coincidental”. Disclaimer is emplaced by the filmmaker voluntarily or on the insistence of the film certification authority to vouch that there are no instances of defamation of the subject or contents that hurt public sentiments in the film. Practically it is a paratext that clarifies the film’s relationship with facts and fiction to the audience, but it can also be a

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<sup>17</sup> Copyrightlaws.com Editor, ‘Introduction to International Copyright Law’ (*Copyrightlaws.com: Copyright courses and education in plain English*, 7 February 2023) <<https://www.copyrightlaws.com/introduction-international-copyright-law/>> accessed 10 May 2023.

<sup>18</sup> Sharon Bar-Ziv and Niva Elkin-Koren, ‘Behind the Scenes of Online Copyright Enforcement: Empirical Evidence on Notice & Takedown’.

filmmaker-friendly tool which, in the name of artistic license, allows abuse. *The Dirty Picture* was meant to be a biopic of Silk Smitha, a dancer-actress who has acted and danced for popular spunky song numbers in all the languages of south India and in Hindi as well. The film was speculated as a biopic of Silk Smitha, the makers of the film, including the director, producer, and the reel Silk Vidya Balan maintained during the promotion of the film and also through the film's disclaimer that the film is not based on the life and experiences of Silk Smitha. The disclaimer of the film claims that the characters in the film are "fictitious and imaginary" If there is any resemblance to any person living or dead, then it is "purely coincidental and unintentional". There seems to be a conspicuous conflict between the intent of the filmmaker, who claims that the film is fictitious and the content of the film, which is silk and silk. This article problematises the claims of disclaimers and analyses how the makers of *The Dirty Picture* use the disclaimer as a convenient labelling device to secure legal insulation and coerce the dissenting voice into the realm of silence. It is on the trope of fidelity that the biopic genre faces challenges from various quarters. The claim of the biopic that it is based on fact or fiction is manifested through the agency of the disclaimer. The film's disclaimer is "a disclosure made with the purpose of clarifying potentially misleading or deceptive statements."<sup>19</sup> Under the guise of section 5 of the Cinematograph Act 1952, the Film Certification Appellate Tribunal (FCAT) has been established by the Ministry of Information and Broadcasting to deal with film-related claims and as a statutory body to receive appeals in this regard.<sup>20</sup> Makers can voluntarily insert a disclaimer. The FCAT, as a statutory film-certification body, direct the makers to append disclaimer/s. The makers are guided to concede for the sole purpose of procurement of certification. Bollywood filmmakers spice biopics up by adding drama to emotionalise the audience for commercial success. It is, therefore, mandatory for the biopics to carry a disclaimer as they traverse a tough terrain in which there are dangers of invading a person's privacy, misrepresentation of her/his life or projections that hurt the sentiments of family, religion, caste, tradition, practices, institutions, professions and so on. Expressing apprehensions about the disclaimer, Johannes Mahlknecht states, "Legally speaking, then, it is safer to renounce *all* claims of

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<sup>19</sup> Mary Ann Stutta and Garland G Hunnicutt, 'Can Young Children Understand Disclaimers in Television Commercials?' (1987) 16 *Journal of Advertising* 41.

<sup>20</sup> 'Film Certification Appellate Tribunal | Ministry of Information and Broadcasting | Government of India' <<https://mib.gov.in/film/film-certification-appellate-tribunal>> accessed 10 May 2023.

authenticity because with it, one renounces all responsibility for potential misrepresentations of fact, whether willful or accidental.”<sup>21</sup>

The disclaimer of *The Dirty Picture* claims upfront that the film is a work of fiction; the characters are imaginary and deny the chances of resemblance as “purely coincidental and unintentional”. The denial of the disclaimer warrants that the film is veritably on Silk Smitha. Indeed, this disclosure encloses in the bosom a “censorial compromise between the artist and any claims to the offence?” The film’s disclaimer follows Friedrich Nietzsche’s quote:<sup>22</sup> “You must have chaos within you to give birth to a dancing star.” The quote appears soon after the disclaimer to divert the audience and reinforce the intentions of the filmmaker and generate consent that the film, indeed is about the “dancing stars/girls” of south India (Jayamalini, Disco Shanti and Anuradha who were contemporaries of Silk Smitha danced for the Indian version of cabaret songs) and not about Silk Smitha. Vidya Balan, who plays Silk, in an interview during the film’s promotion, denied that the film is a biography of the southern dancing star’s life. She said: “The film is primarily about dancing stars in the southern industry. I am named Silk because she was perhaps the most prominent of them all”.<sup>23</sup> Milan Luthria, the director of the film parrots the very lines of Vidya: “We have always said that it was based on a dance girl, but it was not Silk Smitha as in those days there were other women in the industry like Disco Shanti. The story is about a dancing girl who left a mark while she was pitted against so many men.”<sup>24</sup> Besides, “it is the journey of a dancer and what goes on in her mind, what made her a phenomenon and how troubled relationships were part of her life, how she battled fame, fortune and alcohol. So it is not about Silk. You have to see it to believe that it’s a work of fiction.”<sup>25</sup>

Ektha Kapoor, the producer of the film, affirms that the film “chronicles the journey of Silk Smitha, who in my opinion, was one of the boldest and most courageous women out there. At no point have we tried to justify her (Smitha) or criticise her. We will just let the audience

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<sup>21</sup> Johannes Mahlknecht, ‘The Textual Paratext — the Cinematic Motto and Its Visual Presentation on the Screen’ (2011) 27 *Word & Image* 77.

<sup>22</sup> ‘716 Apar Gupta, Movie Disclaimers: A Contract with the Offended’ <[https://www.india-seminar.com/2019/716/716\\_apar\\_gupta.htm](https://www.india-seminar.com/2019/716/716_apar_gupta.htm)> accessed 9 May 2023.

<sup>23</sup> “‘The Dirty Picture’ Is Not about Silk Smitha, Refutes Vidya Balan’ <<https://www.dnaindia.com/entertainment/report-the-dirty-picture-is-not-about-silk-smitha-refutes-vidya-balan-1617994>> accessed 9 May 2023.

<sup>24</sup> ‘Lust Is Part of Our Lives: The Dirty Picture Director’ (*Hindustan Times*, 26 November 2011) <<https://www.hindustantimes.com/india/lust-is-part-of-our-lives-the-dirty-picture-director/story-O4CmzbPALtQsRiSEg5fKhO.html>> accessed 9 May 2023.

<sup>25</sup> Ekta Kapoor, ‘It’s Saucy, Sensational and Shocking!’ *The Times of India* <<https://timesofindia.indiatimes.com/blogs/ekta-kapoor-blog/it-s-saucy-sensational-and-shocking/?val=3728&source=app&frmapp=yes>> accessed 9 May 2023.

live her life.” These polarised statements by the director, the lead artist, the producer and the disclaimer do not render the audience, especially of south India, buy the claim that it is “purely coincidental and unintentional.” The South Indian film-goers are very well aware of “Silukku”, her image and her rebellious life and tragic death. The likeness between Reshma, who transforms into Silk and Silk Smitha is evident enough. The disclaimer’s denial and name change can only serve as a gimmick to avoid litigation. The disclaimer’s negation allows for inconsistencies and contradictions. It affirms that the characters are fictitious and presupposes the “resemblance” to the “dead”. It denies the semblance, and if found, one has to take it to be “accidental and unintentional”. The disclaimer affirms and denies its very own claims.

Silk Smitha’s brother, Vadlapati Naga Vara Prasad, sent a legal notice to the film’s producer Ektha Kapoor and director Milan Luthria to stall the film’s screening. He accused them of making the film without the family’s consent and of the obscene portrayal of his sister. He added that the film was “made on Smitha’s life, barring some modifications to suit the film.”<sup>26</sup> In response to the charge of mischaracterisation, the film’s publicist issued a statement: “It draws inspiration from the strugglers in the 1980s whose indomitable spirit made them emerge triumphant and create a unique space for themselves in a male-dominated film industry. The film is not a formal biopic or biography, as is being speculated. It is a work of fiction, and any character’s resemblance to real persons, living or dead, is coincidental.”<sup>27</sup> The makers of *The Dirty Picture* clarified to the court that the film was not based on the life of the actress-dancer Silk Smitha. The film was already certified and had fortified itself with a disclaimer. The Andhra Pradesh High Court dismissed the writ and cleared the movie for release.

The change of the name of the character Silk in the film, which is otherwise suggested, did not materialise. If the filmmakers do not intend to project real Silk, then why use the name Silk? Is it just to get away from litigations or a foxy publicity stunt? Was it intentional and engineered to take up the project as the subject was dead? The filmmakers are too sure that an illiterate Dalit brother can not save his sister. Is the affair entangled with the superstars of the

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<sup>26</sup> ‘Silk Wasn’t “dirty” at All, Says Brother - India Today’

<<https://www.indiatoday.in/movies/celebrities/story/silk-smitha-the-dirty-picture-brother-148203-2011-12-08>> accessed 9 May 2023.

<sup>27</sup> ‘Makers Say “Dirty Picture” Is Not a Formal Biopic’ (*News18*, 4 November 2011) <<https://www.news18.com/news/india/makers-say-dirty-picture-is-not-a-formal-biopic-415826.html>> accessed 9 May 2023.



dominant caste? The screen name Reshma is a contrived measure as she transfigures only after 22 minutes of the beginning of the movie, and after that, she is Silk (22:03; Running time 144 minutes). If dancing girls were a real inspiration for the filmmakers, we had great dancers like Aruna Irani, Bindu, Helen, Shashikala, and Padma Khanna from Bollywood itself. The insistence on retaining the actual name of the subject and claim that similarity is unintentional and accidental seems too “dirty”. Silk Smitha’s brother claims that the film was “made on Smitha’s life” and further charges that it is made in consultation with Smitha’s Doctor friend, who is believed to be the reason for her doom. The South Indian origin of the subject, poverty, dark skin, fame, success, the image of a sex siren, lack of support, miserable love life, rebellious spirit, the decision to produce films, superstars, press, vulnerability, alcoholism, and her death at the age of 36 these similitude are not unintentional and accidental. The “dirty secret” lies in identifying a vulnerable female victim subject for the biopic who is dead, a Dalit, an outcaste in the film industry because of her sex siren image, and negates the subject’s identity for the very same reasons. Silk Smith’s life is commodified and marketed in the garb of a grand feminist narrative. The disclaimer claims are, in fact, intentional and, therefore, political.

### ***3.1 Unravelling the Legal Controversy***

The film's publicist clarified that "The Dirty Picture" is not a formal biopic but a romantic journey of an ambitious starlet in the 1980s film industry.<sup>28</sup> It is a work of fiction inspired by the struggles of aspiring actors during that time. The filmmakers state that any resemblance to real individuals is coincidental. The clarification came after Silk Smitha's brother sent a legal notice claiming they didn't seek permission. The film is described as a spectacular musical entertainer that celebrates the spirit of newcomers and tells a love story. The Andhra Pradesh High Court dismissed a petition seeking a ban on the movie "The Dirty Picture," filed by the late actress Silk Smitha's brother. The court accepted the filmmakers' claim that the movie was not based on Silk Smitha's life, and the censor board supported this decision. Silk Smitha was a popular actress in South Indian films, but she died by suicide in 1996 at the age of 36.<sup>29</sup> The legal issues surrounding the scenario you described primarily revolve around defamation,

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<sup>28</sup> 'The Dirty Picture Is Not a Formal Biopic' <<https://www.ndtv.com/entertainment/the-dirty-picture-is-not-a-formal-biopic-602349>> accessed 10 May 2023.

<sup>29</sup> 'Bollywood News, Latest Bollywood News and Celebrity Gossips Today' (*Hindustan Times*) <<https://www.hindustantimes.com/entertainment/bollywood>> accessed 10 May 2023.

privacy rights, and the use of real people's lives for commercial purposes without their consent. Here are some key points to consider:

### **3.2 *Defamation***

The brother of Silk Smitha, Vadlapati Naga Vara Prasad, sent a legal notice accusing the filmmakers of making the film without the family's consent and of portraying his sister in an obscene manner. Defamation occurs when false statements are made that harm the reputation of an individual. If the film includes false and damaging portrayals of Silk Smitha, it could potentially lead to a defamation claim.

### **3.3 *Right to Privacy***

Portraying real individuals in a biopic without their consent raises concerns about the right to privacy. Individuals have the right to control the use of their personal information, including their likeness and life story. If the film invades Silk Smitha's privacy or misrepresents her life, it could infringe upon her right to privacy and result in legal consequences.

### **3.4 *Consent and Authorization***

Making a biopic without obtaining the necessary consent and authorisation from the subject's family or estate can lead to legal complications. Using someone's life story, likeness, or personal details for commercial purposes without proper permission may violate their rights and result in legal action.

### **3.5 *Misrepresentation***

The filmmakers claim that the film is a work of fiction and not a formal biopic or biography of Silk Smitha.<sup>30</sup> However, if the film includes significant similarities to Silk Smitha's life, it could be argued that the filmmakers are misleading the audience and attempting to avoid legal liabilities associated with a biopic.

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<sup>30</sup> GEOFFREY COWAN, 'The Legal and Ethical Limitations of Factual Misrepresentation' (1998) 560 *The ANNALS of the American Academy of Political and Social Science* 155.

### 3.6 *Disclaimers*

The presence of disclaimers in the film does not necessarily absolve the filmmakers of legal responsibility.<sup>31</sup> Disclaimers serve as a disclosure to the audience about the fictional nature of the story or characters, but they may not fully protect the filmmakers from legal action if the film infringes upon someone's rights or defames them.

### 3.7 *Litigation and Court Decisions*

In the case you mentioned, the Andhra Pradesh High Court dismissed the writ and cleared the movie for release, indicating that the court did not find sufficient grounds to block the film's screening. However, it's important to note that court decisions can vary depending on the specific circumstances and the jurisdiction in which the case is heard. In a nutshell, the legal issues surrounding biopics involve balancing the rights of the individuals being portrayed with the freedom of expression and artistic license of the filmmakers. Filmmakers need to navigate these legal complexities by obtaining proper consent, avoiding defamation, respecting privacy rights, and ensuring that disclaimers accurately reflect the nature of the film.

## 4.0 CONCLUSION

In India, fair use of copyrighted material is established under Section 52 of the Copyright Act 1957, allowing for the use and reproduction of copyrighted works within certain boundaries. While the Act does not explicitly require a copyright disclaimer, individuals or organizations may choose to include one to clarify ownership and permissible uses of the work. A copyright disclaimer typically includes components such as the copyright symbol, the name of the copyright owner, and a statement regarding permission for use. However, it's important to note that a copyright disclaimer alone does not grant permission to use copyrighted material. The determination of fair use is made on a case-by-case basis, considering factors such as the purpose, nature, amount, and effect on the market of the copyrighted work. Copyright disclaimer requirements vary across jurisdictions, and it is advisable to consult local copyright laws or seek legal advice for specific requirements in a particular jurisdiction.

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<sup>31</sup> 'DISCLAIMER | English Meaning - Cambridge Dictionary'  
<<https://dictionary.cambridge.org/dictionary/english/disclaimer>> accessed 10 May 2023.

Regarding the review of the film "The Dirty Picture," the article discusses the conflict between the filmmakers' claims that the film is fictitious and the content that strongly resembles the life of Silk Smitha. The film's disclaimer denies any resemblance to real persons and asserts that it is a work of fiction. However, the article suggests that the denial in the disclaimer is contradicted by the film itself and the public statements of the filmmakers. The inclusion of Silk Smitha's name and the similarities in the film's portrayal raises questions about the intent and authenticity of the disclaimer. Legal disputes and objections from Silk Smitha's family further complicate the situation. The article highlights how disclaimers can be used as a legal protection but also as a tool to evade responsibility or misrepresent the nature of a biopic.

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## PROTECTION OF REFUGEE'S RIGHTS IN INDIA: LEGAL PERSPECTIVE

*Mihir Umesh Inamdar\**

*Dr. Abhijeet Ramkrishna Dhere\**

### ABSTRACT

*This research article conducts a critical analysis of the mechanisms in place for the protection of refugees in India. With a focus on the legal, policy, and practical dimensions, the study aims to unravel the complexities and effectiveness of the existing refugee protection framework. Despite India's non-party status to the 1951 Convention on the Status of Refugees and its 1967 Protocol, the nation hosts a substantial number of refugees and asylum seekers. The analysis delves into the intricacies of India's legal framework, evaluating its alignment with international standards and the practical implications for safeguarding the rights and well-being of displaced individuals. The findings contribute to the discourse on refugee protection in India, offering recommendations for legal reforms, policy modifications, and awareness campaigns to enhance the overall effectiveness of the existing framework.*

**Keywords:** Refugee, Protection, India, Legislation, displaced persons

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## 1.0 INTRODUCTION

In a world where individuals are forced to flee their homes owing to threats such as violence, persecution, or natural catastrophes, protecting refugees' rights has become an essential component of international law and human rights. The phrase "Sensitizing Refugee Rights" emphasizes the need of recognizing and comprehending refugees' special rights within the larger framework of universal human rights. When people are compelled to seek asylum in other countries, they bring with them the basic human rights that everyone is entitled to.<sup>1</sup> This approach is consistent with the core principles established by international human rights laws, which emphasize that individuals' rights should be respected regardless of nationality or circumstance. The focus here is not just on recognizing these rights but on deepening the understanding and commitment to addressing the unique challenges faced by refugees. Understanding refugee rights in the context of human rights means recognizing that these rights are interconnected. It involves acknowledging that the protection of refugees is not a separate issue but an essential aspect of the larger human rights framework. This perspective underscores the need for comprehensive policies, legal instruments, and global cooperation to address the various challenges faced by refugees while upholding their inherent human rights.

Denying refugees their fundamental rights continues to be one of the most destructive kinds of discrimination in the world.<sup>2</sup> Large-scale migrations of refugees have occurred, and their numbers are growing as they escape both internal and foreign war. The main causes of increased migration and the refugee crisis are liberation wars (domestic or international), political, religious, ethnic, and economic discrimination and persecution, economic stagnation, depression, and overall poverty, famine, and environmental factors.<sup>3</sup> The number of refugees worldwide has been steadily increasing as a result of these circumstances.<sup>4</sup> Even after gaining independence, the situation in India has remained consistent, with the country continuing to provide refuge to a considerable population of individuals fleeing neighboring nations. This

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<sup>1</sup> UNHCR - The UN Refugee Agency. (2017). Protecting Refugees. In UNHCR Office in Cyprus. [https://www.unhcr.org/cy/wp-content/uploads/sites/41/2018/05/UNHCR\\_Brochure\\_EN.pdf](https://www.unhcr.org/cy/wp-content/uploads/sites/41/2018/05/UNHCR_Brochure_EN.pdf)

<sup>2</sup> United Nations. (n.d.). [Fact Sheet No.20, Human Rights and Refugees]. In *Fact Sheet*. <https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet20en.pdf>

<sup>3</sup> Swain, A. (2019). Increasing Migration Pressure and Rising Nationalism: Implications for Multilateralism and SDG Implementation. In United Nations, Development Policy Analysis Division of the United Nations, Department of Economics and Social Affairs. [https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/SDO\\_BP\\_Swain.pdf](https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/SDO_BP_Swain.pdf)

<sup>4</sup> Global Refugee Crisis Growing Worse, with Aid Workers near Breaking Point, Little Respect for Basic Rules of War, High Commissioner Warns Security Council | Meetings Coverage and Press Releases. (2024, May 30). <https://press.un.org/en/2024/sc15713.doc.htm>



includes Tibetans escaping Chinese persecution, refugees from Pakistan, as well as Afghans, Bangladesh, Burmese, Tamils from Sri Lanka, and others, despite facing economic constraints.<sup>5</sup>

This paper endeavours to bring attention to these aspects, examining the legal status of refugees in India and proposing measures aimed at ensuring equality and enhanced protection and promotion of human rights of refugees in India. Additionally, it proposes measures aimed at ensuring equality and enhanced protection for this population.

## 2.0 WHO IS REFUGEE?

A refugee is defined by various international conventions and treaties, reflecting a consensus on the legal status and protection afforded to individuals forced to flee their home countries due to well-founded fears of persecution. The cornerstone of the international legal framework for refugees is the Convention relating to the Status of Refugees, 1951 and its 1967 Protocol. According to Article 1(A)(2) of the Refugee Convention, 1951, a refugee is someone who, "Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country."<sup>6</sup> The definition provided in the Convention is widely recognized and has become a customary rule of international law. It has been supplemented by regional agreements such as the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa and the 1984 Cartagena Declaration on Refugees in Latin America.

Furthermore, dictionaries, such as the Oxford English Dictionary, generally align with the legal definition, emphasizing the involuntary nature of displacement and the underlying fear of persecution. Refugees, as commonly understood, are individuals who have crossed international borders and are unable or unwilling to return to their home countries due to a well-founded fear of persecution.

## 3.0 HISTORY OF REFUGEE LAW IN INDIA

The history of refugee law in India is marked by a combination of constitutional provisions, judicial decisions, and pragmatic responses to the evolving refugee situations. India, while not a signatory to the Refugee Convention, 1951 or its 1967 Protocol, has grappled with

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<sup>5</sup> Jha, M. (2018, January 9). India's refugee saga, from 1947 to 2017. Mint. <https://www.livemint.com/Sundayapp/clQnX60MIR2LhCtpMmMWO/Indias-refugee-saga-from-1947-to-2017.html>

<sup>6</sup> <https://www.unhcr.org/about-unhcr/who-we-are/1951-refugee-convention>

the influx of refugees over the years, necessitating legal considerations to address their status and protection.

1. **Post-Independence Period:** In the aftermath of India's independence in 1947, large-scale population movements occurred due to the partition of the country. Millions were displaced, leading to a significant humanitarian challenge. While the newly formed Indian government dealt with the consequences of this mass migration, there was no specific legal framework addressing the rights and protection of refugees.<sup>7</sup>
2. **Constitutional Provisions:** The Indian Constitution, adopted in 1950, includes provisions that indirectly touch upon the rights of refugees. Fundamental rights, such as the right to life and personal liberty (Article 21), have been interpreted by the judiciary to encompass the protection of refugees, emphasizing India's commitment to humanitarian principles.<sup>8</sup>
3. **Judicial Pronouncements:** Over the years, the Indian judiciary has played a crucial role in shaping refugee law through its interpretations of constitutional provisions and adherence to international humanitarian principles. Landmark judgments, such as the case of National Human Rights Commission (NHRC) v. State of Arunachal Pradesh (1996)<sup>9</sup>, underscored the importance of protecting the rights and dignity of refugees, setting a precedent for judicial activism in this domain.
4. **The Foreigners Act, 1946:** While not exclusively designed for refugees, the Foreigners Act, 1946, provides the legal basis for regulating the entry, presence, and departure of foreigners in India. The Act has been applied to refugees, and the issuance of Long-Term Visas (LTVs) has been a crucial aspect of accommodating those seeking refuge in the country.
5. **Policy Measures:** India's approach to refugees has been largely influenced by political and administrative considerations rather than a dedicated legal framework. The government has adopted policies, such as the LTV scheme, to address the stay of refugees in the absence of specific legislation.
6. **United Nations High Commissioner for Refugees (UNHCR):** India has collaborated with the UNHCR to provide documentation and support for refugees. While UNHCR's

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<sup>7</sup> Gatrell, P. (2013). Midnight's Refugees? Partition and its Aftermath in India and Pakistan. In Oxford University Press eBooks (pp. 148–177). <https://doi.org/10.1093/acprof:oso/9780199674169.003.0006>

<sup>8</sup> Purohit, M., Purohit, M., GS Goodwin-Gill, Ranabir Samaddar, Robert L. Newmark, & James C. Hathaway. (2017). AN ANALYSIS OF NON-REFOULEMENT IN INDIAN LEGAL FRAMEWORK. In Vol. 2 Jamia Law Journal (pp. 167–169). [https://docs.manupatra.in/newsline/articles/Upload/45325657-78F6-45C2-90B5-BB0D35BA56BC.%20Megha%20Purohit%20&%20Mayank%20Purohit\\_Civil.pdf](https://docs.manupatra.in/newsline/articles/Upload/45325657-78F6-45C2-90B5-BB0D35BA56BC.%20Megha%20Purohit%20&%20Mayank%20Purohit_Civil.pdf)

<sup>9</sup> AIR 1996 SC 1234.

presence indicates international cooperation, it also highlights the absence of a standalone national legal framework for refugees.

#### 4.0 LEGAL MECHANISM FOR THE PROTECTION OF REFUGEES RIGHTS IN INDIA

Facilitating humanitarian aid to refugees globally has been made feasible through institutional arrangements with the UNHCR (United Nations High Commissioner for Refugees) and other organizations, thanks to the adoption of the Refugee Convention of 1951 and its 1967 Protocol outlining the status of refugees.

India has not ratified the 1951 Refugee Convention or its 1967 Protocol concerning the Status of Refugees, and it lacks specific national legislation addressing refugees. In the absence of a dedicated legal framework, refugees in India fall under the purview of The Foreigners Act, 1946, and The Registration of Foreigners Act, 1939. Additionally, the entry and departure regulations outlined in The Passport (Entry into India) Act, 1920, and The Passport Act, 1967, are extended to refugees, thereby adding complexity to their situation.<sup>10</sup>

Moreover, refugees are subject to the applicability of various overarching laws, including The Criminal Procedure Code, 1973; The Indian Penal Code, 1860; The Evidence Act, 1872, among others. While India has provided shelter to refugees from neighbouring nations, the lack of transparency in administrative policies related to granting asylum, facilities, grants, etc., coupled with instances of discriminatory treatment toward specific refugee individuals or groups under similar circumstances without clear justification, is a prevalent issue.

Currently, refugees in India are considered as foreigners. The municipal laws directly applicable to them are the Foreigners Act, 1946, the Registration of Foreigners Act, 1939, the Passport (Entry into India) Act, 1920, the Passport Act of 1967, the Extradition Act of 1962, the Citizenship Act, 1955- amended recently in 2019, and the Illegal Migrant (Determination by Tribunals) Act, 1983. Under these laws, there is no distinction made between the broader term ‘foreigner’ and a refugee or foreigner requiring special protection.<sup>11</sup>

In 2011, the Government of India adopted a Standard Operating Procedure (SOP) to be followed by law enforcement agencies while dealing with “foreign nationals who claim to be

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<sup>10</sup> UNHCR. (2011). Refugees and Asylum-Seekers in India [Report]. <https://www.unhcr.org/sites/default/files/legacy-pdf/4cd96e919.pdf>

<sup>11</sup> Pragma Agrahari, Human Rights of Refugees and Asylum Seekers in India: Issues and Challenges. <https://nhrc.nic.in/sites/default/files/Group%204%20June.pdf>

refugees”, which was amended in 2019 by Lok Sabha. It provides for Long Term Visa (LTV) to such persons and thus allows them to freely work and study in India too. For the first time in the Indian context, the text of the SOP acknowledged distinct criteria for the identification of certain foreigners as refugees.<sup>12</sup>

## 5.0 REFUGEE’S RIGHTS UNDER INDIAN CONSTITUTION

As the refugees in India are considered as foreigners, they are also entitled to rights enjoyed by foreigners under Indian Constitution. They are as follows:

**Article 14:** Right to Equality Before Law & Equal Protection of Law

**Article 20:** Protection in Respect of Conviction for Offences

**Article 21:** Protection of Life and Personal Liberty

**Article 21A:** Right to Education

**Article 22:** Protection against Arrest and Detention

**Article 23:** Prohibition of Forced Labor

**Article 24:** Prohibition of Child Labor

**Article 25:** Freedom of Religion

**Article 26:** Freedom to Manage Religious Affairs

**Article 27:** Freedom from Paying Taxes for Religious Purposes

**Article 28:** Freedom from Religious Instruction in Educational Institutions

## 6.0 ROLE OF JUDICIARY IN PROTECTING REFUGEE’S RIGHTS IN INDIA

The Indian judiciary has played an instrumental role in ensuring protection to these refugees by recognizing refugees and refugee law to a certain extent and has introduced refugee law into our legal system through the back door, as it were, since the front door has been shut by the executive. The role of the judiciary in protecting refugee rights in India is pivotal, as it plays a crucial part in upholding constitutional principles and ensuring justice for individuals who have sought refuge within the country's borders. While India lacks specific legislation exclusively addressing refugee rights, the judiciary has interpreted constitutional provisions and international commitments to safeguard the rights and dignity of refugees.

1. **Interpretation of Constitutional Rights:** The Indian Constitution, in its fundamental rights provisions, provides a foundation for the protection of human rights, which are

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<sup>12</sup> RAJYA SABHA SECRETARIAT. (2019). *PARLIAMENTARY DEBATES RAJYA SABHA OFFICIAL REPORT*. <https://cms.rajyasabha.nic.in/UploadedFiles/Debates/OfficialDebatesDatewise/Floor/250/F20.11.2019.pdf>

applicable to all individuals within the country, including refugees. The judiciary interprets these constitutional provisions, particularly Article 21 (Right to Life and Personal Liberty) and Article 14 (Right to Equality), to ensure that the rights of refugees are not arbitrarily violated. Courts have emphasized the broad and inclusive interpretation of these rights to encompass the protection of refugees' lives, personal liberty, and dignity. In the case of *State of Arunachal Pradesh v. Khudiram Chakma*<sup>13</sup>, the Apex Court held that Article 21 of the Constitution of India, which guarantees the fundamental right to life and personal liberty of Indian citizens is extended to all including non-citizens. However, does not include the right to settle and reside in the country, which is a right available only to citizens of India.

2. **Non-Refoulement Principle:** While India is not a signatory to the 1951 Refugee Convention, the judiciary has recognized the principle of non-refoulement, which prohibits the expulsion or return of individuals to countries where their lives or freedom would be threatened. Courts have invoked this principle to prevent the deportation of refugees who might face persecution or harm in their home countries. In the case of *K. A. Habib v. Union of India 1999*<sup>14</sup>, the Court prohibited the expulsion of two UNHCR certified Iraqi refugees after observing that the principle of non-refoulement is encompassed in Article 21. It held that the refugees must be protected from persecution in their home country, as long as their presence in India is not prejudicial to national security.
3. **Judicial Review of Administrative Actions:** The judiciary actively engages in reviewing administrative decisions related to refugees. In cases where refugees face deportation or denial of rights, the courts provide a forum for judicial review, ensuring that administrative actions adhere to constitutional principles and international commitments. In the landmark case *National Human Rights Commission v. State of Arunachal Pradesh*<sup>15</sup>, the Supreme Court safeguarded the fundamental constitutional rights of the Chakma refugees who had taken refuge in large number from erstwhile East Pakistan (now Bangladesh) in parts of Assam and Tripura. However, the respective governments of Assam and Tripura expressed their inability to rehabilitate them; therefore, some of them were moved to the state of Arunachal Pradesh and were settled

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<sup>13</sup> AIR 1994 SC 1461

<sup>14</sup> K. A. Habib v. Union of India, 1999, CriLJ 919, Gujarat High Court.

<sup>15</sup> AIR 1996 SC 1234.

there. Consequently, the All Arunachal Pradesh Students Union (AAPSU) launched an agitation to expel them out of the state and threatened to resort to violence against them in response to which the National Human Rights Commission approached the Supreme Court. In its decision, the Apex Court directed the state of Arunachal Pradesh to take all measures necessary for ensuring the life and personal liberty of Chakmas as a constitutional obligation.

4. **Extension of Fundamental Rights:** The judiciary has extended the protection of fundamental rights to refugees. While refugees may not be explicitly mentioned in the Constitution, the courts have recognized that the term 'person' in the constitutional provisions encompasses refugees. This inclusive interpretation ensures that refugees enjoy the same fundamental rights as Indian citizens. The High Courts and the Supreme Court in their several judgements have ensured protection to the refugees by creatively interpreting Article 21 of the Constitution that guarantees right to life and liberty to all persons irrespective of their status. Also, the right to equality for the non-citizen under Article 14 of our Constitution has been reaffirmed by our High Courts and the Supreme Court in several judgments.
5. **Protection against Arbitrary Detention:** The judiciary acts as a safeguard against the arbitrary detention of refugees. In instances where refugees are held in detention facilities, the courts intervene to ensure that such detention is lawful, just, and complies with constitutional principles. This is particularly significant given the potential vulnerability of refugees in detention. From time to time, Indian Courts have stepped in to safeguard refugees from deportation, expulsion, and forced repatriation. Knowing that refugees are not always able to provide legal documentation or other such proof, the Court even waived off the requirement to provide surety in one such case so the refugees could be released and be free to approach the UNHCR for protection (*U. Myat Kayew and another v. State of Manipur 1991*)<sup>16</sup>.
6. **Enforcement of Humanitarian Principles:** The judiciary has played a significant role in enforcing humanitarian principles in the absence of specific legislation. By considering India's commitment to international human rights treaties and conventions, the courts have emphasized the importance of treating refugees with dignity, ensuring their access to education, healthcare, and basic amenities. India, nonetheless, has ratified various international human rights treaties such as the UDHR, Genocide Convention,

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<sup>16</sup> U. Myat Kayew and another v State of Manipur, 1991, C.R. No. 516/91, Gauhati High Court.

ICERD, ICCPR, ICESCR, CEDAW, CAT, CRC, and Bangkok Principles. Although these agreements are not directly enforceable in Indian courts, they can be incorporated into existing domestic laws or enacted through separate legislation. Indian courts have the authority to apply principles of international law, treaties, or conventions, and Article 253 of the Indian Constitution grants Parliament the power to implement international treaties or conventions through legislation. The Supreme Court, in the case of *Gramophone Company of India v. Birendra Bahadur Pandey and Others (1984)*<sup>17</sup>, further clarified and expanded the Parliament's authority in this regard. The Court emphasized that international law can be integrated into domestic laws as long as such incorporation does not conflict with other legislations enacted by the Parliament. Moreover, a deeper understanding of this concept can be gained by referring to the case of *Maganbhai Ishwarlal Patel v. Union of India and another (1969)*<sup>18</sup>, wherein the Supreme Court asserted that the Parliament is not obligated to pass statutes specifically for the enforcement of international treaties, agreements, or conventions. As long as there is no violation of domestic laws, courts have the authority to incorporate provisions from international conventions and norms into municipal law, even in the absence of formal ratification by India.

## 7.0 RECOMMENDATIONS

1. **Comprehensive Refugee Legislation:** India should enact dedicated and comprehensive legislation specifically addressing the rights and protection of refugees. This legislation should incorporate international human rights standards to ensure that refugees have clear legal status and entitlements.
2. **Ratification of International Treaties:** India should consider ratifying relevant international treaties related to refugees, such as the 1951 Refugee Convention and its 1967 Protocol. This would demonstrate a commitment to upholding global standards for refugee protection and ensure a consistent legal framework.
3. **Employment Opportunities:** Create pathways for refugees to access legal employment opportunities. This could involve easing work permit restrictions, recognizing foreign qualifications, and promoting vocational training programs to enhance refugees' self-reliance.

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<sup>17</sup> *Gramophone Company of India v Birendra Bahadur Pandey and Others*, 1984, AIR 667.

<sup>18</sup> *Maganbhai Ishwarlal Patel v Union of India and another*, 1969, AIR 783.

4. **Non-Refoulement Principle:** Explicitly adopt the principle of non-refoulement into domestic law, ensuring that refugees are not forcibly returned to a country where they face persecution or danger.
5. **Legal Aid and Access to Justice:** Facilitate access to legal aid and ensure that refugees have the right to a fair and impartial hearing in legal proceedings. This includes providing interpreters and culturally sensitive legal assistance.
6. **Public Awareness and Sensitization:** The Govt. of India must conduct awareness campaigns to foster understanding and acceptance of refugees within local communities. Promoting a culture of empathy and inclusion can help reduce discrimination and improve the overall integration of refugees.
7. **Monitoring Mechanisms:** Establish robust monitoring mechanisms to assess the implementation of refugee rights and address any violations promptly. Regular reporting and evaluation will help identify gaps and improve the effectiveness of protection measures.

Implementing these recommendations would contribute significantly to safeguarding the basic human rights of refugees in India and ensure a more compassionate and rights-respecting approach to their protection and well-being.

## CONCLUSION

India's approach to refugee law, shaped by constitutional provisions, judicial decisions, and policies, lacks a dedicated legal framework. Despite refugees being classified as foreigners, they enjoy fundamental rights under the Indian Constitution. The absence of a comprehensive legal structure highlights the need for specialized legislation. The judiciary emphasizes specific rights crucial for refugee protection, recognizing an individual's entitlement to refugee status and opposing expulsion or deportation during asylum seeking. This judicial stance surpasses legislative and executive efforts, actively integrating international law principles.

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## LEGAL PERSPECTIVES ON STATELESSNESS AND REFUGEE RIGHTS

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### *Abstract*

Statelessness poses significant challenges to the protection of refugees within the international human rights framework. Stateless persons, often marginalized and vulnerable, face numerous obstacles in accessing basic rights and protections. This paper explores the intersection of statelessness and refugee protection, focusing on the rights and experiences of stateless individuals in forced migration contexts. Drawing on legal frameworks, case studies, and empirical research, the paper examines the multifaceted nature of statelessness and its implications for refugee rights. It analyses the barriers stateless refugees encounter in accessing asylum, protection, and durable solutions, including challenges related to documentation, legal recognition, and nationality. Moreover, the paper discusses the impact of statelessness on vulnerable groups such as children, women, and minorities, highlighting intersecting forms of discrimination and exclusion. Through a human rights lens, the paper evaluates existing international and regional mechanisms for addressing statelessness and protecting the rights of stateless refugees. It identifies gaps and shortcomings in current legal frameworks and proposes recommendations to strengthen the protection of stateless persons within the refugee regime. By shedding light on this underexplored aspect of forced migration, this paper contributes to ongoing efforts to enhance the rights and well-being of stateless individuals displaced by conflict, persecution, and human rights violations.

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## 1.0 INTRODUCTION

In the complex tapestry of human displacement, where narratives of refuge, asylum, and migration intertwine, there exists a cohort often overlooked yet profoundly vulnerable: the stateless refugees. Within the broader discourse on forced migration, the plight of stateless individuals emerges as a critical intersection point, demanding meticulous examination. Stateless persons, bereft of the protective cloak of nationality, find themselves ensnared in a web of legal limbo and social marginalization, navigating treacherous paths towards basic rights and protections. The nexus between statelessness and refugee protection is a terrain fraught with challenges, complexities, and systemic injustices. While international human rights frameworks ostensibly provide robust safeguards for refugees, the reality for stateless refugees paints a starkly contrasting picture. Their experiences epitomize the fissures within the existing legal and institutional apparatuses, wherein the promise of asylum and protection often remains elusive. This paper embarks on a comprehensive exploration of the multifaceted landscape of statelessness within forced migration contexts. Through a meticulous examination of legal frameworks, empirical evidence, and illuminating case studies, it delves into the intricate dynamics shaping the rights and experiences of stateless individuals on the move. By dissecting the myriad barriers, they encounter in accessing asylum, protection, and durable solutions, this paper sheds light on the intricate hurdles impeding their journey towards security and stability. At the heart of this inquiry lies an acknowledgment of the profound impact of statelessness on the lives of vulnerable groups, including children, women, and minorities. Their narratives unveil intersecting forms of discrimination and exclusion, amplifying the urgency of addressing the root causes and systemic manifestations of statelessness within the refugee regime. Through a rigorous human rights lens, this paper critically evaluates the efficacy of existing international and regional mechanisms in addressing the plight of stateless refugees. It interrogates the gaps, shortcomings, and structural deficiencies inherent in current legal frameworks, illuminating the imperative for nuanced interventions and policy reforms. By foregrounding this often-overlooked facet of forced migration, this paper seeks to catalyse meaningful discourse and action towards enhancing the rights and well-being of stateless individuals displaced by conflict, persecution, and human rights violations. In doing so, it endeavours to contribute to the ongoing global efforts aimed at dismantling the barriers of statelessness, forging pathways towards dignity, inclusion, and justice for all displaced persons. As we embark on this journey of exploration, let us heed the voices of the stateless refugees, whose resilience amidst adversity

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serves as a poignant reminder of our collective responsibility to uphold the fundamental principles of human rights and dignity in the face of displacement.

## 2.0 UNDERSTANDING THE ISSUES

Statelessness refers to the condition of individuals who are not recognized as citizens by any country under its national laws. This lack of citizenship can occur due to various reasons, such as being born in a territory where citizenship is not automatically granted, having parents with conflicting nationalities, or experiencing changes in national borders or laws that leave individuals without citizenship. Statelessness can also arise from the loss or revocation of citizenship, which might happen due to marriage, birth outside the country of nationality, or changes in legal provisions.

Forced migration is the compelled movement of individuals who flee due to threats of harm or death. It stems from conflicts like civil wars or persecution based on religion or ethnicity, and natural disasters such as floods or droughts. Those affected include refugees, internally displaced persons, and asylum seekers. Forced migration inflicts psychological and physical trauma, often leading to conditions like depression and PTSD. Examples include the Syrian Civil War, which triggered the Syrian refugee crisis, and climate-induced displacements, such as in Bangladesh due to sea level rise.

A refugee is someone who has been compelled to leave their home country due to various forms of persecution, violence, or conflict. This could be rooted in reasons such as race, religion, nationality, political beliefs, or belonging to a particular social group. Often, refugees are unable to return home due to the dangers they face there, which could include threats to their lives or freedom. Causes for becoming a refugee are diverse, ranging from war to ethnic or religious tensions, which force individuals and families to seek safety and asylum elsewhere.

On the other hand, a stateless person is an individual who lacks citizenship in any country. Citizenship establishes a legal connection between a government and an individual, granting certain rights and responsibilities. However, statelessness can arise due to various factors, such as legal, technical, or administrative issues, including gaps in documentation or changes in national borders. Despite the fundamental right to nationality proclaimed in the Universal Declaration of Human Rights, many people find themselves without citizenship, which deprives them of basic rights and protections. The Universal Declaration of Human Rights underlines that **“Everyone has the right to a nationality.”**<sup>3</sup>

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<sup>3</sup> Article 15- Universal Declaration of Human Rights

It's important to note that the true scale of statelessness is likely much larger than officially reported figures. Many countries do not provide comprehensive data on statelessness, and some of the most populous nations with significant stateless populations do not report this issue at all. This lack of data obscures the full extent of the problem, making it challenging to address effectively on a global scale. Therefore, efforts to address statelessness must involve not only raising awareness but also improving data collection and implementing policies to prevent and reduce statelessness worldwide.

### **3.0 LEGAL FRAMEWORKS FOR PROTECTING STATELESS REFUGEES**

#### Article 1 - Definition of the term "stateless person"

For the purpose of this Convention, the term "stateless person" means a person who is not considered as a national by any State under the operation of its law.

This Convention shall not apply:

- They have committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provisions in respect of such crimes;
- They have committed a serious non-political crime outside the country of their residence prior to their admission to that country;
- They have been guilty of acts contrary to the purposes and principles of the United Nations.

Statelessness poses challenges within international law, as individuals lacking citizenship lack typical protections. However, international humanitarian law addresses rights and protections of stateless individuals, notably in armed conflicts. According to Article 73 of Additional Protocol I (API) to the Geneva Conventions, stateless persons are treated as civilians, granted protections during conflicts. Additionally, Articles 35-46 of the Fourth Geneva Convention (GCIV) stipulate rights for stateless persons akin to foreign nationals in conflict zones. Two conventions address statelessness: the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. The latter focuses on preventing statelessness, requiring states to grant nationality to those born within their territory or with at least one parent's nationality. The former sets minimum standards for stateless persons' treatment, reaffirming rights under host state laws, including family, personal, property, and movement rights, protection against expulsion, and access to courts and services. These

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conventions complement each other, aiming to prevent statelessness and protect the rights of stateless individuals within the international legal framework.

Rights under the Convention Relating to the Status of Stateless Persons<sup>4</sup>,

**Family Rights, Respect for Personal Status, Freedom of Conscience, and Religion (Arts. 4, 12):**

Article 4: Stateless persons have the freedom to practice their religion and educate their children like nationals.

Article 5: No diminishment of rights or benefits granted by a state to stateless persons outside the Convention.

Article 6: Stateless persons must fulfill requirements like nationals to enjoy certain rights, except where impossible due to statelessness.

Article 7: Treatment equal to aliens by the state, with exemptions after three years' residence.

Article 8: No exceptional measures solely based on previous nationality, unless prevented by national legislation.

Article 9: Provisional measures in grave circumstances in the interest of national security.

Article 10: Recognition of enforced residence during WWII and uninterrupted residence periods for certain purposes.

Article 11: Encouragement of settlement for stateless seamen.

Article 12: Personal status determined by domicile or residence law, ensuring respect for related rights.

**Right to Property (Arts. 13, 14):**

Article 13: Treatment at least as favorable as aliens regarding property acquisition and rights.

Article 14: Protection for industrial and artistic property in habitual residence, and comparable protection in other Contracting States.

**Right of Association (Art. 15):**

Article 15: Favorable treatment regarding non-political and non-profit associations and trade unions.

**Right of Access to Courts (Art. 16):**

Article 16: Access to courts and legal assistance equivalent to nationals in habitual residence, with similar treatment elsewhere.

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<sup>4</sup> [https://www.unhcr.org/ibelong/wp-content/uploads/1954-Convention-relating-to-the-Status-of-Stateless-Persons\\_ENG.pdf](https://www.unhcr.org/ibelong/wp-content/uploads/1954-Convention-relating-to-the-Status-of-Stateless-Persons_ENG.pdf)

**Right to Engage in Different Professions (Arts. 17–19):**

Article 17: Right to wage-earning employment, with consideration for assimilating rights to nationals.

Article 18: Right to self-employment in various fields, with treatment comparable to aliens.

Article 19: Favorable treatment for practicing a liberal profession.

**Right to Benefit from Various Social, Administrative, and Other Public Services (Arts. 20–25):**

Articles 20–25: Equal treatment with nationals regarding rationing, housing, education, public relief, labor legislation, social security, and assistance when foreign authorities are inaccessible.

**Right to Freedom of Movement, Travel Documents, and Transfer of Assets (Arts. 26–30):**

Articles 26–30: Right to choose residence, move freely, receive identity and travel papers, avoid higher fiscal charges, and transfer assets for resettlement purposes.

**Respect for Rights in Terms of Expulsion and Naturalization (Arts. 31, 32):**

Article 31: Expulsion only for national security or public order reasons, with due process, evidence submission, appeal rights, and reasonable period for seeking legal admission elsewhere.

Article 32: Facilitation of assimilation and naturalization, expediting proceedings and minimizing costs.

The Global Consultations on International Protection, initiated by UNHCR in 2001, aimed to assess the evolution of refugee protection since the 1951 Convention, fostering dialogue among stakeholders. It comprised three tracks: ministerial meetings, expert roundtables, and UNHCR Executive Committee sessions. The resulting Declaration of States Parties reaffirmed commitments to refugee protection and stressed the importance of cooperation for durable solutions. Expert roundtables addressed interpretative challenges of the 1951 Convention, such as cessation clauses and family unity, providing guidance for consistent application. Meanwhile, UNHCR Executive Committee meetings focused on issues beyond the Convention's scope, like registration and refugee protection in mass influx situations. The Consultations facilitated dialogue among diverse stakeholders, promoting understanding and consensus on key protection principles. Despite not resolving all interpretative differences, they paved the way for UNHCR Guidelines on International Protection. The Agenda for Protection, adopted in 2002, outlined six goals to strengthen refugee protection, including enhancing implementation of the Convention, sharing burdens equitably, and addressing security concerns. It serves as a comprehensive action plan for UNHCR, governments, and partners. The UNHCR 2004 process,

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launched towards the end of the Consultations, aimed to bolster UNHCR's position within the UN system and enhance multilateral support. It led to institutional priority-setting and a UN General Assembly resolution lifting the time limitation on UNHCR's mandate. Convention Plus, initiated in 2003, seeks special agreements to enhance refugee protection beyond the 1951 Convention. It focuses on strategic resettlement, development assistance for durable solutions, and addressing irregular secondary movements, aiming to bridge gaps in international protection. Convention Plus aims to address gaps in refugee protection by fostering multilateral cooperation and responsibility sharing. It seeks to resolve challenges related to resettlement, development assistance, and irregular secondary movements, complementing efforts to achieve comprehensive solutions for protracted refugee situations.

#### **4.0 BARRIERS IN PROTECTION OF REFUGEES**

1. **Rising refugee populations:** The number of refugees globally has surged, surpassing 20 million by 2003, reflecting ongoing conflicts and human rights abuses worldwide.
2. **Shift in refugee demographics:** Refugee populations have diversified, with asylum seekers originating from various countries and ethnic backgrounds, complicating the management of refugee flows.
3. **Decreasing asylum applications:** While industrialized countries have seen a decline in asylum applications, negative attitudes towards asylum seekers persist, contributing to restrictive asylum policies.
4. **Concerns about mixed migration:** States grapple with managing asylum systems inundated by migrants with mixed motives, including economic migrants and those seeking refuge, straining resources and administrative capacities.
5. **Tightening asylum policies:** Industrialized nations enact measures to prevent unauthorized entry and restrict access to asylum procedures, citing concerns about national security and societal stability.
6. **Disproportionate burden on developing countries:** Developing nations hosting large refugee populations lack adequate support, leading to strained resources, security challenges, and limited capacity for long-term refugee care.
7. **Unequal humanitarian aid distribution:** Humanitarian assistance often prioritizes high-profile crises, neglecting protracted refugee situations in regions like Africa, exacerbating the suffering of vulnerable populations.



8. **Limited durable solutions:** Many refugees face uncertainty and lack clear pathways to durable solutions such as repatriation, resettlement, or local integration, prolonging their displacement and vulnerability.
9. **Protection concerns:** Refugees encounter discrimination, violence, and exploitation, both within refugee camps and in host communities, further exacerbating their plight and hindering their ability to rebuild their lives.
10. **Challenges of repatriation:** Facilitating the return of refugees to their home countries entails significant logistical and developmental hurdles, including rebuilding infrastructure, ensuring sustainable reintegration, and addressing ongoing security concerns.

India's refugee protection framework presents challenges due to its dual system of refugee recognition. Refugees from non-neighbouring countries and Myanmar must seek recognition from UNHCR in New Delhi, while those from neighbouring countries must approach the Ministry of Home Affairs directly. However, India lacks a defined legal framework for refugee protection, relying on arbitrary executive policies and judicial pronouncements. While UNHCR's recognition of refugee status is not widely recognized by Indian authorities, courts have extended some constitutional protections to refugees. India's endorsement of the 2018 Global Compact on Refugees (GCR) was a positive step, but recent legislative amendments and government actions have created further ambiguity and restricted refugees' access to basic rights. The COVID-19 pandemic has further halted refugee registration and recognition processes, necessitating domestic and international advocacy for India to fulfil its commitments under the GCR and uphold humanitarian obligations.

## 5.0 CASE STUDIES AND EMPIRICAL EVIDENCE

### 5.1 *Rohingya Discrimination in North Arakan*

The Rohingya people in North Arakan face systematic discrimination and oppression, making their homeland feel like an open prison. Stripped of citizenship rights, they endure severe restrictions on movement, employment, education, and healthcare. Attempts to leave result in imprisonment, and neighbouring Bangladesh offers little refuge due to the risk of arrest for illegal entry. The denial of basic rights extends to healthcare, as those seeking treatment abroad risk being barred from returning home.

## **5.2 *Marginalization of Biharis in Bangladesh***

Similarly marginalized are the Biharis, who, despite an end to their statelessness, continue to face poverty and discrimination in Bangladesh. Living conditions in camps remain dire, with overcrowding and limited access to education and employment. Despite government poverty reduction efforts, the needs of the Urdu-speaking community are largely overlooked, with no comprehensive plans or funding for their social and economic rehabilitation. The lack of international support exacerbates their plight, with no NGOs or UN agencies taking substantive action.

### **6.0 STATE SUCCESSION AND CITIZENSHIP ISSUES BETWEEN ETHIOPIA AND ERITREA**

The situation surrounding nationality rights in the context of Ethiopia's secession of Eritrea in 1991 was marked by a lack of clarity and proactive measures. Crucially, citizenship issues should have been addressed early on, with both countries' provisional governments prioritizing this matter. Ahead of the referendum, it was essential to inform potential voters about how their registration could impact their citizenship status. In the midst of conflict, Ethiopia ought to have handled the issue of nationality with more transparency and fairness. Expulsion and loss of nationality should have been confined to individuals who underwent a transparent security review process, with ample notice provided to those affected. Additionally, measures should have been in place to allow spouses and children of deported individuals the option to remain in Ethiopia or accompany their loved ones to Eritrea.

## **6.1 *Preventing Statelessness in State Succession***

To prevent statelessness in state succession, concrete actions must be taken by both Ethiopia and Eritrea. This includes adhering to the standards outlined in the UN Statelessness Conventions and actively becoming parties to them. Furthermore, efforts should focus on integrating Ethiopians of Eritrean origin into their respective societies, reuniting families through re-establishing interstate travel and communications, and devising plans to compensate victims of the conflict that occurred between 1998 and 2000, in line with decisions made by the EECC.

## **6.2 *Statelessness Among Thai Descendants in Japan***

Stateless individuals from Thailand residing illegally in Japan face significant challenges due to inadequate international legal protection. Born to Indochinese refugee parents who fled the first

Indochina War, they lack nationality in Thailand, Vietnam, or Laos. Despite Thailand's 1992 law offering nationality to such children, those in Japan cannot access it. They resort to illegal entry and work in Japan but live in constant fear of arrest and deportation, as they have no state to which they belong.

### **6.3 *Forced Migration: Sri Lankan Tamil Refugees in India*<sup>5</sup>**

The complex situation of forced migration of Sri Lankan Tamil refugees in India explores the tough decision they face: whether to return to Sri Lanka or integrate into Indian society. It sheds light on the multitude of factors influencing their choices, such as access to information, livelihood opportunities, education, and security concerns. The recommendations stress the significance of understanding refugees' aspirations and working closely with governments and NGOs to devise effective strategies.

### **6.4 *Challenges at the U.S.-Mexico Border*<sup>6</sup>**

The situation at the U.S.-Mexico border reflects a complex interplay of factors contributing to forced migration. Thousands of migrants, including asylum seekers, are heading northward through Mexico, driven by various root causes such as persistent poverty, insecurity due to organized crime, and environmental stress. The Biden administration faces accusations of an "open border policy" from Republican opponents, despite perpetuating border policies initiated during the Trump administration. Issues surrounding asylum seekers, illegal immigration, and the sheer volume of migrants' strain resources and capacities at the border, exacerbating political tensions. Moreover, Mexico's role in controlling migrant flows, influenced by its leverage in bilateral relations with the U.S., further complicates the situation.

## **7.0 RECOMMENDATIONS FOR ENHANCING PROTECTION**

1. States should ratify the 1954 and 1961 Conventions on Statelessness and enact necessary laws to determine stateless status domestically, ensuring legal protection and recognition for stateless individuals.
2. States must uphold human rights for all within their borders, regardless of nationality, acknowledging that everyone deserves basic rights and dignity.

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<sup>5</sup> <https://www.fmreview.org/return/valcarcelsilvela>

<sup>6</sup> <https://www.brookings.edu/articles/the-us-mexico-border-challenge/>

3. States need to establish effective mechanisms to safeguard stateless individuals from abuses like human trafficking and indefinite detention, providing adequate protection and support.
4. Governments should adopt anti-discrimination measures, including training civil servants, reforming legal systems, and promoting rule of law, to combat exclusion and marginalization of stateless communities.
5. States should ensure children have the opportunity to obtain nationality at birth, preventing statelessness from being passed on to future generations.
6. Collaborating with organizations like UNICEF and Plan International, states should conduct birth registration campaigns, deploying mobile teams, if necessary, to ensure all children are registered at birth.
7. Facilitating naturalization for stateless individuals by considering residency and language skills, and easing requirements to acquire citizenship.
8. Simplifying access to citizenship procedures, reducing fees, and providing mobile registration units to ensure accessibility for those eligible for citizenship.
9. International donors should support UNHCR's efforts in preventing and reducing statelessness by providing necessary resources.
10. Aid from international donors and development agencies should effectively reach stateless groups, addressing their specific needs.
11. Governments and agencies should improve monitoring of stateless populations through embassies and human rights reports to better understand their situation.
12. Funding bodies should support research by academics and NGOs to understand the link between statelessness, poverty, and vulnerability, aiding in effective policy reform.

## **8.0 CONCLUSION**

In conclusion, the plight of stateless persons within the context of forced migration presents a pressing human rights issue that demands urgent attention and action. Through the exploration of the intersection between statelessness and refugee protection, this paper has underscored the formidable challenges faced by stateless individuals in accessing fundamental rights and protections. From barriers to asylum and legal recognition to the compounded vulnerabilities experienced by marginalized groups within stateless populations, the complexities of this issue are vast and multifaceted. Critically evaluating existing international and regional mechanisms, it becomes evident that while strides have been made in addressing statelessness, significant gaps and shortcomings persist. The rights of stateless refugees remain inadequately protected, leaving them vulnerable to exploitation, discrimination, and prolonged displacement. Therefore,

it is imperative for stakeholders, including governments, international organizations, civil society actors, and academia, to collaborate and redouble their efforts in addressing these deficiencies. Building upon the insights gleaned from legal frameworks, case studies, and empirical research, this paper proposes a set of recommendations aimed at bolstering the protection of stateless persons within the refugee regime. These recommendations include enhancing mechanisms for documentation, facilitating legal recognition, and promoting nationality rights for stateless refugees. Additionally, targeted interventions are necessary to address the intersecting forms of discrimination and exclusion faced by vulnerable groups within stateless populations. By advancing a human rights-based approach, stakeholders can work collectively to ensure that stateless individuals displaced by conflict, persecution, and human rights violations are afforded the dignity, security, and opportunities they rightfully deserve. Through sustained advocacy, policy reform, and capacity-building initiatives, progress can be made towards closing the protection gap and realizing the full potential of international human rights norms in safeguarding the rights and well-being of all individuals, irrespective of their nationality or legal status. Ultimately, by prioritizing the rights of stateless refugees, we can strive towards a more just and inclusive world for all.

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## EXAMINING REFUGEE RIGHTS UNDER THE HUMAN RIGHTS FRAMEWORK

Anita Verma<sup>1</sup>

### Abstract

*The plight of refugees and their human rights remains a critical concern on both international and national levels. This paper provides a comprehensive examination of the multifaceted challenges refugees face, analyzed through international human rights frameworks and national policies. At the international level, protections under the 1951 Refugee Convention and its 1967 Protocol outline state obligations; however, refugees often struggle to access their rights due to barriers such as restrictive asylum processes, violence, discrimination, and limited access to essential services like education and healthcare. The politicization of refugee issues and rising anti-immigrant sentiments have led to increasingly hostile national policies, including border closures and the criminalization of irregular migration, further exacerbating refugee vulnerabilities. Responses vary significantly among countries: while some adopt progressive measures to uphold refugee rights, others implement detrimental policies shaped by political ideologies and public opinion. This paper critically evaluates the effectiveness of existing mechanisms in safeguarding refugee rights, identifying key areas for improvement, including adherence to international obligations, enhanced support for resettlement and integration, and the promotion of tolerance. Ultimately, addressing these challenges necessitates a collaborative effort from the international community, national governments, and civil society to foster a more inclusive and compassionate environment for refugees, ensuring their rights and dignity are upheld.*

**Keywords:** *Refugee Rights, Human Rights Frameworks, Asylum Challenges, National Policies and International Human Rights instruments*

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## 1.0 INTRODUCTION

Forced migration, arguably the most egregious violation of human rights in today's world, has intensified over the years, exacerbating the global refugee crisis that has persisted since the aftermath of the First World War. According to a recent report by the United Nations High Commissioner for Refugees (UNHCR), the number of forcibly displaced individuals reached a staggering 80 million by mid-2020. Among them, 26 million were categorized as refugees, 4.2 million as asylum seekers, and 45.7 million as internally displaced persons. Asia, home to 41 percent of the global refugee population, bears the brunt of this crisis, with South Asia ranking fourth globally, hosting approximately 12 percent of all refugees. The question arises: why do individuals endure the perilous journey of forced migration, risking not only their own lives but also the lives of their loved ones? The reasons for their displacement are diverse, spanning civil wars, political and religious turmoil, ethnic conflicts, large-scale development projects, and other factors. The complexity of these causes underscores the challenge of comprehending why people opt for the uncertain life of a refugee. In recent years, the identification of root causes has gained prominence due to the significant movement of people within and across borders, placing considerable social and economic strain on host nations, particularly those in middle- and low-income brackets.

The limited resources in these countries make it arduous for refugees to access basic necessities, especially when they must compete with local communities for essential services.<sup>2</sup> India, from a multifaceted perspective, has served as a sanctuary for numerous waves of refugees, asylum seekers, and forcibly displaced populations throughout its history, including the post-independence era.<sup>3</sup> Notably, despite being a developing nation, India has successfully provided refuge to over 2.5 million refugees. The Constitution of India upholds certain fundamental rights applicable to non-citizens, including the Right to Equality,<sup>4</sup> the Right to Life and Personal Liberty,<sup>5</sup> and the Freedom to Practice and Propagate Religion.<sup>6</sup> The Indian Supreme Court has asserted that any violation of these rights can be remedied through legal means, stressing that refugees or asylum seekers should not face discrimination based on their non-citizen status.

In this paper, we delve into the profound issue of forced migration and the global refugee

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<sup>2</sup> Sumita Das Majumder, "Refugee Management in India: Policy Introspection", 5 ISIL 2005

<sup>3</sup> Ibid.,

<sup>4</sup> (Article 14)

<sup>5</sup> (Article 21)

<sup>6</sup> (Article 25).

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crisis, examining its causes and consequences. We also explore India's pivotal role as a safe haven for displaced populations, analyzing its legal framework and commitment to protecting the rights of refugees and asylum seekers. Through this exploration, we aim to shed light on the complexities of forced migration and the imperative of upholding human rights in addressing this pressing global challenge.<sup>7</sup>

## **I. MEANING & DEFINITION OF HUMAN RIGHTS**

Human beings possess certain basic rights which belong to them simply because of their very existence. These rights are the fundamental and inhere in a human being from their birth irrespective of their caste, creed, religion sex and nationality. These rights are commonly known as human rights. Human rights do not depend for their existence on any legal or moral practices of a country they become operative with the birth of the individual and are inalienable.<sup>8</sup>

**R.J Vincent:** Human rights are the rights that everyone equally has by virtue of his very humanity and also because of the reason of being grounded in an appeal to our human nature.<sup>9</sup>

**D.D Basu:** Human rights are the minimal rights which every individual possess against the state or other public authority by virtue of his being a member of the human family, irrespective of any other consideration.

Human rights are therefore rights which belong to an individual as a consequence of his very humanity. These rights are possessed by individuals every time and everywhere and cannot be deprived without a grave affront of justice.<sup>10</sup>

### **1.1 MEANING OF REFUGEES**

The term "refugee" originates from the ancient French word "refuge," meaning a "hiding place" or "shelter from danger or distress." Its roots can be traced back to the Latin word "refugere," which signifies "to flee," and "refugium," denoting "taking refuge or a place to flee back to."

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<sup>7</sup> available at: <https://www.unhcr.org/> last accessed on 19th september, 2023.

<sup>8</sup> Tim Dunne, Nichols J. Wheeler, "Introduction: Human Rights in Global Politics"<sup>4</sup> (Press Syndicate of the U.S.A)

<sup>9</sup> H.O Agarwal, "International Law & Human Rights", 754(Central Law Publication, Allahabad, 20th edn.,2014).

<sup>10</sup> D.D Basu, "Human Rights in constitutional Law", 5 (Prentice Hall of India Pvt. Ltd., New Delhi, 1994)



<sup>11</sup>In a broad sense, a refugee is an individual or alien who finds themselves outside their native place or habitual residence due to persecution, human rights violations, or disasters, whether natural or man-made.<sup>12</sup> A refugee, whether a man, woman, or child, is compelled to leave their country of origin due to a well-founded fear of persecution based on religion, race, nationality, sex, membership in a particular social group, or political opinion. It's essential to note that individuals fleeing criminal prosecution for non-political breaches of the law are excluded from the refugee category. Common to all refugees are the shared characteristics of being uprooted, homeless, and lacking national status and protection. A refugee is an involuntary migrant, often a victim of political turmoil, warfare, or natural catastrophes.<sup>13</sup>

## 2.0 DEFINITION OF REFUGEE:

There was and is no single definition of "refugee" suitable for all purposes. The term 'refugee' is an evolutionary as well as a contested concept.<sup>14</sup> Refugee is not a concept of customary international law. Therefore, refugee has not been defined thereunder. Refugee has been the subject of treaties and other international agreements. So, it is impossible to give one single definition, which could be used in all circumstances.<sup>15</sup> As Prof Goedhart rightly observed that: "A sociological definition of the term "refugee" differs from a legal one; the definition drafted for the purpose of the binding international agreement will look very different the definition adopted by an association with a humanitarian aid." However a more precise definition of a refugee is given as "a person having well-founded fear of persecution on grounds of race, religion, nationality or membership of a particular 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, was unable or, owing to such fear, was unwilling to return to it."<sup>16</sup>

However, in general terms, a 'refugee' is usually thought of a person compelled to flee his state of origin or residence due to political troubles, persecution, famine or natural disaster.<sup>17</sup> A man's status as a refugee is determined first and foremost by the factors which led to his

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<sup>11</sup> R.C. Chhangani, "Rights of Refugees Under Nigerian Law",30 JCPS 45(1996).University of Cambridge, United Kingdom,1994).

<sup>12</sup> Ibid.,

<sup>13</sup> See Supra-8

<sup>14</sup> Ibid.,

<sup>15</sup> G.J.V. Hemen Goedhart - "The Problem of Refugees", 267 (Recueil Des Cours,1953)

<sup>16</sup> Article 1(2) of the Convention Relating to the status of Refugees,1951.

<sup>17</sup> C.R. Partharathi "State's Obligation Towards Refugees: Vision and Reality",45(Oxford University Press, 2004)

condition: expatriation and the breaking of the ties that bound him to the states of his nationality.<sup>18</sup> A refugee is distinguished from an ordinary alien because of the lack of normalcy of relationship between him and the authorities of his state of origin, arising from the fear of political persecution upon his return. The refugee is distinguished from a stateless person because he, unlike the stateless person, may still have a de jure national status. The refugee is perceived as an involuntary migrant, a victim of circumstances which force him to seek sanctuary in a foreign country.<sup>19</sup>

### **3.0 INTERNATIONAL PERSPECTIVE FOR THE PROTECTION OF THE REFUGEES:**

#### **3.1 *Universal Declaration For Human Rights, 1948:-***

The rights of refugees under international law are derived from various sources, including treaties, customs, and general principles of international law. In addition to specific laws, there are also general human rights documents that provide protection for all individuals.<sup>20</sup> All states are therefore obligated to safeguard the human rights of refugees, as well as those of other individuals. The Universal Declaration of Human Rights (UDHR) of 1948, along with subsequent international treaties such as the International Covenant on Civil and Political Rights (ICCPR)<sup>21</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR), establish human rights as mandatory and non-negotiable. These rights are protected under customary international law, with some, like the right of asylum seekers and the principle of non-refoulement, attaining the status of jus cogens. While the UDHR sets out standards for human rights, it is not enforceable.<sup>22</sup> Therefore, the ICCPR<sup>23</sup> and ICESCR<sup>24</sup> were adopted to provide enforceable mechanisms for protecting these rights. States are permitted to progressively implement the provisions of these covenants based on their resources. Additionally, certain rights outlined in the UDHR have been

<sup>18</sup> Jacques Vernant, "The Refugee in the Post-war World" 13(George Allen and Unwin Ltd.,1953).

<sup>19</sup> Atle Grahl Moolen, "The Status of Refugees in International Law", (A.W. Sijthoff, 1966). The Shorter Oxford English Dictionary, 3rd Edition, 1977, The statute of International Court of Justice, 59 stat 105 1945, adopted on June 26 1945 and entered into force on October 24 1945 (ICJ Statute), article 38 (1).

<sup>20</sup> 18 The statute of International Court of Justice, 59 stat 105 1945, adopted on June 26 1945 and entered into force on October 24 1945 (ICJ Statute), article 38 (1).

<sup>21</sup> Adopted by the UN General Assembly on 10th December 1948. It is the basic document of Human Rights Law and was referred to as the Magna Carta of Human rights by Eleanor Roosevelt who chaired the UN Commission on Human Rights that drafted the document.

<sup>22</sup> available at <https://www.refworld.org>.last accessed on 20 september,2023 at 05:00 PM.

<sup>23</sup> UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966.

<sup>24</sup> Article 2 para 1 of ICESCR.

recognized as part of customary international law over time. The principles and provisions of the UDHR, along with those of the UN Charter, are seen as guaranteeing the human rights of all individuals, including refugees and asylum seekers.<sup>25</sup> The UDHR has also influenced national laws and constitutions, with many countries, such as India, incorporating its principles into their legal frameworks. According to the UDHR, states have a duty to protect the inherent dignity and worth of every human being, including refugees and asylum seekers. The principle of non-refoulement ensures that asylum seekers are not returned to countries where they may face persecution. These rights are further reinforced by the Convention on the Status of Refugees of 1951 and its 1967 Protocol. Even states that are not signatories to these conventions are still bound by customary law to fulfill the basic rights of refugees. If customary law is recognized as *jus cogens* internationally, it takes precedence over treaty provisions.<sup>26</sup>

### **3.2 UN CONVENTION ON STATUS OF REFUGEES, 1951:**

The United Nations adopted the Convention Relating to the Status of Refugees in 1951, commonly referred to as the Refugee Convention, under the UN General Assembly resolution 429(V). The preamble of the convention emphasizes the commitment, as outlined in the UN Charter and the Universal Declaration of Human Rights, to ensure the enjoyment of fundamental rights and freedoms for all individuals without discrimination.<sup>27</sup> This convention establishes the status of a 'Refugee' and delineates the protection of the rights associated with that status.<sup>28</sup> The primary objective of the Refugee Convention was to consolidate and extend the scope of protection provided by previous international agreements related to refugees. According to the convention, a 'Refugee' is defined as "any person who is unable or unwilling to return to their country of origin owing to a well-founded fear of persecution based on race, religion, nationality, membership of a particular social group, or political opinion." The fundamental purpose of the convention is to prevent contracting states from expelling a refugee from their territory if their life or freedom would be threatened due to factors such as

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<sup>25</sup> Article 53 of Vienna Convention on Law of Treaties, 1155 UNTS 331, done May 23, 1969, entered into force on Jan.27, 1980 (Vienna Convention).

<sup>26</sup> The Shorter Oxford English Dictionary, 3rd Edition, 1977.

<sup>27</sup> 30 Adopted by General Assembly Resolution 429(V) of 14 December 1950 and came into force on 22 April 1954.

<sup>28</sup> UN Convention Relating to the Status of Refugees signed in Geneva on 28 July 1951, 189 UNTS 150.

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race, religion, nationality, or social or political affiliation.<sup>29</sup>

The convention also outlines exemptions for certain individuals who may not be entitled to refugee status, including those who have committed crimes against peace, war crimes, or crimes against humanity, as defined by international law. Additionally, individuals guilty of serious non-political crimes outside the country of refuge or acts contrary to the purposes and principles of the United Nations may be excluded from refugee status. Key principles of the convention include non-discrimination, non-penalization, and non-refoulement. It prohibits the penalization of refugees for illegal entry or stay, with certain restrictions.<sup>30</sup> The principle of non-refoulement ensures that refugees cannot be expelled or returned against their will to a territory where they fear threats to their freedom or life.<sup>31</sup> Importantly, the convention establishes minimum standards for the treatment of refugees, including access to work, primary education, courts, and documentation such as refugee travel documents. It also delineates grounds for the loss of refugee status, including voluntary re-availing of the protection of one's nationality or re-establishment in the country left due to fear of persecution.<sup>32</sup> Additionally, individuals without nationality may lose refugee status if they can return to their former habitual residence after the circumstances leading to their recognition as a refugee cease to exist.<sup>33</sup>

**V. NATIONAL PERSPECTIVE RELATING TO STATUS OF REFUGEE:** As of January 31, 2023, India continues to stand out among developing nations for its remarkable record of providing sanctuary to over 2.5 million refugees since gaining independence in 1947. India's tradition of offering refuge transcends its borders, embracing diverse persecuted communities such as Jews and Parsees. Notably, during World War II, India welcomed thousands of Polish refugees, many of whom later returned to Poland or resettled elsewhere.<sup>34</sup> The post-independence era marked one of history's largest mass migrations, triggered by the India-Pakistan partition, which displaced over 140 million Hindus, Sikhs, and Muslims. While these individuals did not strictly fit the 1951 Convention's definition of refugees, India established a separate Ministry for the Rehabilitation of these Displaced Persons to address their needs.

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<sup>29</sup> 31 Article 1(2), Refugee Convention 1951.

<sup>30</sup> *id.*, Article 33

<sup>31</sup> Guy S. Goodwin Gill, "The Refugee in International Law" (Oxford University Press, 4th edn. 2021).

<sup>32</sup> Article 1(C), Refugee Convention.

<sup>33</sup> Article 53 of Vienna Convention on Law of Treaties which states that a treaty which conflicts with peremptory norms on the date of conclusion will be void.

<sup>34</sup> *Id.*, Article 1(C)(1) 36 *Id.*, Article 1(C)(2) 37 *Id.*, Article 1(C)(3) 38 *Id.*, Article 1(C)(4) 39 *Id.*, Article 1(C)(6)

In 1959, India witnessed another significant influx of refugees, this time from Tibet, where over 80,000 Tibetans sought refuge in neighboring countries due to religious persecution, torture, and other atrocities inflicted by the Chinese government. Prime Minister Nehru extended support to the Dalai Lama and his followers, offering asylum based on shared cultural ties and humanitarian concerns. Despite providing refuge, India refrained from officially recognizing the Tibetan Government in Exile to maintain solidarity with China. India's commitment to providing sanctuary extends to Afghan and Sri Lankan refugees, while a considerable number of Bangladeshi refugees have sought safety in India following its separation from Pakistan. However, the recent arrival of Rohingya refugees from Myanmar has prompted discussions on national security, with concerns raised about potential terrorist infiltration among the refugee population.<sup>35</sup>

#### **4.0 LEGAL FRAMEWORK FOR REFUGEE PROTECTION IN INDIA:**

In India, there is no specific legislation addressing the protection and status of refugees. Instead, the country deals with refugee matters at political and administrative levels, treating refugees under the laws applicable to foreigners. The Registration of Foreigners Act, 1939 mandates that every foreigner entering India must provide true particulars about themselves and the purpose of their visit to the registration officer to obtain a registration certificate. Similarly, the Foreigners Act of 1946 regulates the presence and departure of foreigners to and from India. Under the Foreigners Act, the executive is vested with broad powers to remove foreigners from India, a discretion typically exercised without judicial review. Section 3(2)(c) of the Foreigners Act, 1946 empowers the Central Government to execute such removals. This authority, including the power to refuse entry and prompt deportation for failure to meet entry conditions, was first affirmed by the Supreme Court in 1955. Subsequent judicial decisions have upheld the executive's discretion in this matter. Additionally, both the Parliament and various states in India have enacted legislation related to refugees, contributing to the legal framework governing refugee protection in the country.<sup>36</sup>

#### **5.0 CONSTITUTIONAL PROTECTION**

Refugees residing on Indian soil benefit from several provisions of the Indian Constitution that safeguard their fundamental rights, akin to those afforded to Indian citizens. These rights,

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<sup>35</sup> Sanjay K.Roy, "Refugee and Human Rights", (Rawat Publications, New Delhi, 2001). 43 Section 3(2)(c) of the Foreigners Act reads, "In particular and without prejudice to the generality of the foregoing power, orders made under this section may provide that the foreigner ... shall not remain in India, or in any prescribed area therein."

<sup>36</sup> International Commission of Jurists, *The Question of Tibet and the Rule of Law* (Geneva: ICJ, 1959)

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primarily enshrined in Part III of the Constitution, ensure equitable treatment and protection for refugees within the territory of India.

a) Part II - Citizenship (Articles 5-11): These articles delineate the provisions regarding Indian citizenship. While refugees may not necessarily be Indian citizens, they are still entitled to certain fundamental rights guaranteed by the Constitution.

b) Article 14: Equality before Law: Article 14 ensures that refugees, like Indian citizens, cannot be denied equality before the law or equal protection of laws within the territory of India. This provision prohibits discrimination based on nationality or refugee status.

c) Article 20: Protection in respect of conviction of offences: Article 20 provides safeguards to refugees facing criminal charges, including protection from ex post facto laws, double jeopardy, and self-incrimination. This ensures that refugees are afforded fair treatment under the law.

d) Article 21: Protection of life and personal liberty: Article 21 guarantees the protection of life and personal liberty to all individuals, including refugees. This provision ensures that refugees cannot be arbitrarily deprived of their life or liberty, except according to established legal procedures.

e) Article 22: Protection against arrest and detention: Article 22 provides refugees with protections against arbitrary arrest and detention. It includes rights such as knowing the grounds for arrest, the right to defense by a legal practitioner, and the right to be produced before a magistrate within specified timeframes.

f) Article 25(1): Freedom of conscience and free profession, practice, and propagation of religion: Article 25(1) grants refugees the freedom to practice and propagate their religion without discrimination. This ensures that refugees have the right to follow their religious beliefs without interference from the state.

g) Article 27: Freedom as to payment of taxes for the promotion of any particular religion: Article 27 ensures that refugees, like Indian citizens, are not compelled to contribute to the promotion of any particular religion through taxes. This provision upholds the secular principles of the Indian Constitution.

h) Article 28(3): Freedom as to attendance at religious worship in educational institutions: Article 28(3) guarantees refugees the freedom to attend religious worship in educational institutions, ensuring that they can practice their religious beliefs freely within educational settings.

i) Article 13 read with Articles 32 and 226: These articles empower the High Courts and the Supreme Court of India to declare any law or administrative action contravening the

aforementioned rights as null and void. This ensures that refugees have access to legal remedies in case of violations of their fundamental rights. In all the aforementioned provisions, the term 'person' is understood to include any alien, such as refugees, excluding enemy aliens. Articles 22(1), 22(2), and 25(1) of the Indian Constitution underscore that the principles of natural justice in the common law system are equally applicable in India, extending protection even to refugees.<sup>37</sup>

## 6.0 LAWS GOVERNING REFUGEES

India currently employs several domestic legislations to address refugee matters, without drawing a distinct line between "foreigners" and "refugees." These laws include:

- Passport (Entry into India) Act, 1920<sup>38</sup> & Passport Act, 1967.<sup>39</sup>
- Registration of Foreigners Act, 1939.
- Foreigners Act, 1946.
- Foreigners Order, 1948.

The Passport (Entry into India) Act, 1920, and the Passport Act, 1967 do not differentiate between genuine refugees and other categories of foreigners, such as economic migrants or tourists. Consequently, refugees face the risk of arrest by immigration authorities and potential illegal deportation due to the absence of a valid passport. Imposing penalties on refugees for this reason seems unjustifiable, considering their circumstances and the challenges they face in obtaining passports amid turmoil. While refugees may obtain valid passports and identity cards upon entering Indian territory if they fulfill certain criteria, currently, only Tibetan refugees have been granted this privilege. This preferential treatment stems from the presence of their political and spiritual leader in India, along with their parliament being located on Indian soil. However, some scholars criticize this practice, arguing that it compromises India's sovereignty.

The Registration of Foreigners Act, 1939 authorizes the Central Government to establish rules for foreigners regarding reporting, proof of identity, and registration certificates. However, applying this law to refugees adds to their hardships, as they have already endured persecution in their home countries. Moreover, the arbitrary use of Central government power to harass genuine refugees lacks proper oversight, leaving them vulnerable to exploitation. Similarly, the

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<sup>37</sup> Bimal N Patel, *India and International Law*, (Martinus Nijhoff Publishers, 2005).

<sup>38</sup> THE PASSPORT (ENTRY INTO INDIA) ACT, 1920, ACT NO. 34 OF 1920

<sup>39</sup> THE PASSPORTS ACT, 1967 ACT NO. 15 OF 1967[24th June, 1967.] An Act to provide for the issue of passports and travel documents, to regulate the departure from India of citizens of India and other persons and for matters incidental or ancillary thereto.

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Foreigners Act, 1946 imposes additional restrictions on refugees, dictating whom they can meet and the specific routes through which they can enter the country. Critics argue that this act grants authorities unlimited power to arrest and detain any foreigner based on mere suspicion of non-compliance, further exacerbating the challenges faced by refugees.

### **7.0 JUDICIAL APPROACH TO REFUGEE PROTECTION IN INDIA:**

The legal status of refugees in India is that they are to be treated as foreigners under the Foreigners Act, as India does not have any specific law to deal with refugees. India is also not a signatory to the refugee convention and its protocol, and there is no separate National legislation for dealing with refugee issues therefore the Government of India adopts adhoc policies based on political exigencies and the discretion of the executive. The Constitution of India, 1950 provided for strong fundamental rights which the courts have liberally interpreted extending the protection of certain provisions even to refugees. Under right to judicial remedy many refugees have sought protection through the High Courts and the Supreme Court based on the protection given by the Constitution of India which is applicable to both citizens and non-citizens. One important provision is Article 21 of the Indian Constitution which envisages protecting the life and personal liberty of a person.<sup>40</sup> Based on this provision, several petitions have been filed by asylum seekers and refugees contending that sending a person to a place where they may face persecution will violate their right to life. Courts have agreed to that this provision is also applicable to refugees and therefore they cannot be sent to places where their life is threatened. This is an example how India has helped in protecting the right to non-refoulement, through constitutional interpretation by the higher courts.<sup>41</sup> In the landmark decision of the Indian Supreme Court in the case of Chakma refugees from Bangladesh, the court prevented the government from sending them back as there was threat to their lives. The Government of India in 1989 gave assistance to the 3000 refugees who came from Myanmar, ensuring that no one would be sent back even though they did not recognize them as refugees. But the same was not the case in 2015 when Government of India returned some Rohingya refugees on the grounds of national security. The government had apprehensions that there could be militants posing as refugees within their ranks. Government of India decides on taking refugees when there is a mass influx, while individual cases are handled by UNHCR. In

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<sup>40</sup> 49 R. J. S. Tahir (eds.) Ragini Trakroo Zutshi, Jayashree Satpute, Md. Saood Tahir: Refugees and the Law, 2edn, HRLN, 2011, pp 78.

<sup>50</sup> Ibid, pp 79. <sup>51</sup> National Human Rights Commission v. State of Arunachal Pradesh, 1996 SCC 742.

<sup>52</sup> 1999 CrLJ 919.

<sup>53</sup> AIR 1981 SC 1886

<sup>41</sup> 51 National Human Rights Commission v. State of Arunachal Pradesh, 1996 SCC 742.



several cases the courts have suspended deportation of refugees while their applications are pending for consideration of refugee status with UNHCR. In the landmark case of *Ktaer Abbas Habib Al Qutaifi v Union of India*<sup>42</sup>, the Gujarat High Court upheld the principle of non-refoulement under the wide umbrella of Article 21 of the Indian Constitution and decided not to deport the two Iraqi nationals to their original country as long as they had a fear for their life and liberty. Instead, they were handed over to UNHCR in India. *Louis De Raedt v. Union of India*<sup>43</sup>, the court held that even non-citizens have the fundamental right to life, liberty and dignity.

### 8.0 SUGGESTIONS AND RECOMMENDATIONS:

There have been endless debates and discussions over which is better passing a domestic legislation or framing a refugee convention specifically for India. The various recommendations are:

#### 8.1 NEED FOR A DOMESTIC LAW

1. A domestic law is needed in India to ensure that all refugees are given basic protection. Without that, refugee rights are not rights in the real sense, they are simply privileges at the hands of the administration.
2. A domestic law should also define refugees to include “**internally displaced people**” due to natural calamities, terrorist activities. For instance, the Kashmiris were forced to flee Kashmir due to the militant activities.
3. Housing and employment can be ensured to refugees so that they can become self-reliant. A number of civil society organizations should work in collaboration with the Govt. under this act to improve their living conditions.
4. A domestic legislation will overrule all the existing acts like the Passport act and the foreigner act and will reduce the suffering of refugees by specifically dealing with their problems. A domestic legislation will make the procedure of granting refugee status simple, fair and transparent. It will also call for greater accountability and checks on the power of the officials.
5. It will abolish discrimination which currently exists among refugees of

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<sup>42</sup> 1999 CrLJ 919.

<sup>43</sup> AIR 1981 SC 1886

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different nationalities.

6. Special provisions guaranteeing protection to women and children should be made because in the Indian society, crimes against women (rape) and children (child trafficking) are at its peak. This will also be in consonance with India's obligations under UNCRC.
7. India is a superpower in Asia, so it has a tendency to “**dominate**” over other nations. In such a case drafting a South Asian Refugee convention will be of great significance to ensure refugee protection.
8. The convention can be drafted by experts from all countries highlighting their specific issues relating to the refugees based on the understanding of each nation. In this way, the convention will reflect the background of every country.
9. The definition of refugee should be broadened to incorporate people displaced due to environmental disasters, socially ostracized because of admitting openly of a different sexual orientation and people fleeing because of threat caused by crimes against women and children. This can ensure that there is no western intervention in case of dealing with refugees and at the same time, maximum protection can be given.

### **9.0 CONCLUSION**

Thus, at last it can be concluded that Protection of the Refugees in today's world is much more complex undertaking than it when the 1951 convention relating to the status of refugees was drafted. Today refugees are not only those persons who satisfy the traditional definition to the term refugees but also victims of all sorts of conflicts. The refugee problem is reaching critical proportions in almost all the parts of the world, placing the international and national governance under stress of their protection. India has important role in treatment of refugees because it shelters a large population in the world. However, India still lacks in providing clear standards for refugee treatment and is resulting in violations of the international norms for treatment of refugees. Thus, in order to protect refugees India has need to improve domestic laws, pass relevant legislations for the protection of refugees and at the same time monitoring refugee groups. Along with all these there is dire need to conform with the International Community and must accede the Refugee Conventions or Protocols.