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REFUGEE PROTECTION IN LIGHT OF THE EMERGING NATIONALIST GOVERNMENTS

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ABSTRACT

The disastrous effect of the two World Wars on both person and property resulted in the international community recognising the need to set aside their nationalist agendas and ideological differences to bring about national and international development while protecting rights of both States and individuals. However, the rise of the terrorist organisations and their attacks from the early 2000s on various States promoted strength to populist nationalist feelings across the globe. It also created wide-spread sentiments against immigrants and refugees. Recent years have seen political parties with underlying populist agendas receive majorities in elections in many States, especially in Europe, USA and Asia. During and after the 2015 Refugee Crisis, these governments implemented policies that suited their ideologies irrespective of them being in derogation to their humanitarian obligations. However, recent years have seen a trend of political parties with a nationalist agenda attaining political majorities in many States. Recent years have seen political parties with underlying populist agenda receive majorities in elections in various States, especially in Europe, America and Asia. During and after the 2015 Refugee Crisis, these governments implemented policies that suited their ideologies irrespective of them being in derogation to their humanitarian obligations. This paper analyses the growth of nationalist governments and their impact on the International Refugee Law.

Keywords: Refugee, International Refugee Protection, Nationalism, Politics.

INTRODUCTION:

The UN Refugee Agency estimates that there are about 26 million¹ refugees in the world. This large number of refugees in the world is changing the States- their governments and policies. Running away from persecution or the fear of being persecuted, refugees often reach another country in the hope of a safe and better life. However, during and after the 2015 refugee crisis, the governments in many 'liberal' States adopted policies that gave undue importance to their own interests as a State rather than their humanitarian obligations. Hungary in 2015, for example, passed a new anti-immigrant law which imposed media regulations and sanctioned the building of a wall along its border with Serbia, thereby

¹ UN High Commissioner for Refugees, Population Statistics Database, <https://www.unhcr.org/figures-at-a-glance.html>

declaring that refugees are not welcomed in their State². It was right after the Hungarian Prime Minister, Viktor Orban's speech pronouncing that Hungary is an illiberal democracy³ and this marks one of the most notable transformations in recent European politics. The unwillingness to tolerate and accommodate refugees by the nationalist Hungarian government is a mere reflective of the practices in many other European States, USA and South- Asian States. This paper analyses the impact of the rise of nationalist governments in the States on international refugee law.

WHO IS A REFUGEE?

The 1951 Convention on Status of Refugees and its 1967 Protocol remains the fundamental international instruments in determining the status of refugees and the protection offered to them. The determination of refugee status under the 1951 Convention is declaratory⁴. The recognition as a refugee under the 1951 Convention enables a person to receive international refugee protection which provides along with survival rights and certain civil and socio-economic rights to the person. Under international law, a refugee is a person forced to leave his home for reasons of a well-founded fear of persecution because of his race, religion, nationality, membership of a particular social group or political opinion and is outside the country of origin and does not have its protection.

The nationality of a person determines his legal personality. This nation-State has the responsibility to protect the individual, domestically and internationally.⁵ Refugees lack this protection of their home state which makes them vulnerable.

After the Second World War, the end of the Cold War and the instability it caused because of armed conflicts and the formation of new States, increased the number of refugees. There was a considerable decline in both the number and intensity of international and civil wars till 2010 when the Arab Spring reached its peak. The Arab Spring and the conflicts it brought in along with massive human rights violations in countries like Syria resulted in the new refugee situation. The 1951 Convention does not provide for a refugee status determination. It has helped States to take restrictive practice concerning the acceptance of refugees into their territory. These practices can be directly related to the rise of nationalist governments across the globe.

RISE IN NATIONALIST GOVERNMENTS

Studies show that nationalist movements are gaining strength around the world due to a “perceived loss of national sovereignty, increased economic inequality and changes in the cultural and demographic composition”⁶. The increased importance to the protection of human rights of the people in the post-World War era resulted in the development of international law. The acceptance of the idea that international law protects both states and individuals and the rise in free- trade agreements and global communications resulted in the liberalisation of nation-States.⁷ Regional and global cooperation along with the peace and stability it brought was a direct result of globalisation that occurred from the 1990s. However, in light of the Arab Conflict and the refugee situation that it brought in, the effects of globalization were weighed against its negative consequences like economic imbalance, issues on national security, the mass inflow of refugees and immigrants.⁸ The rise in terrorist organizations, terror attacks and increase in crimes related to gender, conflicts in cultural and traditional values have created

² Lauren Fielder, *Is Nationalism the Most Serious Challenge to Human Rights: Warnings from Brexit and Lessons from History*, 53 *Tex. Int'l L. J.* 211, 217(2018).

³ *Id.* at 218.

⁴ GUY.S.GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW*, 22 (2nd ed.1996).

⁵ DAVID WEISSBRODT, *THE HUMAN RIGHTS OF NON-CITIZENS* 81 (2008).

⁶ Michael J. Mazarr, *The Once and Future Order: What Comes After Hegemony*, 96 *FOREIGN AFF.* 25, 28 (2017).

⁷ *Id.* at 29.

⁸*Id.*

a fear in people about the people who generally do not belong to their State. This fear was successfully passed down through generations and in different forms. The rise of nationalism in the present era is established on the exploitation of this fear along with the other perceived negative consequences of globalisation by various political parties. The rise in power of the many political parties with nationalist and populist agendas in different parts of the world, simultaneously, has repercussions in international refugee protection.

NATION-STATE, NATIONALITY AND NATIONALISM

The change in the idea of law as one deriving from people's will rather than from nature or God and monarchs resulted in the development of the concept of nationalism based on popular sovereignty in the early 19th century. The two World Wars and their excruciating impacts on human life and property led to the rise of the need for international cooperation and obligation to protect and respect human rights. This resulted in the nationalist feelings reaching a dormant state in many parts of the world, irrespective of the fact that many small groups of militant nationalists remained active. However, recent years have seen a trend of political parties with a nationalist agenda attaining a political majority in many States.

A domestic legal system recognises its individuals on basis of their nationality. It forms the basis of rights an individual has against the State. Nationalism on the other hand is "primarily a political principle"⁹. It is based on the fact that cultures existed before nations and nationalism "takes pre-existing cultures and turns them into nations"¹⁰. Amartya Sen¹¹ states that nationalism means identity and the values attached to it and hence is a potential cause of clashes and conflicts. Nationalist sentiments have the power to break or make the global world order and hence it is of utmost importance to understand whether the political leaders promoting these ideas, promote human rights violations rather than unity and peace. Nationalism has always been used to exclude the ones who do not belong to the national community¹². And it is this sentiment of nationalist propaganda that threatens the already vulnerable refugee community.

REFUGEES AND NATIONALISM:

Any event that challenges or is feared to threaten the identity of a nation-state and its nationalist outlook can promote the growth of outward expression of nationalist sentiments. As seen from the recent experiences, increased migration- voluntary or forced, is one such event. The supporters of the nationalist sentiments provide various reasons for the same. Wimmer and Glick Schiller¹³ identifies four reasons that the nationalist propagandas provide in support of their arguments in denying asylum and support to the refugees. The first and foremost reason is that "migration destroy the isomorphism between people, sovereign and citizenry."¹⁴ The refugees are perceived as 'others' who complicates the structural system of the existing society in the host State. It is this identity issues that make people consider refugees as threats to society. The "isomorphism between people and nation will be destroyed"¹⁵ by the migrant population is another reason put forward by the supporters of nationalism. In light of the issues relating to Citizenship Amendment Act, 2019 (hereinafter CAA) and National

⁹ ERNEST GELLNER AND JOHN BREUILLY, *NATIONS AND NATIONALISM*, 30 (2nd ed.2008).

¹⁰ *Id* at 33.

¹¹ Amartya Sen, *Is Nationalism a Boon or a Curse?* XLIII EPW 39, 42 (2008).

¹² Hilde Weiss, *A Cross-National Comparison of Nationalism in Austria, the Czech and Slovak Republics, Hungary, and Poland*, 24 *Political Psychology* 377, 379 (2003).

¹³ A. Wimmer and N. Glick Schiller, *Methodological Nationalism and beyond: Nation-state Building, Migration and the Social Sciences*, 2(4) *Global Networks*, 301 (2002).

¹⁴ *Id.* at 309.

¹⁵ A. Wimmer and N. Glick Schiller, *Methodological Nationalism and beyond: Nation-state Building, Migration and the Social Sciences*, 2(4) *Global Networks*, 309 (2002).

Register of Citizen in India, this fear can be explained a little more specifically. According to Giorgio Agamben¹⁶ a “state of exception” is created when the “home sacer or bare life” is reduced to bare bodies, stripped of all their civil, political, economic, social rights and send to camps. Here, the State as sovereign enjoys an absolute monopoly of power or violence through law. For example, through the CAA, the Indian government has brought in a defence mechanism to protect India’s identity and sovereignty by creating a law of exception based on religion.

The third argument is related to tensions that the inclusion of refugees in a society creates and the supporters of the nationalist propaganda provide that this resentment destroy the “isomorphism between people and solidarity group”¹⁷. For this, the example put forward is the orthodox practices of the refugees who are majorly Muslims and that their practices can have repercussions on gender, eating patterns and security. They also identify that “every movement across the borders of the States affects the rule of sedentariness within the boundaries of the nation-state”.¹⁸The belief that providing asylum to refugees, complicates the existing social structure, the historical sanctity of the nation-state, the inviolability of its borders and territory along with its political sovereignty resulted in the rise of the nationalist propaganda in the recent years. Along with these, the possible strain on the already scarce natural resources in a State, lack of employment, deteriorated economic conditions also promote the hatred towards the “other”.

The terrorist attacks, ever since 2001 and the threat of Islamic State infiltration through the refugee population arising from the conflict States are also brought in as a concern of the host-state governments to deny asylum. The fact that the majority of the refugee population belong to the Muslim religion has been used to strengthen such arguments and further develop the populist national governments. For example, Muslim refugees were the central campaign topic of Viktor Orban in his 2018 elections and the same helped him receive an increased majority. This fear against the Muslim community stems from the values that form the basis of many European States and USA. In India, irrespective of the secular character of State that the Constitution of India stands for, the right-wing politicians promote and exploit this fear against the Rohingya refugees. The Nationalist parties in Europe, USA and India fuel the fear among the common citizens and benefit out of the same, leaving millions of people to lose their only hope just because they were born in a particular religion or nation.

BARRIERS IN REFUGEE PROTECTION

In September 2015, Hungary send fully armed soldiers to its borders and the anti-immigration laws authorized use of “dogs, rubber bullets, tear gas and nets” to prevent the entry of refugees.¹⁹This showcases the State’s willingness to protect its people and the intolerance towards refugees and this intolerance is a direct result of Hungary’s “own brand of nationalism”. The construction of a fence along Hungary’s Serbian border and the fact that it received support from many politicians, world-wide, has significance about the actual conditions of refugee and their protection in the world. Hungary, with its constitutional principles embedded in Christianity, fears that the entry of the refugees who are majorly raised in another religion and also representing different culture and tradition destroy their principles and traditions²⁰. Although many civil societies in Hungary had responded against the governmental policies, a large majority of the people supported the government policies as

¹⁶ GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* 13 (Daniel Heller Roazen trans., Stanford University Press 1998).

¹⁷ Wimmer, *supra* note 13, at 310.

¹⁸ *Id.*

¹⁹ Kim Lane Scheppele, *Orban’s Police State*, *POLITICO*, (Sept 14, 2015)

<http://www.politico.eu/article/orbans-police-state-hungary-serbia-border-migration-refugees/>.

²⁰ Rebecca Mendelsohn, *The European Refugee Crisis: Nationalist Backlashes within the European Union*, 7 *MJUR* 150, 164 (2017).

they felt that refugees will destroy Europe and hence Europe is to be saved from these people. The general trend of favouring the far-right politics in Hungary is an example of the rising nationalism and is evident in the policies adopted by the governments of Austria, France, Italy and Netherlands.

During the refugee situation, Sweden followed an open-door policy and received 150,000 asylum applications in 2015 only. However, the increasing number of migrants along with growing opposition by anti-migrant political forces pushed the Swedish government to start border checks in January 2016.²¹ The German government, committed to its humanitarian obligations, adopted an open-door policy, receiving about 1.1 million asylum seekers in 2015 only. But many street protests against the so-called 'Islamization' of the country by right-wing populist forces and several migrant hostels were attacked in Germany which forced the government to insist on other member countries of the European Union to accept their mandatory quota of migrants.

Brexit, which although was centred on many economic and political reasons, can also identify the support of the general public towards the nationalist propaganda. Brexit also can be analysed as an immediate consequence of the refugee situation and an exit way to avoid burden-sharing with other European countries. The Trump Administration in the USA has also been unwelcoming to the refugee situation. Donald Trump's victory in the Presidential elections was in itself a markable example of the shift to right-politics around the world. From drastically reducing the maximum number of refugees that can enter the United States, the US government has also imposed new security procedures that have lengthened waiting period for a refugee before he or she can be admitted to the country²². The increase in the waiting period for refugee status determination has direct repercussions over the safety of the refugee and this has reduced the prospects of refugees who can settle in the USA. Campaigns to both Brexit and Trump's presidential elections were built on notions of nationalism, state sovereignty, xenophobia along with addressing communities threatened by terrorists or illegal immigrants, religious communities and communities left behind by globalization.

In South Asia, the Indian government had enacted policies to deny asylum to Rohingya Muslims. The identity crisis that threatened the Rohingyas in form of persecution has followed them to India. India had always been a beacon of hope for the people who left their country of origin. However, in India, the nationalist government advocated that Rohingyas created disturbances in their homeland and this, along with the increased threat of militant infiltration, as reasons to suggest that Rohingyas are a threat to the national security and that they are not to be protected. India, as a non-party to the 1951 Convention, still have the duty to protect the refugees within their territory from non-refoulement to a place where they face threat. National security and national sentiments are used as grounds by the nationalist government to receive the support of the people to execute their propagandas. India had always been a safe-haven for refugees from the neighbouring States is now slowly becoming a lost hope.

CONCLUSION

The protection of the basic rights of refugees and providing for their necessities have always been a struggle for the international refugee law regime. Adding to this, unprecedented obstacles in seeking protection which includes border closures, discrimination, refoulement and hostile host communities have further challenged the effectiveness of the humanitarian obligations that each State has towards the refugees. Irrespective of a State been signatory to the 1951 Convention, each state has the obligation to protect the refugee within its territory. However, from 2015, there has been an increasing trend wherein States shun this humanitarian obligation. The Refugee situation from 2015 has brought in the

²¹ Claudia Postelnicescu, *Europe's New Identity: The Refugee Crisis and the Rise of Nationalism*, 12(2) *European Journal of Psychology*, 203, 206 (2002).

²² Margie McHugh, *In the Age of Trump: Populist Backlash and Progressive Resistance Create Divergent State Immigrant Integration Contexts*, 5 Migration Policy Institute Policy Brief (2018).

inadequacies of international responses to refugee protection. Unless the refugee law and its institutions, reflect the contemporary changes in conflict and displacement along with understanding the changing attitude of the States, refugee protection will be more difficult in the future. The main reason for the challenge to the regime is that the developed nations have increasingly forced the less developed states to cater to the needs of the refugee population. Most of the developed States have, in the pretext of choosing their national security over their humanitarian considerations, denied the hope of safety for many people. They have cultivated a fear among their citizens against the "other". There have been instances where civil societies have rose to the position to challenge the governmental policies in many States. The civil societies should be able to work jointly with the international organisations and respective State governments to provide protection and basic amenities to the refugees, for their safety, equality and freedom. The fear among the people in the host States should be addressed by a joint effort of the civil societies and the international organisations. Equal efforts should be done to help the refugees integrate with the local social structures of the host State. With no immediate solution to the conflicts that lead to the refugee crisis, there arises a need to have a policy where the humanitarian considerations of people who have lost their home to threats or conflicts, and national security of the host countries along with their economic conditions are balanced.

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