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# Refugees in the EU: Right to Asylum or Languish? - A Critical Analysis

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## ABSTRACT

*The European Union has for decades been the destination of millions of refugees seeking asylum after being persecuted in their own country. Asylum is a fundamental right recognized by the Geneva Convention of 1951. Various international instruments contain provisions guaranteeing rights to refugees and asylum-seekers. In 1999, the Common European Asylum System (CEAS) was established to handle the issue of granting asylum to refugees. Yet, some challenges and anomalies still exist, making the quest for asylum even more difficult. There is a need to spearhead reforms in the asylum system considering the increasingly globalizing nature of the world.*

## I. INTRODUCTION

The very circumstance of being torn apart from one's roots wreaks havoc in one's life. Besides the problems already faced by asylum-seekers, landing on the soil of a new country also poses problems in terms of a long-drawn asylum procedure and uncertain socio-economic conditions. While several international instruments of high stature do provide for the safeguard of fundamental rights of these refugees, their on-ground implementation poses a big question mark. While on the one hand they are deprived of their identity, on the other, they are more often than not, subjected to gruesome living conditions. The hope of seeking asylum in a safe haven is also crushed for many owing to its problematized nature. There is a need to highlight the challenges of the asylum system in the EU and craft a way forward to tackle them.

### (A) Research methodology and acknowledgements

The selection of sources for this research paper was done after carefully selecting the area of research – Refugee Rights and the Challenges of Asylum in the European Union. This being a form of doctrinal research, secondary sources have been used to corroborate all facts, legal regulations, and international conventions. Credible legal databases such as Hein Online, JSTOR and West Law Asia have been used to extract articles from reputed sources like Georgetown Immigration Law Journal, International Journal of refugee Law, International Journal of Law Management and Humanities, Journal of Law and Administrative Sciences, that

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provide extremely valuable content on contributions made by scholars to this field.

### **(B) Objectives of the research paper**

This paper aims to give a comprehensive picture of Refugees and Asylum in the European Union. First, the paper enumerates the social and economic rights that various International Conventions grant to refugees. Then, it goes on to connect the Migration Crisis of 2015-16 and the challenges of the Asylum system in the EU.

## **II. RIGHTS GRANTED TO REFUGEES – UNCONDITIONAL OR PARTIAL?**

The **Geneva Convention Relating to Status of Refugees 1951** provides for economic and social rights such as public education, health, employment, housing, and social security. It is rather unfortunate that these rights are often limited to “established refugees” staying in state parties and not to asylum seekers.<sup>2</sup> *Non-Refoulement*, defined as the right to not be returned to the country of persecution is the cornerstone of refugee law, and the denial of socio-economic rights would constitute a violation of this absolute right given in Article 31 of the Geneva Convention. The international human rights law goes beyond the refugee-centric rights of the Geneva Convention and grants rights of universal nature.<sup>3</sup> The **International Covenant on Civil and Political Rights (ICCPR)** and the **European Convention of Human Rights (ECHR)** apply to both nationals and non-nationals. The principle of *Non-Discrimination* guarantees rights to all individuals irrespective of race, color, sex, language, political opinion, social origin, or nationality. The **International Covenant on Economic, Social and Cultural Rights (ICESCR)** is limited in scope as compared to the ICCPR as it distinguishes between nationals and non-nationals in some respects. The state has been recognized as the “provider” of rights.<sup>4</sup>

Article 12(1) highlights the duty of the state to ensure that everyone enjoys the highest attainable standard of mental and physical health. However, for refugees and asylum seekers who are wary of their shelter, this right seems rather meaningless. The **UN Special Rapporteur on the Right to Adequate Housing** highlights this point.<sup>5</sup> Social security, that constitutes both “earned” benefits and “need-based assistance” are provided for in Article 9, however, it is skewed when it comes to its actual implementation. The right of education, encompasses language and

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<sup>2</sup> Ryszard Cholewinski, Economic and Social Rights of Refugees and Asylum Seekers in Europe, 14 GEO.IMMIGR. L.J. 709 (2000).

<sup>3</sup> Ryszard Cholewinski, Economic and Social Rights of Refugees and Asylum Seekers in Europe, 14 GEO.IMMIGR. L.J. 709 (2000).

<sup>4</sup> Ryszard Cholewinski, Economic and Social Rights of Refugees and Asylum Seekers in Europe, 14 GEO.IMMIGR. L.J. 709 (2000).

<sup>5</sup> Ryszard Cholewinski, Economic and Social Rights of Refugees and Asylum Seekers in Europe, 14 GEO.IMMIGR. L.J. 709 (2000).

culture-based training for children, and vocational training for adults in the country of asylum. Denmark, Finland, Luxembourg, Spain and Sweden are the only EU countries who have made this facility available. Article 22 of the Refugee Convention prioritizes free primary education. Article 2 and Article 14 of the ECHR contain a non-discrimination clause exclusively for the sphere of education. Twin objectives of education are enshrined in Article 13(1) of the ICESCR – full development of individual personality and effective participation in society. <sup>6</sup>The Geneva Convention in Article 17(1) provides the right to employment only for those refugees who stay in state parties. In some countries, certain period of residence would provide employment, while in others, discrimination is prevalent on the ground of priority. In most Eastern European Countries, asylum seekers are barred from work.

The **Human Rights Committee (HRC)** has most rightly so, termed the right to life as the “supreme right”, and these are stated in Article 6(1) of the ICCPR and Article 2(1) of the ECHR.

<sup>7</sup> Article 3 of the ECHR prohibits any derogatory treatment, which was defined in *East African Asians v. United Kingdom*, as any interference that grossly humiliates one before others and infringes dignity.<sup>8</sup> Article 8(1) of the ECHR grants the right to private and family life, and home, which was affirmed in cases like *Lopez Ostra v. Spain* and *Guerra and others v. Italy*, wherein the well-being of residents was affected because of environmental pollution.<sup>9</sup>

Article 47 of the **Charter of Fundamental Rights of the European Union** provides for right to an effective remedy, but when taken in the context of accelerated asylum procedures, the remedies are often unfair and inaccurate. Lengthy procedures prove expensive for the state and also increase the threat of unauthorized refugees staying in the country, which is why states seek to dispense off these cases speedily. In *IM v. France, the European Court of Human Rights (ECtHR)* ruled that time was an important factor, but this does not justify hasty decisions.

The **Qualification Directive** of the EU lists criteria for granting refugee or subsidiary protection status. The **Procedures Directive** grants certain rights to refugees – right to be informed on asylum procedures, right of access to legal advisor, right to an interpreter and right to remain on the territory of the member state. <sup>10</sup> The **Common European Asylum System (CEAS)** was

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<sup>6</sup> Ryszard Cholewinski, Economic and Social Rights of Refugees and Asylum Seekers in Europe, 14 GEO.IMMIGR. L.J. 709 (2000).

<sup>7</sup> Ryszard Cholewinski, Economic and Social Rights of Refugees and Asylum Seekers in Europe, 14 GEO.IMMIGR. L.J. 709 (2000).

<sup>8</sup> *East African Asians v. United Kingdom*, App. Nos. 4403/70-4419/70, 4422/70, 4423/70, 4434/70, 4476/70-4478/70, 4501/70 & 4526/70-4530/70 (joined), 78-A Eur. Comm’n H.R. Dec. & Rep. 5 (1994).

<sup>9</sup> *Lopez Ostra v. Spain*, App. No. 16798/90, 20. Eur. H.R. Rep. 277, 277 (1994); *Guerra v. Italy*, App. No. 14967/89, 26 Eur. H.R. Rep. 357 (1998).

<sup>10</sup> Marcelle Reneman, Speedy Asylum Procedures in the EU: Striking a Fair Balance between the Need to Process Asylum Cases Efficiently and the Asylum Applicant’s EU Right to an Effective Remedy, 25 INT’L J. REFUGEE

set up in 1999 with the objective of harmonizing and improving asylum laws, yet significant differences are observed between member states of the EU in terms of protection to refugees and their reception.

### III. THE ‘MIGRATION CRISIS’ OF 2015-16

In 2015-16, Europe witnessed the greatest entry of migrant refugees since the time of World War II. The **UN Refugee Agency** estimates that about 20 people are displaced in a minute. Scholars have broadly categorized migration into two types: (i) Push Migration that arises when people leave an area due to low standard of living, unavailability of job opportunities, natural disasters, war or food scarcity (ii) Pull Migration that arises when people migrate to an area attracted by its better standard of living, lucrative job opportunities, and other amenities.

People from Morocco, Algeria, Guinea, Senegal, and Cambodia took the Western Mediterranean route, people from Sub-Saharan African Countries like Nigeria and Libya took the Central Mediterranean route, while those from Bulgaria, Greece, Cyprus, Syrians, Iranis, Afghans and Pakistanis took the Eastern Mediterranean route to enter into the European Union. The migration crisis is primarily attributed to the liberal model introduced by the United States and the NATO allies in the Middle East, with which the countries were unable to cope up, resulting in civil wars.<sup>11</sup> The Arab Spring and the Syrian Civil War led to the unauthorized crossings of about 1.82 million migrants in 2015-16, according to Frontex, EU’s border agency. In 2016, the **European Border and Coastguard Agency** replaced **Frontex** with stronger executive power and a larger budget.<sup>12</sup>

This highlighted the shortcomings of the **Dublin Declaration** that placed burden on a few member states to screen asylum applications. In September 2020, the European Commission proposed a Pact on Migration and Asylum to enable faster procedures. In December 2021, the Regulation establishing the **European Union Agency for Asylum** was adopted, which also took into consideration the COVID-19 pandemic. The **European Asylum Support Office (EASO)** was relaunched as the EUAA in order to assist the government to relocate migrants within the EU.<sup>13</sup>

The idea of international solidarity on the issue of granting asylum to refugees is a relatively new one and for years together, the dominant view was that the state had a right to deny entry

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L. 717 (2013).

<sup>11</sup> Prenita Ranjan, Refugee Crisis: A Special Reference to European Refugee Crisis, 4 INT’L J.L. MGMT. & HUMAN. 1906 (2021).

<sup>12</sup> Tim Hatton, European Asylum Policy Before and After the Migration Crisis, IZA World of Labour, 480 (2020).

<sup>13</sup> Mhaela Adina Apostolache, The Issue of Asylum in the EU, 16 J.L. & ADMIN. Sci. 39 (2021).

to foreigners. As times changed, the right to asylum came into existence – one, the state’s right to provide or refuse asylum, and second, the right of a private individual to seek asylum. This dual nature is the cornerstone of international migrant and refugee law.<sup>14</sup> The European Commission proposed a plan that might come into effect from 2023 for “compulsory solidarity mechanism” that would enable member states to share responsibility for asylum seekers. It provides for the pre-screening of migrants before their entry into the EU, a mechanism to return failed asylum seekers and a legal obligation for each member state to accommodate refugees.<sup>15</sup>

#### IV. CRITICAL ANALYSIS

The foundation of EU’s asylum policies is the Refugee Convention of 1951. It defines refugee as “a person who is outside their country of origin and, who has a ‘well-founded fear of persecution’ within that country”.<sup>16</sup> EU asylum policies have been distraught with some challenges. Firstly, only a small percentage of asylum seekers were recognized as refugees. Secondly, the burden of refugees was distributed unevenly, making Germany the largest receptor between 2009-13. Control of the EU’s external border is another issue to prevent unauthorized entry.

The Geneva Convention states that “serious harm” and “failure of state protection” should be prevalent in order to constitute ‘persecution’.<sup>17</sup> This was clarified further in *Islam and Shah v SSHD*, in which a Pakistani woman who was married was subjected to gory domestic violence, and the Court held that both the elements were present in order to constitute persecution, even though the harm was not of the nature mentioned in the Geneva Convention.<sup>18</sup>

In *Chahal v UK*, Chahal, a political activist engaged in passive resistance for Punjab’s autonomy was detained and his deportation from the UK on grounds of national security was pending before the Court.<sup>19</sup> Refugee law distinguishes between the ‘deserving’ and the ‘undeserving’ refugee. In *Ahmed v Austria*, the applicant’s refugee status was forfeited as he was found guilty of robbery.<sup>20</sup> These cases were found violative of Article 3 of the ECHR, thereby highlighting how problematized the issue of asylum-seeking has become in the EU.

Asylum applicants have the burden of proof to furnish documents in order to confirm their stay

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<sup>14</sup>Carol Sinnott, The Development of Refugee and Asylum Law in the European Union, 6 HIBERNIAN L. J. 287 (2006).

<sup>15</sup> Prenita Ranjan, Refugee Crisis: A Special Reference to European Refugee Crisis, 4 INT’L J.L. MGMT. & HUMAN. 1906 (2021).

<sup>16</sup>Tim Hatton, European Asylum Policy Before and After the Migration Crisis, IZA World of Labour, 480 (2020).

<sup>17</sup>The Migrant Crisis and Refugees – A Crisis of EU Solidarity, 9 Polish REV. INT’L & EUR. L. 169 (2020).

<sup>18</sup>*Islam and Shah v SSHD*, (1999) 2 AC 629.

<sup>19</sup>*Chahal v. UK*, 23 EHRR 413 (1996).

<sup>20</sup>*Ahmed v. Austria*, 71/1995/571/663 (1995).

in the new country. Victims of sexual torture, violence and vulnerable minors would need additional time to confide with the officials and produce documents. Such factor should be taken into account while designing asylum procedures. In *Bahaddar v. Netherlands*, the ECtHR ruled that time limits should not be very short or applied inflexibly.<sup>21</sup> In *MM v. Minister for Justice, Quality and Law Reform*<sup>22</sup>, it was laid down that not only material, but also psychological deprivation of the applicant for asylum must be considered. People smuggling is a menace that needs to be tackled with, as they mislead people by luring them into getting an asylum or a job easily. The Interpol and Frontex have been devising strategies to mitigate this problem.

Migrants for decades have been termed as “illegal” and the EU has left no stone unturned in fighting a “proxy war” against them. A proxy war would mean unaccounted deaths of migrants arising from state action. **UNITED’s List of Deaths and Fortress Europe** blog, the primary source of border-related deaths estimated that by May 2018, 34,361 deaths had occurred along the borders of EU and Switzerland. Migrant refugees are most often than not subjected to deterrence and containment, that also involve more direct and indirect forms of violence.<sup>23</sup> Direct violence would involve the use of lethal force while indirect violence would result in hunger, robbery, and diseases, that can ultimately cause death.

## V. CONCLUSION

The rights provided in the ECHR, ICCPR and ICESCR have a broad scope on the face of it, but as one digs deeper, anomalies with respect to their applicability to non-nationals and refugees arise. A close examination of the EU asylum system reveals several challenges that asylum-seekers must swim through, making life miserable for them. In this light, several scholars suggest that the asylum system can be improved by supporting local resettlement agencies, integrating refugees with local customs and providing additional funding to the states in order to manage their asylums better. There is also a need to shift from spontaneous asylum-seeking to a comprehensive resettlement programme. These steps will certainly go a long way in improving the standard of living of refugees and asylum-seekers in their new-found residence they have to make peace with.

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<sup>21</sup> *Bahaddar v. the Netherlands*, App. No. 25894/94 (Admissibility Decision, ECtHR, 1998) 45.

<sup>22</sup> ECJ Case C-277/11 *MM v. Minister for Justice, Equality and Law Reform* (2013).

<sup>23</sup> Helen Hintjens & Ali Bilgic, *The EU’s Proxy War on Refugees*, 8 State CRIME J. 80 (2019).

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