THE FUTURE OF ASYLUM IN INDIA:
FOUR PRINCIPLES TO APPRAISE
RECENT LEGISLATIVE PROPOSALS

Bhairav Acharya*

India has a long history of sheltering refugees. The number of forced migrants who have received protection in India is one of the highest in the world. For a variety of ideological and practical reasons, India has refused to sign the 1951 Refugee Convention and shows little interest in joining the evolving international refugee order. Without a formal asylum regime, the Foreigners Act, 1946, a stringent deportation-oriented law, governs refugees unless they are given special leave to stay in India. In a few unconvincing cases, some courts have given asylum seekers a small measure of due process. Any suggestion that the courts have recognised the principle of non-refoulement is false.

In late 2015, Shashi Tharoor MP introduced the Asylum Bill, 2015 in the Lok Sabha with the aim of putting India “at the forefront of asylum management in the world.” While the bill is welcome in principle, it has several shortcomings. Future asylum law should be based on four principles which Tharoor’s bill should be measured against. The principles are: (i) asylum is multifaceted requiring different categories of protection; (ii) mixed migratory flows demand flexible processing mechanisms; (iii) mass influxes call for greater attention than individualised procedures; and, (iv) the goals of legislation are asylum management and refugee governance.

Asylum is conceptually diverse and predates refugee status but the two are often conflated. India has a sovereign right to grant asylum to a person who does not qualify for refugee status. Protection should be given to persecuted individuals, groups forced to flee, as well as those escaping environmental phenomena. ‘Disguised extraditions’ should be stopped. Mixed migration has only recently captured attention because of events in Europe even though it is an old reality in South Asia. The law should differentiate between various categories of refugees and migrants, assign each a relevant form of protection - if applicable, anticipate secondary movements, and protect the most vulnerable.

* Bhairav Acharya was the deputy director of the Public Interest Legal Support and Research Centre (PILSARC) which drafted the Refugees and Asylum Seekers (Protection) Bill, 2006. He can be contacted at bhairav.acharya@berkeley.edu and @bhairavacharya. I am grateful to Ms. Paridhi Poddar, Mr. Aditya Ayachit, Ms. Ira Chadha Sridhar, Mr. Tejas Popat and Mr. Chaitanya Deshpande at the NUJS Law Review for their editorial assistance.
The failure to protect mass influxes has damaged the credibility of the international refugee regime. India’s experience calls for promoting the principle of non-refoulement, using differentiated protection procedures, intelligently managing refugee populations, and addressing secondary movements. Refugee situations should be proactively governed. Processing centres should be efficiently located. Evidence-based impacts on home communities should determine how refugee communities are hosted. Refugee camps must be demilitarised. The right against statelessness must be actualised. Durable solutions should be strategically pursued. Participatory citizenship models should be developed.

I. INTRODUCTION

On December 18, 2015, the Lok Sabha witnessed the extraordinary introduction of three bills to enact an asylum regime. Since the house first sat in 1952, no bill, neither from the government nor a private member, had attempted to create an asylum regime, although several members of Parliament had openly talked about the need for refugee protection.¹ The most prominent of those proposals was made by Shashi Tharoor who introduced the Asylum Bill, 2015.² Tharoor’s bill was accompanied by bills by Rabindra Kumar Jena³ and Feroze Varun Gandhi.⁴ Although introduced together, Tharoor’s bill was preceded by Jena’s and followed by Gandhi’s. On the day his bill was introduced, Tharoor wrote: “The bill […] will put India at the forefront of asylum management in the world.”⁵

This paper measures Tharoor’s bill against his claim of creating a world-leading asylum management system.⁶ Instead of a clause-by-clause analysis, this paper weighs Tharoor’s bill against four principles which, I claim, are crucial to a future Indian asylum regime. The four principles relate to the

² The Asylum Bill, 2015, 334 of 2015, Lok Sabha (‘Tharoor’s Bill’).
³ The Protection of Refugees and Asylum Seekers Bill, 2015, 290 of 2015, Lok Sabha.
⁴ The National Asylum Bill, 2015, 342 of 2015, Lok Sabha.
⁶ The intent of this paper is to offer a constructive critique of Tharoor’s asylum proposal. It is not a criticism of Tharoor whose bill is welcome. The writer would be remiss not to draw the reader’s attention to the following potential for bias: Tharoor’s bill borrows heavily from an earlier legislative proposal in 2006 made by PILSARC, a legal advocacy and research centre established in 1987 and advised by the late Justice V.R. Krishna Iyer. That proposal was called the Refugees and Asylum Seekers (Protection) Bill, 2006 (‘PILSARC’s Bill’), available at https://notacoda.files.wordpress.com/2014/08/refugees-and-asylum-seekers-protection-bill-2006.pdf. PILSARC was led by Rajeev Dhavan, a Senior Advocate of the Supreme Court. The writer was retained by PILSARC and contributed to the drafting of PILSARC’s bill.
different shades of asylum, the prevalence of mixed migration, the importance of mass influxes, and the need for asylum governance. The paper finds that although Tharoor’s bill ought to be welcomed in principle, it largely falls short of the mark of a good asylum regime. As one of the first asylum bills in Parliament, it is a historic missed opportunity.

This paper is divided into four parts. Part II revisits India’s existing refugee protection regime – a mix of legislation, executive action, and unwritten governmental policy – which Tharoor says his bill consolidates. Part III sets out four propositions that underpin any intelligent asylum management. Each proposition is contextually explained, deconstructed, and weighed against Tharoor’s bill. Part IV explains the links between asylum and Indian governance, and offers suggestions to improve Tharoor’s bill.

II. INDIA’S AD HOC ASYLUM PRACTICE

This Part discusses the law, policy, and practice of asylum in India to determine if Tharoor’s claim that his bill “consolidates the prevalent executive policies, judicial pronouncements, and international norms” is true. Subpart A outlines the definitions of the term “refugee” and the meanings of the undefined term “migrant.” Subpart B presents historical and latest estimates of the numbers of refugees and migrants in India. Subpart C examines both India’s reasons for staying away from the international refugee regime as well as its domestic statutory, constitutional, and practical framework of asylum.

A. REFUGEES, MIGRANTS, AND MIXED FLOWS

Refugees and migrants are legally distinct. According to the 1951 Convention Relating to the Status of Refugees (‘Refugee Convention’) and the 1967 Protocol Relating to the Status of Refugees (‘Protocol’), a refugee is a person who flees across an international border because of a well-founded fear of being persecuted in her country of origin on account of her race, religion, nationality, membership of a particular social group, or political opinion. The Refugee Convention’s definition is the most popular one in use around the world but broader descriptions also exist. For instance, the African Union’s 1969 Convention Governing the Specific Aspects of Refugee Problems in

---

7 Tharoor, supra note 5.
8 Id.
Africa (‘OAU Convention’) recognises that a person fleeing external aggression, occupation, foreign domination, or serious disturbances of public order, is also a refugee.11 And, in 1984, a group of Central and South American governments adopted the non-binding Cartagena Declaration on Refugees and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in Latin America (‘Cartagena Declaration’) which further included people fleeing threats to their lives, safety, or freedom due to generalised violence, foreign aggression, internal conflicts, and massive human rights violations.12

On the other hand, migrants are a far broader category of people who leave their places of habitual residence to live elsewhere. This happens most often within a country as migrants move to follow better prospects, usually to large cities.13 However, significant numbers of migrants also cross international borders.14 Because there is no formal legal definition of a migrant, the term accurately describes high-income professionals moving between two advanced economies, people leaving impoverished areas, as well as people fleeing persecution.15 So, all refugees are migrants – in the sense that refugees move away from their places of habitual residence, but not all migrants are refugees.16 The distinction between the two is important because refugees, not migrants, are protected by international refugee law.

B. REFUGEES AND MIGRANTS IN NUMBERS

According to the Office of the United Nations High Commissioner for Refugees (UNHCR), by the end of 2015, India hosted 2,01,381 refugees and an additional 6,480 asylum seekers, bringing the total number of persons of concern to UNHCR to 2,07,861.17 Of these, UNHCR assisted 27,078 refugees and the remaining 1,80,783 persons of concern, of which 1,74,303 are refugees,
were assisted by the Indian government. In 2015, India ranked twenty-third on a list of countries hosting the highest number of refugees.

When read in isolation, these statistics are incomplete for two reasons. First, they do not convey a historical sense of the large refugee populations India has hosted in its past. In total, over the second half of the twentieth century, India has hosted one of the largest populations of refugees and externally displaced peoples in the world. These include around 1,00,000 refugees from Tibet, 1,02,055 from Sri Lanka, 17,270 from Myanmar, and 47,471 Chakmas and Hajongs from Bangladesh in addition to around 10 million refugees from erstwhile East Pakistan. These vast numbers do not include the approximately 14 million people who sheltered and resettled in India as a result of the Partition of India and its accompanying violence. Second, there are a large number of unrecognised refugees in India who remain uncounted. These include large populations of unregistered refugees from Nepal and Bhutan.

---

18 Id. By February 2016, the number of persons of concern had increased to 2,09,234. UNHCR, Factsheet India, 1 (February 2016), available at http://www.unhcr.org/50001ec69.pdf (Last visited on November 13, 2016).
19 The Times of India, 10 countries with highest numbers of refugees, June 22, 2015.
20 Lydia DePillis, Kulwant Saluja & Denise Lu, The Washington Post, A visual guide to 75 years of major refugee crises around the world, December 21, 2015.
28 Human Rights Watch, Last Hope: The Need for Durable Solutions for Bhutanese Refugees in Nepal and India 76 (May 2007), available at https://www.hrw.org/reports/2007/bhutan0507/12.htm (Last visited on November 28, 2016) (Between 15,000 and 30,000 Lhotshampas (ethnic Nepalese expelled from Bhutan)).
as well as asylum seekers who were denied asylum as a result of structural failures in UNHCR’s refugee status determination mechanism.  

In 2015, there were 52,41,000 foreign migrants in India, the world’s twelfth-largest population of migrants in a single country. Again, this statistic does not tell the whole story. From 1960 to 1980, India was the world’s most popular migrant destination after the United States, hosting a population of 94,11,000 foreign migrants in 1960. Between 1980 and 2000, India fell to fourth place with 64,11,000 foreign migrants in 2000 as the expansion of the European Union (EU) resulted in millions of people exercising the EU’s ‘freedom of movement’ to migrate within Europe. By 2010, Germany was the world’s second-most popular destination for migrants and India had fallen to twelfth place.

C. CURRENT ASYLUM LAW AND PRACTICE

This Subpart is divided into three sections. Section 1 examines India’s position in the international refugee regime. Section 2 assesses India’s domestic law and policy regarding foreigners and asylum. Section 3 reveals the government’s three approaches to refugee protection.

1. India and the Global Refugee Regime

This section is divided into two subsections. The first subsection summarises India’s discontent with the Refugee Convention. The second subsection highlights India’s paradoxical attitude towards the larger interconnected global asylum regime.

a. Standing Apart from the Refugee Convention

144 countries have signed the Refugee Convention but India has not, making it an outlier in the international refugee regime. This is a curious anomaly for a country which has sheltered tens of millions of refugees during the life of the Convention. India’s reasons for refusing to sign the Convention

---

31 Id.
32 Id.
33 Id.
have never been clearly communicated; nevertheless four main grounds are apparent from official resources and the informed speculation of commentators.34

First, Delhi was irked by the Eurocentrism of the original Refugee Convention and its drafting process.35 Despite being a founding member of the United Nations (UN) and one of the few independent countries from the Global South, India’s input during the drafting of the Convention was marginal.36 The first drafts of the Convention ignored non-European displacement and refugees,37 reflecting a ‘Europe only’ approach to refugees which was carried forward into the draft placed before the General Assembly.38 Meanwhile, India struggled to cope with the “largest mass migration in human history,”39 caused by the colonial Partition of India which resulted in the forced cross-border displacement of 14.5 million people and the deaths of 1 million people.40 The experience and circumstances of Partition survivors were similar to Europe’s refugees but they did not qualify for protection under the Refugee Convention or the Statute of the Office of the United Nations High Commissioner for Refugees (‘UNHCR Statute’).41 Indian objections to the Convention’s Eurocentrism were dismissed by the drafting governments.42


36 See Paul Weis, The Refugee Convention, 1951: The Travaux Préparatoires Analyzed, with a Commentary 18, 22, 27 (1995) (recording only three Indian interventions during the drafting negotiations); United Nations Economic and Social Council (‘UN ESC’), Official Records: Fourth Year, Ninth Session, Supplement No. 1, 60-61, E.S.C. Res. 248 (IX), U.N. Doc. E/1553 (August 8, 1949) (appointing thirteen governments, but not India, to an ad hoc committee to define refugees). But see Pia Oberoi, South Asia and the Creation of the International Refugee Regime, 19 Refugee 36, 37 (2001) (“It is […] not surprising to find that India was initially well represented in the debate on the creation of a new international refugee regime.”).


40 Prashant Bharadwaj et al., supra note 26.


Second, there remains discomfort with the Refugee Convention’s imagination of a refugee solely as an individual rather than as a constituent of a group or community. Since it is the product of a European weltanschauung, the Convention’s focus on individuated persecution is unsurprising. 43 But, for India, an individualist asylum system would ignore its unique national imagination and fluid conception of citizenship; it might even ideologically betray the “idea of India.” 44 Refugee individualism conceptually conflicts with mass influx situations because individuals in a mass influx are unable to prove individuated persecution, leaving them vulnerable to refoulement. 45 For India, India’s founders largely rejected homogenising narratives of nationhood in favour of state-supported multiculturalism and distinct communities. 46


India’s founders largely rejected homogenising narratives of nationhood in favour of state-supported multiculturalism and distinct communities. Sunil Khilnani, The Idea of India 153 (1998). See also Alfred Stepan, Juan J. Linz & Yogendra Yadav, Crafting State-Nations: India and Other Multinational Democracies 40-44, 50-54 (2011). The foundational rejection of homogeneity called other aspects of the European model of citizenship, as they applied to India, into question. See Makarand R. Paraniye, Making India: Colonialism, National Culture, and the Afterlife of Indian English Authority 243 (2013); Binoda K. Mishra, The Nation-State Problematic in Asia: The South Asian Experience, 19 Perceptions 71, (2014). The existence of multiple nationalities in one country has tempered the citizen-alien dichotomy, making it easier for refugees to find shelter in India. That inclusivity was exemplified by former Foreign Secretary and National Security Adviser the late J.N. Dixit’s response to Lhotshampa refugees staying in India instead of returning to Nepal: “Mother India will take care of them.” Professor Mahendra Lama, Jawaharlal Nehru University, Address at the UNHCR Seminar on Refugee Protection: New Challenges (June 19, 2006).


47 Refoulement (from the French ‘refouler’) refers to the practice of forcibly returning refugees to a place where they fear persecution. The principle of non-refoulement is the guarantee that such a forced return will not occur. The principle is “the most essential component of refugee status and of asylum.” UNHCR, Note on Non-Refoulement (Submitted by the High Commissioner) ¶ 1, EC/SCP/2 (August 23, 1977), available at http://www.unhcr.org/en-us/excom/3ae68cd10/note-non-refoulement-submitted-high-commissioner.html (‘UNHCR Non-Refoulement Note’) (Last visited on October 13, 2016); UNHCR, UNHCR Note on
which has a history of receiving large mass influxes of refugees, the Refugee Convention’s relative silence regarding mass influxes constitutes a continuing failure.48

Third, the Refugee Convention fails to deal with mixed migration,49 which lacks a definition, although there is broad consensus on its features.50 India has long faced mixed migration, particularly across its eastern land and sea frontiers.51 Nevertheless, mixed flows were completely ignored by the international refugee regime until growing migration to Europe forced the issue to the top of the agenda. Europe’s ‘migrant crisis’ comprises classic mixed


50 Mixed migration flows include refugees, asylum seekers, economic and environmental migrants, victims of trafficking, and others. Their reasons for migrating may range from a single or many ‘push’ or ‘pull’ factors or a combination of them. Push factors include targeted persecution, generalised or disparate incidents of violence, real or perceived threats, and environmental degradation. Pull factors include economic opportunities, political freedoms, and educational opportunities. Migrants in a mixed flow may travel by air, land, sea, or a combination of them. Refugees and migrants often utilise the same means of transportation, which are often illegal, and travel together. See generally UNHCR, Mixed Migration, available at http://www.unhcr.org/en-us/mixed-migration.html (Last visited on October 13, 2016); Mixed Migration Hub, What is mixed migration?, available at http://www.mixedmigrationhub.org/about__trashed/what-mixed-migration-is/ (Last visited on October 13, 2016); The Migration Observatory at the University of Oxford, Mixed Migration: Policy Challenges (March 24, 2011), available at http://www.migrationobservatory.ox.ac.uk/resources/primers/mixed-migration-policy-challenges/ (Last visited on October 13, 2016).

flows of the type that India has talked about for several years.\textsuperscript{52} UNHCR’s first official response, the “10-Point Plan of Action,”\textsuperscript{53} was published only in 2006, identifying five areas around the world for special attention. South Asia was not one of those areas, despite its familiarity with migration.\textsuperscript{54} Mixed flows often coincide with conflict and other refugee-creating factors; consequently, mixed flows and mass influxes go together.\textsuperscript{55}

\textit{Fourth}, and finally, Delhi wants the Refugee Convention to contain strong ‘burden sharing’ provisions.\textsuperscript{56} This is the argument: since the countries of the Global South which actually host the bulk of the world’s refugees had no say in the making of the Convention, and since the Convention’s drafters in the Global North have constructed regimes to prevent refugees entering their territories,\textsuperscript{57} no demands should be made regarding how southern host countries actualise the Convention’s core principles, unless the costs of the demands are shared by the North.\textsuperscript{58} The argument resonates in India after its experience of sheltering around 10 million refugees in 1971 with inadequate foreign assistance.\textsuperscript{59} Of the total costs of hosting the refugees, estimated at over half a billion

\textsuperscript{52} 50th EXCOM, \textit{supra} note 48, 8; 52nd EXCOM, \textit{supra} note 48.


\textsuperscript{56} 48th EXCOM, \textit{supra} note 48, 14; 51st EXCOM, \textit{supra} note 48.

\textsuperscript{57} Barnett, \textit{supra} note 46, 249.


dollars, UNHCR contributed between 120 million to 183 million US dollars. India was forced to ask its citizens to pay a special tax to tide over the crisis. The argument is more pointed in Africa. Since most refugees and migrants flee colonially-created conflicts, Europe’s ex-colonial powers are accountable for their protection.

b. Disinterest in the ‘Refugee Regime Complex’

There are other instruments besides the Refugee Convention which bear on refugees and migrants such as the geographically-determinate OAU Convention and the issue-specific International Labour Organisation’s (ILO) migrant workers conventions of 1949 and 1975. The multiplicity of regimes has enabled would-be refugees to ‘forum shop’ and states to ‘regime shift,’ thereby injecting cross-institutional strategies into asylum policy. According to Alexander Betts, this regime complexity has resulted in the traditional refugee regime, which was built around the Refugee Convention, giving way to a new ‘refugee regime complex’ - a global network of interdependent, independent, and overlapping refugee institutions which underpins contemporary migration and asylum.

Despite facing multiple influxes of people from across South Asia and elsewhere, India has instituted neither geographic nor issue-specific regimes to address refugees or migrants. It has eschewed regional frameworks,
such as the EU’s successful multilateral travel regime, in favour of bilateral agreements such as those with Nepal and Bhutan, and event-specific domestic measures, such as the orders regarding Tibetan refugees. The reluctance to create a refugee regime may be prompted by the costs of socio-economic protection, but that does not account for the absence of a territorial asylum framework to minimally preserve the principle of non-refoulement while protecting state interests.

On the other hand, India is a member of UNHCR’s Executive Committee (‘EXCOM’), the body which helps to set the agenda for global refugee policy. But its EXCOM contributions have been self-justificatory and self-congratulatory, ranging from denouncements of the international refugee regime to reminders of India’s generosity as a host country. Both claims are accurate, but they do nothing to set out an Indian vision for enforceable asylum. The disinclination to create regional or issue-specific structures of its own to address refugees and migrants reveals the actual reason for its hostility to asylum law - political expediency. The absence of an enforceable asylum

---


72 E.g., Ministry of Home Affairs, Order Regulating Entry of Tibetan Nationals into India, S.R.O. 1108 (Notified on December 26, 1950).

73 H. Knox Thames, Washington College of Law, India’s Failure to Adequately Protect Refugees, available at https://www.wcl.american.edu/hrbrief/v7i1/india.htm (“India’s argument that the Refugee Convention places the burden on the host state […] is unfounded because signing the agreement would allow UNHCR to provide greater assistance to the refugee population […]”). For an explanation of the concept of territorial asylum, see Kay Hailbronner & Jana Gogolin, Asylum, Territorial in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum ed., 2013), available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e757 (Last visited on December 2, 2016).


75 48th EXCOM, supra note 48, ¶¶ 48, 67; 50th EXCOM, supra note 48, ¶ 27; 51st EXCOM, supra note 48, ¶ 10; 52nd EXCOM, supra note 48, ¶ 1.

76 48th EXCOM, id., ¶ 70; 50th EXCOM, id., ¶ 27; 51st EXCOM, id., ¶ 10; 52nd EXCOM, id., ¶ 5.

law permits the government to respond to asylum requests purely to gratify an instant political interest.\textsuperscript{78}

2. Inchoate National Law

This section is divided into two subsections. The first subsection explores the stringent legal framework for foreigners and refugees in India, particularly the extraordinary width of the government’s absolute power of deportation. The second subsection argues that, contrary to popular claims, the Constitution does not invest refugees with meaningful rights, not even the right against refoulement.

\textit{a. The Foreigners Act Framework}

India’s \textit{ad hoc} refugee system is made possible by the wide powers given exclusively to the Centre to act with unfettered discretion with regard to foreigners. In the nineteenth century, India’s colonial government enacted the Foreigners Act, 1864, the first statute to ban, detain, and expel foreigners. The statute was heavy-handed, having been designed to promote colonial power and maintain social control.\textsuperscript{79} But when the Second World War broke out, the colonial government found even the 1864 statute too lenient for the absolute powers it demanded, so it was replaced by the Foreigners Act, 1940.\textsuperscript{80} After the war ended, and amidst the large-scale displacement that followed, the 1940 wartime legislation was further consolidated as the Foreigners Act, 1946 (‘Foreigners Act’).

The Foreigners Act is wholly devoid of nuance because it does not differentiate between people on intelligible criteria such as their purpose for entering India. It consequently fails as a people management law.\textsuperscript{81} For instance, tourists, travellers, expatriate workers, fugitives, refugees, and migrants have widely divergent reasons for entering and staying in India, but the


\textsuperscript{80} The Foreigners Act, 1946, Statement of Objects and Reasons.

\textsuperscript{81} Cf. The Immigration and Refugee Protection Act, 2001 (Canada) (recognising three broad classes of economic immigrants, family movements, and refugees with sub-classes under each category.)
Foreigners Act treats them uniformly under a monolithic regime. The Centre has used the Foreigners Act to compel foreigners to prove their identities; present themselves at police stations; control their movements, activities, and residences; confine them in internment camps; and, of course, to leave India.

The sheer breadth of the law’s deportation power, which has enabled the government to achieve deportations without even minimal judicial review, is revealing. In 1955, the Supreme Court blessed this position and in the intervening 61 years, it has not just reiterated the untrammelled deportation power, it has also relieved the Centre of the requirement of complying with due process while effecting deportations. This awesome power of deportation has been delegated and sub-delegated to such an extent that, in many states, a mid-level police officer can order a foreigner to leave India without even having to provide a reason.

---

89 Foreigners Order, supra note 24, ¶¶ 3, 5, 7.
90 The Foreigners Act, 1946, §§ 3(2)(c) and (cc); RAJEV DHAVAN, REFUGEE LAW AND POLICY IN INDIA 54 (2004) (pointing out that besides statutory deportation, there is a general power to refuse entry for non-fulfilment of entry conditions).
91 Hans Muller v. Supt., Presidency Jail, AIR 1955 SC 367 : (1955) 1 SCR 1284, ¶ 36 (“The Foreigners Act confers the power to expel foreigners from India. It vests the Central Government with absolute and unfettered discretion and, as there is no provision fettering this discretion in the Constitution, an unrestricted right to expel remains” (emphasis supplied)).
b. Unconvincing Constitutional Symbolism

Some commentators - including, in an earlier article, this writer - have claimed that refugees and asylum seekers enjoy constitutional protection while in India which, amongst other things, protects them from refoulement. That is not true in any meaningful sense. In fact, some of those claims are patently false. No right to non-refoulement has ever been read into Indian constitutional jurisprudence, nor can it be extrapolated. Arguments that Article 21 of the Constitution encompasses non-refoulement usually point to the Gujarat High Court’s decision in Ktaer Abbas Habib Al Qutaifi v. Union of India (‘Habib’). But, in fact, the Single Judge in Habib did not prohibit refoulement, he only ordered the government to re-examine its deportation order on humanitarian grounds. There are two reasons why Habib does not validate the non-refoulement principle: (i) it expressly permits deportations on the basis of public order and national security, and (ii) it is powerless against the Supreme Court’s confirmation of the Centre’s “unrestricted right to expel.”

What is incontrovertible is that in National Human Rights Commission v. State of Arunachal Pradesh (‘NHRC’), the Supreme Court ordered regional authorities to stop the harassment of a refugee community by the area’s local inhabitants on the basis of an obvious, textualist interpretation of Article 21 of the Constitution. Since the Article uses the word “person”
instead of ‘citizen,’ the court correctly held that the life and liberty of foreigners are protected on Indian soil.\textsuperscript{101} Consequently, the inhabitants of an informally blockaded refugee camp were permitted access to healthcare and food. NHRC neither creates a refugee protection regime nor even mentions the non-refoulement principle; it only confirms that foreigners enjoy limited protections under Article 21.

Besides the minimal right to life and liberty, which does not protect against detention and deportation under the Foreigners Act, refugees arguably have the right not to be discriminated against in relation to other refugees.\textsuperscript{102} That is all. In some cases, very few and far between, regarding very specific facts, some courts have required the government to meet procedural due process standards before restrictively regulating refugees.\textsuperscript{103} Those cases must be confined to their facts because they are very clearly exceptions; indeed none of them were even declared reportable and they are no longer than a few unreasoned paragraphs.\textsuperscript{104} No amount of spin can create a pro-refugee jurisprudence where none exists, and it is dangerous to persist with the claim that such a jurisprudence does exist because it deflects attention away from a worrying gap in Indian law.

3. State Approaches to Refugee Protection

An examination of independent India’s responses to refugees reveals three approaches to protection.\textsuperscript{105}

\begin{itemize}
  \item \textsuperscript{101} Id., ¶ 20.
  \item \textsuperscript{102} The state may classify a group of people as a separate class and subject them to special law if the separate class is intelligibly different and the classification is rationally linked to the special law’s objective. See generally Charanjit Lal v. Union of India, AIR 1951 SC 41; Kedar Nath Bajoria v. State of W.B., AIR 1953 SC 404; Kathi Raning Rawat v. State of Saurashtra, AIR 1952 SC 123. Foreigners are a special class, hence unequal treatment within the class is axiomatically unreasonable. See Air India v. Nergesh Meerza, (1981) 4 SCC 335 : (1982) 1 SCR 438; Kathi Raning Rawat, id. But see Hans Muller v. Supt., Presidency Jail, AIR 1955 SC 367 : (1955) 1 SCR 1284, ¶¶ 23-24, 1295 (“[I]t is easily understandable that reasons of State may make it desirable to classify foreigners into different groups”).
  \item \textsuperscript{103} Dhavan, supra note 90, 63.
  \item \textsuperscript{104} E.g., P. Nedumaran v. Union of India, Civil Writ Petitions Nos. 12298 and 12343 of 1992 (Mad) (Unreported); Gurunathan v. Union of India, Civil Writ Petitions Nos. 6708 and 7916 of 1992 (Mad) (Unreported) (declaring UNHCR a competent agency to determine the voluntariness of Sri Lankan refugee repatriations); Malavika Karlekar v. Union of India, Criminal Writ Petition No. 583 of 1992, decided on 25-9-1992 (SC) (UR) (conditionally injuncting deportations to Myanmar while UNHCR refugee status determination was pending); Bogyi v. Union of India, Civil Rule No. 1847 of 1989 (Gau) (Unreported) (permitting an asylum seeker to apply to UNHCR for protection).
  \item \textsuperscript{105} Acharya *1, supra note 77, 4.
\end{itemize}
First, mass influx refugees are channelled to temporary camps to be identified and given shelter. No individualised refugee status determination process is conducted. There is sometimes a minimal screening process to identify dangerous persons such as irregular combatants who may be subjected to restrictive measures. Refugees receive varying levels of socio-economic protection. Most mass influxes have prompted specific legal measures regarding the entry, stay, and protection of refugees. At the end of the conflict or situation that created them, mass influx refugees are usually expected to return en masse to their country of origin.

Second, politically sensitive individuals, usually from countries with which India has sensitive relations, are granted asylum in rare instances by the Centre without a formal finding of persecution. Rarely referred to asylees, such individuals include the Dalai Lama, Bangladeshi writer Taslima Nasrin, and, potentially, the Baloch dissident Brahmandagh Bugti. Grants of asylum of this nature have usually accompanied a political conflict with the asylum seeker’s country of origin and, as such, have prompted accusations of deliberate and non-humanitarian political subversion against the Indian government.

---

107 C. Cutts, supra note 25, 66.
110 Acharya *1, supra note 77, at 5.
111 See Grbac, supra note 109, 7 (recounting India’s firm position that the 1971 refugees had to return).
Third, and finally, citizens of countries not covered by the two preceding approaches are allowed to apply to be recognised as mandate refugees by UNHCR following an individualist determination procedure in accordance with the UNHCR Statute.116 If they are recognised as refugees, they are given an identity document stating that they are refugees which is generally respected by local authorities.117 However, UNHCR’s operations in India are not protected by formal agreement with the Indian government and its identity documents have no legal validity.118 Mandate refugees receive no support from the Indian government but the most vulnerable sometimes receive a subsistence allowance from UNHCR.119

III. A CRITIQUE OF THAROOOR’S BILL

This Part weighs Tharoor’ bill against four principles which underpin a normative asylum framework. Subpart A introduces the four principles to facilitate the appraisal of Tharoor’s bill. Subpart B calls for a nuanced view of asylum cognizant of its many historical forms. Subpart C proposes a framework for regulating mixed migration. Subpart D highlights the significance of mass influxes, particularly India’s experience of them, and the crucial challenges they will pose for a future asylum regime. Subpart E underscores the importance of a coherent model of asylum governance.

A. PRINCIPLES TO FACILITATE APPRAISAL

In light of India’s critiques of the international refugee regime, any legislative proposal which merely recreates the terms of the Refugee Convention would be incomplete. So too, a bill that does not take account of past state approaches to refugee protection would potentially be a failure. India presents a unique context for refugees. It is a country committed to the protection of refugees, democracy, and diversity but situated in the volatile South Asian region which has highly fluid population movements, almost no signatories to the Refugee Convention,120 and was recently described as “the second


119 Id., ¶ 51.

120 From the greater South Asian region, Afghanistan is the only signatory to the Refugee Convention. UNHCR, States Parties to the 1951 Convention relating to the Status of Refugees
most violent place on earth.” An Indian asylum law must be cognizant of Indian exceptionalism.

Bearing India’s context in mind, this writer proposes that an intelligent asylum system is underpinned by four propositions. These propositions should inform the assessment of any proposed asylum regime including Tharoor’s bill. The propositions are:

First, there are different forms of protection. People become refugees for various reasons and not always because of fear of persecution. Where persecution occurs, it varies in intensity and may be based on grounds that conventional refugee law does not recognise. Refugee determination may even be redundant because it arbitrarily privileges certain criteria over others. Refugees have dissimilar protection needs and host countries have different circumstances. Consequently, future law must recognise that asylum is nuanced, exists in different forms, and accessible through differentiated procedures.

Second, mixed flows must be addressed. Refugees often move within large mixed flows of migrants which might include people fleeing generalised violence, torture, targeted persecution, as well as economic migrants, victims of trafficking, women and children at risk, and environmental displaces. Future asylum law must contain an effective mechanism to scrutinise mixed flows, differentiate between dissimilar categories of people, interdict dangerous individuals, and match those in need of protection with an appropriate form of asylum.

Third, mass influx protection is more pressing than individualised procedures. The sheer number of mass influx refugees who have sheltered in India is far greater than those who have undergone an individualised status determination procedure. Mass influxes have high costs. There is greater

---

122 See OAU Convention, supra note 11, Art. I(2).
potential for them occurring when socio-cultural affinities transcend political boundaries as they do in South Asia. Consequently, future asylum law must devote significant attention to creating a comprehensive regime for protecting mass influx refugees.

*Fourth*, asylum must be managed and refugees must be governed. Refugee influxes have a range of impacts on host communities. Mass influxes pose enhanced security challenges. Refugee policy often swings between two extremes - on the one hand, refugees are viewed with suspicion and on the other hand, they are patronised. Neither approach is optimal, both approaches are reactive. Future asylum law must recognise that asylum situations demand management, refugees require participatory quasi-citizenship, and the needs of local communities and India’s interests must be secured.

**B. A NUANCED UNDERSTANDING OF ASYLUM**

This Subpart is divided into three sections. Section 1 briefly explores the multifaceted nature of asylum. Section 2 distinguishes asylum from refugee status. Section 3 proposes four distinct categories of shelter based on the different meanings of asylum, refugee status, and other standards of protection.

1. Asylum is Conceptually Pluralistic

   Asylum is not monochromatic, it is a concept which has evolved over several centuries and continues to display a wide variance of meanings. Before it evolved into an institution in international law, asylum was an ecclesiastical concept affording refuge in a place of worship. It has never been

---


defined by any international instrument. Nevertheless, in 1950, the Institute for International Law, a wholly European body, said “‘asylum’ means the protection which a state grants […] to a person who comes to seek it” - a circular definition. The inability to pin down asylum’s definitional characteristics have enabled states to interpret it expansively.

Viewed from a European prism, asylum predates the international refugee regime and as a result, there are several modern differences between asylum and refuge. That distinction has been judicially recognised in numerous cases. The EU’s Qualification Directive recognises two forms of protection for forced migrants - refuge and subsidiary protection, while some countries go further. For instance, in addition to refuge derived from the Refugee Convention and subsidiary protection derived from the Qualification Directive, Germany also provides for asylum protection and a deportation ban. Outside the EU’s *acquis communautaire*, the richest legal source of difference between refuge and asylum is provided by Latin America which has championed a distinct interpretation of asylum.

The Latin American version of asylum specifically protects people persecuted for political reasons or accused of political offences, including leaders of political movements, civil wars, and coups. It is codified in two conventions of the Organisation of American States (OAS) of 1954 which

---


133 Gil-Bazo, *supra* note 128, 7. Asylum is ancient from an Indian perspective too. *See generally Shapubji Kavasji Hodivala, Parsis of Ancient India* (1920) (recounting the grant of asylum by a Hindu ruler to Zoroastrians (Parsis) fleeing from Sassanid Persia).


135 *E.g.*, Joined Cases C 57/09 and C 101/09 Bundesrepublik Deutschland v. B & D, [2010] ECR I-10979 (Federal Administrative Court of Germany (Bundesverwaltungsgericht)).


distinguish between territorial and diplomatic asylum (“OAS Conventions”).

Whereas the former is granted to someone already in the host state, the latter can be granted by diplomatic missions abroad making it possible to receive asylum extra-territorially. Julian Assange is a diplomatic asylee on the premises of Ecuador’s embassy in London. As a tool to defend freedom of expression from authoritarian states, this version of asylum was adopted by the Pan-African liberationist movement to protect African anti-colonial leaders.

2. Defining and Distinguishing Refugee Status and Asylum

Tharoor’s bill begins with the error of conflating refugee status and asylum. Refugee status and asylum are terms that are frequently and erroneously used interchangeably in common parlance. However, asylum is conceptually wider than refugee status. States can grant asylum in their discretion without regard for the Refugee Convention, even in direct contravention of it. Tharoor’s bill is called an asylum bill but deals only in refugee status, and, as discussed in the next paragraph, it has a problematic definition of refugee status. The conflation of refuge and asylum is a mistake that Tharoor’s bill imports from PILSARC’s bill.

In Tharoor’s bill, the refugee definition contains two parts. The first part reproduces the Refugee Convention’s definition and adds “ethnicity” as an additional ground of persecution. The second part of the definition incorporates UNHCR’s extended mandate which derives from a paper discussed at the 33rd meeting of EXCOM’s Standing Committee in June 2005. UNHCR


142 Tharoor’s Bill, supra note 2, Cl. 2(1)(d) read with Cl. 4(1).


144 See Gil-Bazo, supra note 128, 4.

145 PILSARC’s Bill, supra note 6, Cl. 2(c) read with Cl. 4.

146 Tharoor’s Bill, supra note 2, Cl. 4(1) (“A person qualifies as a refugee for the purposes of this Act if such person – (a) is outside his country of origin and is unable or unwilling to return to or avail himself of the protection of that country because of a well-founded fear of persecution on account of race, religion, sex, nationality, ethnicity, membership of a particular social group or political opinion; or (b) has left his country owing to serious and indiscriminate threats to life, physical integrity or freedom resulting from generalized violence or events seriously disturbing public order”).

refers to its extended mandate as “complementary protection” and does not equate it with refugee status. According to UNHCR, complementary protection corresponds to the notion of subsidiary protection under the Qualification Directive,\textsuperscript{148} which is distinct from refugee status too.

Why is the distinction between refugee status and subsidiary protection significant? There are two reasons. First, according to the Qualification Directive, subsidiary protection is a class of asylum distinct from refugee status because of the absence of targeted persecution.\textsuperscript{149} Instead, subsidiary protection turns on the existence of “serious harm” which is objectively defined but individually weighed.\textsuperscript{150} Consequently, the standards of treatment which are owed to subsidiary protectees differ from those owed to refugees.\textsuperscript{151} As subsidiary protection is minimally individuated, it does not apply to mass in-flux displacees who may only receive a most basic form of temporary protection.\textsuperscript{152} Tharoor’s bill, without explanation, bands these categories of protection together, thereby treating unequals equally to permit a potential discrimination claim.\textsuperscript{153} Second, Tharoor might argue that for people forced to flee their homes, the targeted-individuated-temporary distinction is a meaningless technicality. This is a compelling argument that has been made before.\textsuperscript{154} However, if that is the case, Tharoor must explain why his bill chose UNHCR’s narrower conception of complementary protection instead of the wider criteria in the OAU Convention and Cartagena Declaration, which informed earlier regional and Indian refugee proposals.\textsuperscript{155}

\textsuperscript{148} UNHCR, Statement on Subsidiary Protection under the EC Qualification Directive for People Threatened by Indiscriminate Violence (Submission to the European Court of Justice, January 2008), available at http://www.refworld.org/pdfid/479df7472.pdf (Last visited on November 28, 2016); See also UNHCR EXCOM, supra note 147.


\textsuperscript{151} Id., 4-5.

\textsuperscript{152} Supra note 102 and accompanying text.

\textsuperscript{153} E.g., Gunning, supra note 29, 48-56. See also, ARISTIDE R. ZOLBERG, ASTRI SUHRKE & SERGIO AGUAYO, ESCAPE FROM VIOLENCE: CONFLICT AND THE REFUGEE CRISIS IN THE DEVELOPING WORLD 269-71 (1989).

3. Four Forms of Protection for India

In the view of this writer, there ought to be distinct classes of protection for (i) refugees fleeing objective criteria of the nature described in the OAU Convention, the Cartagena Declaration, and UNHCR’s extended mandate, usually travelling in a mass influx; (ii) refugees fleeing subjective persecution on the grounds described in the Refugee Convention; (iii) asylees fleeing political persecution or politically-motivated actions of the nature described in the OAS Conventions; and (iv) asylees fleeing specific events such as natural disasters and catastrophic environmental changes. Measured against that standard, Tharoor’s bill missed the opportunity to create a wide-ranging and flexible asylum regime, with different forms of refuge and asylum for different circumstances, which would protect the largest number of people while permitting the government a measure of latitude over, for instance, non-refugee political asylees.

C. A FRAMEWORK FOR MIXED MIGRATION

This Subpart has three sections. Section 1 briefly investigates recent efforts to conceptualise mixed migration. Section 2 describes India’s familiarity with the historic phenomenon of mixed migration and the resemblance between mixed migration and mass influxes. Section 3 highlights the components of a good mixed migration regime.

1. Thinking about Mixed Migration

Mixed migration is both a new phenomenon and an old reality. In the Global North’s refugee debate, the novelty of mixed migration is manifested by its uncertain nomenclature. India refers to the phenomenon as mixed migration; to European policymakers, it is irregular migration; and in the Law, see Rajeev Dhavan, Refugee Law and Policy in India 36-54 (2004). See also Arun Sagar & Farrah Ahmed, The Model Law for Refugees: An Important Step Forward?, 17 STUDENT BAR REVIEW 73 (2005). For a 2001 version of the Model Law, see Model National Law on Refugees, 1 ISIL Y.B. INT’L HUMAN. & REFUGEE L. 19 (2001).


158 E.g., 50th EXCOM, supra note 48; 52nd EXCOM, supra note 48. However, India hypocritically refers to mixed migration from Bangladesh as illegal immigration. E.g., Press Information Bureau, Government of India, SOP for Repatriation of Illegal Bangladeshi Immigrants, July - December, 2016
United States, it is illegal immigration. There have been recent efforts in northern policy debates to conceptualise mixed migration. According to the International Organisation for Migration (IOM),

“mixed flows concern irregular movements, frequently involving transit migration, where [refugees, asylum-seekers, economic migrants and other migrants] move without the requisite documentation, crossing borders and arriving at their destination in an unauthorized manner”

The recent rise of the mixed migration debate - as opposed to mixed flows themselves, which are older - owes in large part to events in Europe over the last two decades. The creation of the Schengen area, which enhanced internal mobility but reinforced Europe’s external borders, spurred mixed migration because it supplanted regular immigration routes to ex-colonial countries, thereby pushing migrants into irregular channels such as boats. Growing alarm at the ineffectiveness of applying traditional refugee concepts, such the Refugee Convention’s definition of a refugee and individualised status determination, prompted UNHCR to issue an “action plan” for mixed migration in 2006. Europe’s current “migrant crisis” has dramatically increased awareness of mixed migration.


165 10-Point Plan, supra note 53.

2. The Old Reality of Mixed Flows and Mass Influxes

though it accounted for around 47 per cent of total international migration in 2005.173

When arriving in large numbers, mixed flows resemble a mass influx, a grey area because there is no commonly accepted numerical threshold for gauging mass influxes.174 Consider the flow of people from Syria, currently the world’s largest group of refugees and migrants,175 entering the Schengen area in mixed flows and confounding EU asylum law. Under the African Union’s expansive conception of refugee status, that entire mixed flow would receive asylum based on the *prima facie* existence of aggression and public disorder alone - assuming, of course, that Syria had signed the OAU Convention.

### 3. The Components of a Mixed Migration Regime

Once within a place of safety, a good asylum regime ought to parse mixed groups to identify the most vulnerable, differentiate between categories of people, and address secondary movements.176 Parsing a mixed flow is akin to triage. It should occur as soon as the mixed group is within an area of safety and certainly before any formal asylum determination proceedings are conducted. UNHCR refers to this process as “profiling and referral.”177 It describes the identification of the most vulnerable persons within a mixed group such as unaccompanied children, women at risk, torture survivors, victims of trafficking, and others. As it is inspected, people in a mixed flow can receive differentiated actions such as special help for the most vulnerable and formal asylum determination procedures for asylum seekers.

Considering mixed migration has captured and now dominates the global refugee debate, it is difficult to understand why Tharoor’s bill ignores it altogether. The statement of objects and reasons attached to Tharoor’s


177 10-Point Plan, *supra* note 53, 126.
bill says that migration has not received legislative recognition, which is true, but the text of his bill does not even mention mixed flows and does not contain a single provision to create the special procedures and authorities necessary to deal with the phenomenon. Considering his early career with UNHCR, and the fact that mixed migration was talked about in the Lok Sabha in 2015 during his ongoing term there as a member of parliament, Tharoor’s bill is simply out of touch with the contemporary asylum debate and India’s migration realities.

Perhaps the failure of Tharoor’s bill to address mixed migration is because the phenomenon was not addressed in PILSARC’s bill of 2006. Chapter III of Tharoor’s bill, where the special procedures necessary for mixed flows ought to be located, borrows heavily from Chapter III of PILSARC’s bill which was not drafted with mixed migration in mind. But that does not explain why no new provisions were added to Tharoor’s bill to take account of UNHCR’s 10-Point Plan for mixed migration which was also released in 2006.

D. THE SIGNIFICANCE OF MASS INFUXES

This Subpart has nine sections. Section 1 underscores the international refugee regime’s failure to quantify a mass influx. Section 2 surveys the Eurocentrism behind the failure to protect mass influxes. Section 3 briefly revisits India’s unstructured but notable record of mass influx protection. Section 4 draws four lessons for future mass influx protection based on past international failures and Indian practices. Section 5 identifies specific failures regarding the principle of non-refoulement in Tharoor’s bill which would hurt mass influxes. Section 6 deals with ‘disguised extradition,’ the immigration law loophole which is often used against refugees. Section 7 calls for specialised procedures to parse mass influx groups leading to differentiated protection mechanisms. Section 8 revisits the immediate administrative and structural challenges posed by mass influxes. Section 9 talks about the need to address secondary movements.

1. The Elusive Mass Influx Threshold

Debates on mixed migration often dovetail into mass influx discussions because the two phenomena are seamless in many respects. According to the EU’s 2001 Temporary Protection Directive, a mass influx is the “arrival [...] of a large number of displaced persons, who come from a specific country or geographical area, whether their arrival [...] was spontaneous or aided” who are unable to return to their country of origin “because of the situation prevailing in that country”.178 But, as UNHCR points out, there is no European

consensus on how many people constitute a mass influx, so the Directive has never been activated. In 2004, through a crucial EXCOM conclusion, UNHCR provided a structural description of a mass influx.

The primary difference between a mass influx and a mixed flow is that, more often than not, the latter originates from many places whereas the former usually originates from a specific area. But mixed flows can originate from a single area too, and when that occurs in a time of conflict, it confuses the international refugee regime. Unfortunately, the price of definitional imprecision is usually paid by migrants and asylum seekers. The inability to reach an understanding on terminology prevented the invocation of the Temporary Protection Directive in response to the exodus from Syria.

2. The Discontents of Eurocentrism

Europe’s wilful blindness regarding mass influxes goes back to the time the Refugee Convention was negotiated. Several European states were of the view that the duty of non-refoulement only applied to refugees already within their territories and not to those who had reached their frontiers and

---


181 UNHCR EXCOM, International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations (General Conclusion on International Protection No. 100 (LV) of 2004, 55th Session, UN Doc. A/AC.96/1003), available at http://www.unhcr.org/en-us/excom/exconc/41751fd82/conclusion-international-cooperation-burden-responsibility-sharing-mass.html (“[M]ass influx situations may, inter alia, have some or all of the following characteristics: (i) considerable numbers of people arriving over an international border; (ii) a rapid rate of arrival; (iii) inadequate absorption or response capacity in host States, particularly during the emergency; (iv) individual asylum procedures, where they exist, which are unable to deal with the assessment of such large numbers”) (Last visited on November 23, 2016).

182 Tometten, supra note 55, 79-80.

sought entry. In other words, European states wanted to protect their ability to refuse entry to mass influxes by rejecting such refugees at the frontier. Over the years, the non-refoulement principle has been expansively recast to prohibit frontier rejections and entry refusals. This is an important point to note because, as pointed out in Part III, Subpart D, Section 5 of this paper, Tharoor’s bill enables the rejection of refugees and asylum seekers at India’s frontiers.

Breaking first from Eurocentrism, the OAU Convention expressly prohibited refoulement at national frontiers. By recognising that refugees flee objective criteria too such as serious public disorder, it acknowledged that refugees are created for reasons other than targeted persecution on Westphalian ethno-cultural grounds. On the other hand, there are claims that the OAU Convention’s wide refugee definition was not intended to redress the failings of the Refugee Convention, but to accelerate African decolonisation. Others have challenged the view that the Convention promotes group-based rather than individualised protection. In any event, with a few exceptions, many

---

186 OAU Convention, supra note 11, Art. II(3) (“No person shall be subjected […] to measures such as rejection at the frontier […]”).
187 But see Sharpe, supra note 156; Okkoth-Obbo, supra note 156.
189 Okkoth-Obbo, supra note 156, 111-12.
191 E.g., Roni Amit, All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination (African Centre for Migration and Society, June 2012), available
African countries have impressive histories of mass influx protection made possible by expanding on the Refugee Convention’s European notion of refugee status.  

When targeted persecution is a precondition for protection, people fleeing generalised violence are often left unprotected because they are unable to prove that they were singled out for persecution. That is because it is easier for a person to prove targeted persecution when her peers are not persecuted; when an entire community is victimised, the standard of targeted persecution for that person to prove is higher. European courts have required people fleeing generalised violence to prove, above and beyond the threats to their life and liberty, a higher risk to themselves compared to the already heightened risk to their community. This has resulted in an uneven corpus of differential risk in international refugee law.  

The Refugee Convention’s European notion of refugee status imposes unfairly high penalties on rural non-elites, particularly illiterate or uneducated individuals unable to prove they were persecuted. It also fails to protect people fleeing from community-enforced atrocities such as female

---

192 D’Orsi, supra note 141, 75-84; Penelope Mathew & Tristan Harley, Refugees, Regionalism and Responsibility 43-45 (2016).


195 But see Prophete v. Canada, 2008 FC 331 (Federal Court of Canada); Minister for Immigration and Multicultural Affairs v. Haji Ibrahim, 2000 HCA 55 (High Court of Australia).

196 Gunning, supra note 29, 35-36.
European attitudes towards mass influxes changed only when Europeans constituted those mass influxes, particularly after the Balkan wars in the 1990s, resulting in the Temporary Protection Directive being adopted.

3. India’s Experience of Mass Influxes

India has an exemplary but unsystematic history of protecting mass influx refugees. In 1971, around 10 million refugees from what is now Bangladesh found refuge in India - the “largest single displacement of refugees in the second half of the century.” But there was no systematic mechanism to parse the mass influx group, for example, to identify vulnerable and dangerous individuals. The 1971 refugees were voluntarily repatriated en masse after the violence in Bangladesh subsided, bringing the crisis to an end.

On the other hand, the Tibetan mass influx into India, beginning in 1959 and still continuing, remains in search of a permanent solution. For Sri Lankan Tamil refugees, their stay in India has been marked by heavy surveillance following Prime Minister Rajiv Gandhi’s assassination by one of their compatriots. But a policy of suspicion cannot correct the original failure to screen the group when it entered India. For Chakmas and Hajongs displaced

---

197 But see UNHCR, Guidance Note on Refugee Claims relating to Female Genital Mutilation, 5-6 (May 2009), available at http://www.refworld.org/docid/4a0c28492.html (Last visited on November 23, 2016).
200 See Cutts, id., 68-71. But see Grbac, supra note 109, 7.
by a dam and religious persecution in Bangladesh, Indian asylum has not yielded the kind of protection and generosity shown to other communities.  

4. Four Lessons for Mass Influx Protection

There are four chief lessons from international practice and India’s experience that should inform a future asylum regime. First, the duty to respect the principle of non-refoulement is overriding, and it extends to preventing frontier rejections and entry refusals. Second, there is a need for special procedures to parse mass influx groups, similar to those described in the previous section for mixed flows, to identify vulnerable persons; and a screening mechanism to prevent criminals, genocidaires, and other dangerous individuals from entering India. Third, alongside different forms of protection, there must be different models of refugee management designed to quickly achieve a durable solution to end the mass influx. Fourth, there must be a mechanism to deal with secondary movements and asylum shopping.

5. Strengthening Non-Refoulement

There should be an absolute bar against refoulement regardless of whether a person is on Indian soil or trying to get in, and regardless of what form of India’s protection she seeks or already enjoys, whether that is refugee status, asylum, or any shade of either of them. Tharoor’s bill would derogate the principle in three ways. First, Clause 8 of his bill restricts the protection against refoulement to refugees only, not asylum seekers; and refugees are defined as people who have been formally granted asylum. So asylum seekers, both those whose asylum claims are pending as well those who have not filed claims yet, can be sent back as long the procedure for their removal complies with clause 9.

---


Second, Clause 8 permits frontier rejections because it qualifies the application of non-refoulement to “refugee[s] present within the national territory of India.” That would permit refugees at India’s frontiers, but not on its territory, to be turned away. If enacted, the clause would reverse India’s decades-old, unwritten policy of never rejecting asylum seekers at the frontier.

Through Clause 10(2), Tharoor’s bill tries to staunch the wound it inflicted on the non-refoulement principle by preventing “police officer[s] or […] person[s] exercising powers under the Foreigners Act” from denying asylum seekers entry into India. But Clause 10(2) would be ineffective against members of India’s army and navy because they are not police officers and do not derive legal authority from the Foreigners Act while on active duty. That is a significant error because many Indian borders are controlled by the army or the navy. An asylum seeker at such a border may be turned away by a soldier or sailor against whom Tharoor’s bill is unenforceable. The general non-obstante clause does not suffice.

Third, through Clause 8, Tharoor’s bill restricts the protection of the non-refoulement principle only to those fleeing subjective persecution on the grounds listed in his Clause 4(1)(a). It explicitly does not protect people fleeing the objective criteria listed in his Clause 4(1)(b), which happen to be the grounds on which mass influxes will most probably receive asylum. In effect, besides enabling rejections at the frontier, Tharoor’s bill would allow mass influx refugees to be forced back to places where there are “serious and indiscriminate threats to life.”

6. Preventing Disguised Extraditions

A ‘disguised extradition’ occurs when a state uses its immigration law, instead of extradition law, to transfer the custody of a person to another state. Usually, the former’s deportation power grants wider leeway to the

---


expelling state than the latter’s due process regime. Disguised extraditions enable states to bypass the ‘political offence exception’ in extradition law by which a state can refuse an extradition request if it believes it is for an offence of a political nature. The political offence exception is recognised in Indian law. Some jurisdictions also recognise a ‘discrimination exception’ if the requisition is informed by persecutory intent, but not India.

Why is this significant? Asylum and extradition share an interface which permits removals for non-political offences only. For instance, Tharoor’s bill excludes from asylum persons who have committed “serious non-political offences;” and the Extradition Act, 1957 exempts political offenders from extradition. Hence, if a state wants to remove a political offender to face punishment elsewhere, it must effect a disguised extradition which is only possible if the person has been excluded from asylum.

To exclude a person from asylum, there must be serious charges of a non-political nature against her. There is no consensus on what constitutes a political offence, hence non-political offences are open to interpretation. Acts of sedition or lèse-majesté are overtly political but terrorism, even when it is committed for a political purpose, is not. In many jurisdictions, the decision as to what constitutes a political offence ultimately belongs to the executive.


Compare R. v. Governor of Brixton Prison, ex p Soblen, (1963) 2 QB 243 : (1962) 3 WLR 1154 : (1962) 3 All ER 641 (CA) (‘Soblen’) (permitting the deportation of a fugitive because his presence was not conducive to the public good, not because he was wanted as a criminal elsewhere), with R. v. Horseferry Road Magistrates’ Court, ex p Bennett, (1994) 1 AC 42 : (1993) 3 WLR 90 : (1993) 3 All ER 138 HL(E) (finding that forcibly returning an accused without regard for extradition procedures is an abuse of law).


The Extradition Act, 1962, §§ 7(2) and 31(1)(a) read with § 31(2) and the Schedule. But see Hans Muller v. Supt., Presidency Jail, AIR 1955 SC 367 : (1955) 1 SCR 1284 ¶¶ 23-24, 1301 (“[T]he fact that [an extradition] request has been made does not fetter the discretion of Government to choose the less cumbrous procedure of the Foreigners Act when a foreigner is concerned”). See also R.C. Hingorani, Deportation or Extradition: Re Soblen in Retrospect, 6 Journal of the Indian Law Institute 120 (1964).


Tharoor’s Bill, supra note 2, Cl. 5(1)(a)(ii).

Supra note 215.

Kapferer, supra note 214, 28.

Id., 30-31.

E.g., Extradition of McMullen, In re, 989 F 2d 603, 613 (2nd Cir 1993); Hans Muller v. Supt., Presidency Jail, AIR 1955 SC 367 : (1955) 1 SCR 1284 ¶¶ 23-24, 1300-01. See generally David M. Lieberman, Sorting the Revolutionary from the Terrorist: The Delicate
be enough to deprive an asylum seeker of protection. To protect against this, Tharoor’s bill should list the political offences that enable protection.

7. Special Procedures and Differentiated Protection

Mass influxes demand statutorily guaranteed special procedures. UNHCR’s emergency handbook contains a list of minimum standards for mass influxes, which are broadly covered by Clause 36 of Tharoor’s bill. Whereas logistical needs can be left to subordinate legislation, the screening of mass influx groups to weed out criminals, genocidaires, dangerous elements, and fake claimants must be statutorily mandated. Econometric analyses of twentieth century conflicts reveal that refugees are an important causal link between the onset and continuation of civil conflict, although their effects can be politically mediated. Tharoor’s bill lacks not just a screening mechanism, it is also missing an understanding of conflict diffusion.

Tharoor’s mass influx proposals are borrowed almost verbatim from PILSARC’s bill. In the intervening decade, Europe’s migrant crisis provides new cues for refugee policymakers which Tharoor’s bill should have reflected. The most significant missing provisions pertain to differentiated asylum procedures. They are necessary because a mass influx contains different categories of people, it is not a homogeneous congregation. This paper has already proposed four categories of asylum. Those who want to claim refugee status on the basis of subjective persecution should be allowed to undergo a full-fledged individual status determination procedure conducted by a professional asylum agency. People fleeing generalised violence should be granted prima facie group refugee status. Individuals accused of political crimes in their home countries should receive a time-bound asylum decision directly

---


Rutinwa, supra note 208.


Compare Tharoor’s Bill, supra note 2, Cl. 30-33 with PILSARC’s Bill, supra note 6, Cl. 25-28.

from the Centre. And, refugees from disasters and climate change should receive customised solutions.

8. Managing Mass Influxes

An asylum regime is not only about granting asylum, it is also about what comes afterwards - the actual governance of refugees. This broad point is discussed in more detail in Subpart E of this Part. The narrow point discussed here is specifically about managing mass influxes. Because they strain capacity and resources, mass influxes must be managed at a number of levels. Mass influx camps require municipal management; local areas where refugees are located require proactive administration, particularly to prevent conflicts between refugees and locals; and mass influxes as a whole must be brought to a swift conclusion without coercion or refoulement.

Refugees should not - to adapt a European term - be kept in ‘orbit’ by being forced to wander looking for protection, never being granted asylum but not being refouled either, as the Chakmas have been. For non-transient asylum, when quick en masse repatriation is not possible, a good asylum regime ought to integrate refugees into the workforce through a formal work-permit system, a measure first proposed to formalise and control Bangladeshi migration. Because it does not contain a single proposal to manage mass influxes, Tharoor’s bill is found wanting for substance.


9. Dealing with Secondary Movements

Tharoor’s bill fails to take account of ‘secondary movements.’ Asylum seekers, particularly in mixed flows, often transit through other countries before reaching their final destination. Such a country is considered a ‘safe third country’ if the asylum seeker would be safe there, or a ‘first country of asylum’ if it granted any form of protection to the asylum seeker. The terminology is uncommon in India but the concepts are familiar: Tibetans enter India through Nepal where some have received asylum in the past;234 Rohingyas have come from Myanmar through Bangladesh;235 and others. On the other hand, Lhotshampa refugees passed through India on their way to Nepal, so from Nepal’s perspective, India could be a safe third country.237

From India’s point of view, there are two questions: How should a future asylum regime respond to a protection request from a person who transited through a safe third country or received asylum en route to India? And what to do about people who make secondary movements from India?


233 Legomsky, supra note 176, 575-76, 588-89.


237 Acharya *2, supra note 157.

July - December, 2016
International refugee law and policy offers no consensus.\textsuperscript{238} The EU’s Dublin Regulation, which attempts to arrest secondary movements to prevent ‘asylum shopping’ has largely failed in the face of current migration volumes.\textsuperscript{239} For now, any proposed asylum regime should: (i) explicitly declare that the non-refoulement principle is binding, regardless of secondary movements; (ii) respect family unity; and (iii) act against human trafficking of asylum seekers. On all three counts, Tharoor’s bill is silent.

\textbf{E. A COHERENT MODEL OF REFUGEE GOVERNANCE}

This Subpart has three sections. Section 1 very briefly reviews the literature regarding the impacts of refugees on host countries, including the phenomenon of conflict diffusion, and revisits specific failures in India’s governance of refugee situations. Section 2 discusses the dangers associated with refugee camps being militarised. Section 3 outlines specific measures for India to better govern refugee situations.

1. Impacts on Host Countries and Communities

Refugees and migrants, particularly in mass influxes and mixed flows, pose unique challenges to the governments of host countries.\textsuperscript{240} The presence of refugees and migrants has a range of cultural, environmental, and political effects on host communities.\textsuperscript{241} In Europe, there is growing alarmism that


\textsuperscript{240} \textsc{Gil Loescher, Refugee Movements and International Security (The Adelphi Papers)} 41-45 (2008).

\textsuperscript{241} UNHCR EXCOM, \textit{Social and economic impact of large refugee populations on host developing countries} (Standing Committee Report, EC/47/SC/CRP.7, January 6, 1997), available at http://www.unhcr.org/en-us/excom/standcom/3ae68d0e10/social-economic-impact-large-refugee-populations-host-developing-countries.html (Last visited on November 24, 2016); UNHCR EXCOM, \textit{The role of host countries: the cost and impact of hosting refugees}
migration is accelerating a clash of civilisations. In rural areas, refugees can spark a competition for resources and exacerbate social fault lines. In India, while there certainly is friction between refugees and local communities, more serious forms of conflict are absent although religiously-inspired nativism is escalating anti-refugee rhetoric. In north-east India, ethno-religious conflict is clearly visible with regard to Bangladeshi migrants.


There is a large body of research identifying links between refugees and violent conflict.\textsuperscript{247} The broad thrust of those arguments is that mass influx refugees bring with them the conflict they flee from, and in this way they diffuse civil wars and sub-state violence across borders.\textsuperscript{248} Qualitative evidence in support of that claim exists in respect of mass influx refugee camps in various parts of Africa and the Balkans,\textsuperscript{249} but there are also arguments that dispute the links between refugees and conflict diffusion.\textsuperscript{250} How to prevent refugee-related conflict from spreading? The dominant thesis calls for diffusing refugee settlements through spatial distance but maintaining contiguity with demographically proximate areas.\textsuperscript{251}

The Sri Lankans in India are a model case study of India’s multifaceted failure to govern refugees properly. In 1991, there were around 2,10,000 Sri Lankan Tamil refugees in Tamil Nadu housed in 243 camps.\textsuperscript{252} Their welcome was influenced by kinship with their demographically proximate hosts.\textsuperscript{253} But it soon went wrong. Militant groups brought the Sri Lankan conflict onto Indian soil by openly recruiting in the camps,\textsuperscript{254} culminating in Rajiv Gandhi’s assassination. Consequently, local communities turned on the refugees,\textsuperscript{255} and the government created stringently-policed ‘special camps’ with “watch towers, focus lights, and machine-gun posts.”\textsuperscript{256} From one extreme, refugee policy fled to the other extreme.

\textsuperscript{247} See generally Zolberg et al., supra note 154; Loescher, supra note 240; Sarah Kenyon Lischer, Dangerous Sanctuaries: Refugee Camps, Civil War, and the Dilemmas of Humanitarian Aid (2006); Robert Muggah, No Refuge: The Crisis of Refugee Militarization in Africa (2006).

\textsuperscript{248} Choi & Salehyan, supra note 224.


\textsuperscript{250} Shaver & Zhou, supra note 224.


\textsuperscript{253} Hans, supra note 106, 33.

\textsuperscript{254} Id., 30.

\textsuperscript{255} Navine Murshid, The Politics of Refugees in South Asia 80 (2013).

To re-establish order, the Sri Lankan camps were relocated across the State. Spatial distance between the camps lessened refugee concentrations which, in turn, reduced the perceived threat of resource competition with local populations and minimised intra-community conflict amongst the refugees. Nevertheless, the Sri Lankans have deeply impacted their host community, even influencing the course of Tamil Nadu’s politics. That was never the case for Tibetan refugees who were deliberately dispersed across India very soon after the mass influx began. Dispersal protected them from Chinese reprisals near the border but deprived Tibetans of demographic similarities, resulting in conflict, with their host communities.

2. Militarisation of Refugees

Very often, to achieve political ends, host governments capitalise on the disaffection of refugees who were forced from their home countries. India did that when it militarised the Bangladeshi refugee camps in 1971 to aid the war that followed, as well as when it secretly created a de facto Tibetan army. While both strategies paid political dividends, there are concerns that militarising refugee camps increases their likelihood of being militarily attacked, resulting in civilians being killed. Refugees may arm without state support too, particularly if their camps are near conflict zones, making it easy to establish supply lines. In many refugee camps, especially in Africa, militarisation has seriously undermined asylum and caused increased violence against women.
Most refugee laws contain boilerplate provisions prohibiting refugees from committing subversive activities. PILSARC’s bill did not even contain that. It failed to comprehend the importance of achieving a demilitarised state of asylum and Tharoor’s bill is deficient too because it imports the same failure. In the previous section, this paper recommends screening and other special measures for mass influxes. But that is not enough. Non-transient refugee camps should be moved away from borders and conflict zones; former combatants should be disarmed and rehabilitated; and fighting-age men and women should be prioritised for gainful employment. Further, while Indian authorities cannot prevent refugees from voluntarily returning to conflict zones, there should be an absolute bar against militarising refugees.

3. Governing Migration and Refugee Situations

India’s traditional response to migratory flows, which may include refugees, has been control-oriented. It focuses on detection, apprehension, and deportations of unauthorised foreigners. But it is haphazard and therefore susceptible to political opportunism. On the other hand, although popular elsewhere, externalising the control-oriented approach by offshor-
ing refugee processing to peripheral areas has never been tried in India. For instance, the EU’s “hotspot” scheme shifts all refugee and migrant processing to single locations which conduct screening and asylum determination and also provide special care to the vulnerable. An extreme version of offshoring, designed to deter migratory inflows, is Australia’s ‘Pacific Solution’ which detains unauthorised arrivals in surrounding islands. A future asylum regime should provide for hotspots but prohibit detentions.

There is a growing European effort to pre-empt migratory flows by attempting to mitigate ‘push factors’ in the migrants’ countries of origin. The strategy includes efforts to generate employment and create infrastructure. It is essentially a targeted financial aid programme. More controversially, direct intervention to pre-empt refugee situations in host countries is fraught with difficulty. If the push factor for refugees is conflict, at what point does a humanitarian intervention constitute an invasion; should interventions, even non-military ones, be unilateral? These are some of the questions a future asylum regime would have to grapple with. Let us not forget that in 1971, India engineered mass repatriations through military intervention.

The overriding governance goal for a host country dealing with a large refugee population is to achieve a durable solution for the crisis. Of the three types of durable solutions, India is best placed to achieve local integration. It can do that by granting citizenship to refugees who meet eligibility criteria which a future asylum law should make clear. For instance, the Tibetan community in India which cannot return in the foreseeable future is effectively stateless. Such refugees should be automatically eligible for citizenship. Future asylum law should set out a right against statelessness, followed by procedural provisions for acquiring citizenship within clear timeframes.

---


When refugees do not encounter fear and suspicion in their host countries, they often find patronisation. That can have deleterious effects for refugees who exist outside the bounds of the citizen-state contract and are completely dependent on their host country’s charity. Creating refugee self-governing institutions such as the Central Tibetan Administration, which has limited powers of government over Tibetan refugees, creates new models of participatory citizenship. And, as recommended earlier in this paper, integrating refugees in the formal workforce through a work permit system will promote economic independence and contribute to national growth. No doubt refugees must have the benefit of India’s welfare system but because it is rent-seeking and stunts participatory citizenship, it should be the last resort.

IV. IMPROVING THAROOR’S BILL

This Part suggests how Tharoor’s bill can be improved to achieve its objective of creating a world-leading asylum regime. It is divided into two parts. Subpart A highlights three important governance-related issues which will determine the success or failure of any future asylum regime. Subpart B is informed by the discussion in Part III and contains specific recommendations for Tharoor to consider.

---

A. UNDERSTANDING HOW GOVERNANCE AND ASYLUM INTERSECT

Tharoor’s bill is clearly the most comprehensive of the three bills introduced in Parliament. It takes several important steps towards an asylum regime. It clearly sets out inclusion, exclusion, and cessation criteria for refugee status;\(^{279}\) attempts to enact the principle of non-refoulement;\(^{280}\) prescribes procedures to apply for asylum;\(^{281}\) creates institutions to determine asylum claims;\(^{282}\) sets out a minimal rights regime;\(^{283}\) and, with exceptions, is mindful of the rules of statutory construction. Although flawed, the bill includes preliminary frameworks for mass influx situations\(^{284}\) and voluntary repatriations.\(^{285}\)

But, as anyone who is structurally familiar with India’s governance and judicial system knows, there are bigger, more wide-ranging criteria that determine the success or failure of regulatory regimes. Tharoor’s bill intersects with three overarching constitutional and regulatory themes that will determine how his proposed asylum system functions: due process, federalism, and institutional capture.

1. Due Process and Related Safeguards

Tharoor’s bill hits the nail on the head by carefully establishing a comprehensive due process regime. Due process is an unsexy but critical component of the law. Without it, the bill’s various institutions and procedures would be meaningless. Procedure, according to Justice Hansraj Khanna, is the source of liberty.\(^{286}\) He was talking about due process yet the concept did not begin its life with the Constitution, it had to be read into Article 21 of the Constitution over several decades,\(^{287}\) a contested process that continues to this day.\(^{288}\)

As foreigners, refugees are vulnerable to a frightening lack of due process. Despite the constitutional mandate for due process, the history of personal liberty, we must bear in mind, is largely the history of insistence upon procedure. (Frankfurter, J.).

ADM, Jabalpur v. Shivakant Shukla, (1976) 2 SCC 521, ¶ 221 (“The history of personal liberty, we must bear in mind, is largely the history of insistence upon procedure.”) (quoting from McNabb v. United States, 1943 SCC OnLine US SC 55 : 87 L Ed 819 : 318 US 332, 346 (1943) (Frankfurter, J)).


process, especially in relation to deportation, because the Supreme Court has refused to update its decades-old position that the Centre’s absolute expulsion power is unencumbered by due process.289

In the context of an asylum regime, substantive due process is necessary to protect against the excesses of the government’s deportation prerogative including the power to detain foreigners pending deportation.290 Procedural due process is required to build a regime of natural justice to accompany the asylum determination process and any restrictive actions concerning forcible migrants. Because a long line of cases have identified structural links between Articles 14, 19, and 21 of the Constitution, there are additional safeguards pertaining to arbitrariness and reasonableness which are available.291 Of course, when operational, statutory actions under Tharoor’s bill will also be judged according to the doctrines of proportionality and Wednesbury unreasonableness.292 Tharoor’s bill does right by due process which is not surprising considering the bill’s due process provisions originated in the chambers of a practicing senior counsel of the Supreme Court.293

2. Federalism-Related Tensions

Is Tharoor’s bill within the Union’s competence? Yes, it clearly is.294 But the States control public order and the police, both of which may be implicated during mass influx situations and in refugee camps.295 Assuming his bill became law and the principle of non-refoulement became binding, it is not inconceivable that a state will refuse to enforce the law’s duty to protect

290 For the power to detain pending deportation, see Foreigners Act, 1946, §§ 3(1), 3(2)(g); Foreigners Order, 1948, supra note 24, ¶¶ 3(2), 3(5); Passport (Entry into India) Act, 1920, § 5.
293 Cf. PILSARC’s Bill, supra note 6, Cl. 8-24.

July - December, 2016
refugees. In such a situation, the Constitution unequivocally upholds the Centre which may direct the state to comply with Parliament’s law, failing which the President may find that the state’s constitutional machinery has broken down, justifying direct rule from Delhi. In practice, there are a number of political and legal bridges to cross before states’ governance can be displaced by the Centre.

Regardless of the Centre’s legislative competence, there are potential creases regarding fiscal federalism which need ironing out. The Union’s place at the top of the federal hierarchy has been reinforced by its large effective tax base at the cost of the States. To even out the resulting fiscal imbalance, there is an institutionally-mediated system of vertical resource redistribution to the States. But the Constitution also provides for funds to be specially transferred from the Centre to the States to defray the costs of performing duties imposed on the latter by the former. Tharoor’s bill was accompanied by a hastily put together financial memorandum which mentions only the most obvious aspects of revenue expenditure, such as salaries, and fails to mention the amounts that will be charged to the States. State expenditure on refugees is a past and present reality which will no doubt grow to accommodate a future mass influx. It should have been legislatively anticipated.

3. Institutional Decline and Capture

Indian federal executive power, which is nominally exercised by the President, was allocated in 1961 to the Centre’s ministries, departments, secretariats, and offices (“departments”). But contemporary Indian governance leans increasingly heavily on independent institutions that are not departments

---

298 Id., Art. 365.
299 Id., Art. 356.
302 Id., 1250. The amount of Central tax revenue to be distributed to the states is determined by the Finance Commission established pursuant to Article 280 of the Constitution.
303 The Constitution of India, 1950, Art. 258(3).

July - December, 2016
and exist outside the regular framework of the government. Four permanent types of independent institutions exercise varying degrees of limited power -- constitutional commissions, economic sectoral regulators, professional self-regulators and rights-based commissions (collectively, ‘institutions’). In broad terms, except for the economic sectoral regulators, all the institutions have failed after succumbing to mismanagement, corruption, or lost independence following governmental capture.

The institutions remain an anomalously under-studied area of Indian governance and the rights-based commissions are almost totally unexamined. The exception is the National Human Rights Commission (NHRC) which has been intermittently scrutinised to reveal widespread failures. The NHRC’s disappointing career is emblematic of the all-round failures of other rights-based commissions. It was created to be a watchdog against state violence but even though its parent statute strongly insulated it from political interference, it is failing its mandate. Today, the NHRC has withered into irrelevance, its own chairperson recently attacked its impotence. What is more

---

305 E.g., The Constitution of India, 1950, Arts. 315-323 (chartering the Union Public Service Commission); Art. 324 (chartering the Election Commission of India).

306 E.g., Telecom Regulatory Authority of India Act, 1997, 24 of 1997, § 3 (establishing a telecoms regulator); Competition Act, 2002, 12 of 2003, § 7 (establishing the Competition Commission of India to secure fair market competition).

307 E.g., Advocates Act, 1961, 25 of 1961, § 4 (creating the Bar Council of India to self-regulate professional conduct amongst lawyers and legal education); Indian Medical Council Act, 1956, 102 of 1956, § 3 (reconstituting the pre-independence Medical Council of India to regulate medical education and register new doctors).


310 There are few wide-ranging reviews of the institutions. See generally PUBLIC INSTITUTIONS IN INDIA: PERFORMANCE AND DESIGN (Devesh Kapur & Pratap Bhanu Mehta eds., 2007).


Tharoor wants to create a new rights-based commission called the National Commission on Asylum with appeals to a quasi-judicial tribunal known as the National Appellate Board for Asylum. That is an understandable proposal considering the alternative is to leave refugees to the whims of the Department of Internal Security. On the other hand, there is an opportunity to learn from the failures of the rights-based commissions. Tharoor’s bill misses that opportunity. At a minimum, Tharoor’s proposed commission and tribunal should have mandated a pre-appointment cooling-off period, strengthened protections against governmental interference, increased transparency requirements, external performance audits, and more.

**B. SPECIFIC SUGGESTIONS TO IMPROVE THAROOR’S BILL**

1. The Objects Clause

Clause 3 of Tharoor’s bill is a general objects clause of questionable utility. It has been borrowed from PILSARC’s decade-old bill but ignores the lessons learned from Section 83 of the Patents Act, 1970. For objects clauses to be successful, they should be narrowly tailored to signal an overriding policy objective to the judicial branch, leaving broad summaries of

---


316 Mehra, *supra* note 314.


318 PILSARC’s Bill drew on Section 83 of the Patents Act, 1970, India’s only objects clause, which went into force in 2003 to aid grants of compulsory licences of unworked patents. Section 83 is a specific objects clause designed to achieve a precise objective.


---
a statute’s general aims to a preamble.\textsuperscript{320} It can be corrected by narrowing the objects clause to focus on the non-refoullement principle.

2. The Scope of Asylum

\textit{a. Who is an Asylee?}

This paper proposes a four-fold categorisation of asylum for the reasons discussed in Part III, Subpart B of this paper. Clause 4(1) of Tharoor’s bill should be redrafted to state that an asylee is a person who:

(i) is a refugee because she meets the criteria listed in Paragraph (b) of Clause 4(1) which reflects UNHCR’s extended mandate for complementary protection plus the additional grounds listed in Article I(2) of the OAU Convention and Paragraph III(3) of the Cartagena Declaration;

(ii) is a refugee because she meets the criteria listed in Paragraph (a) of Clause 4(1) which reflects the grounds listed in Article 1A(2) of the Refugee Convention plus the added ground of ethnic persecution contained in PILSARC’s bill;

(iii) has been granted discretionary asylum by the Centre; and,

(iv) has been displaced as a result of a natural disaster or catastrophic climate change.

\textit{b. The Exclusion Clauses}

Clause 5(1)(a)(ii) which denies protection to people who have committed serious non-political crimes must be narrowly tailored. Learning from Dorji’s case, Tharoor’s bill should provide a clear list of serious non-political crimes, ideally in a schedule, to pre-empt disguised extraditions.

Clause 5(1)(a)(iii) excludes perpetrators of “inhuman acts” which are undefined. The term could be a reference to either crimes against humanity or torture.\textsuperscript{321} Crimes against humanity are pre-existing exclusion grounds, hence redundant here.\textsuperscript{322} Torture and inhuman acts are inseparable; the latter


\textsuperscript{321} Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984, 1465 U.N.T.S. 85, Art. 16(1).

\textsuperscript{322} Tharoor’s Bill, \textit{supra} note 2, Cl. 5(1)(a)(i). Furthermore, an inhuman act is a crime against humanity only if it is committed “on national, political, ethnic, racial or religious grounds,” not “for any reason whatsoever” as Tharoor’s clause states. \textit{Compare} Statute of the International
cannot be carved out willy-nilly. This confusion can be avoided by adding a definition which is tenable in international law or deleting the provision from the bill altogether.

Clause 5(1)(b) has two linked parts. It excludes peoples who seriously threaten public order or national security if they commit a crime bearing a sentence of at least ten years’ imprisonment. The clause should define “national security.” It should also replace the imprisonment threshold with a list of exclusion offences.

Clause 5(1)(c) excludes people who have “the rights and obligations of an Indian citizen” recognised by “competent authorities of India.” The term “competent authorities” should be defined. This can be corrected if Tharoor includes a definition in his bill so that the maxim *lex specialis derogat legi generali* is fulfilled. Tharoor’s intent is unclear too. If the clause was applied in India, it would lend credence to the view that India is above all a Hindu homeland.

3. The Principle of Non-Refoulement

Clause 8 and Clauses 2(1) (b) and (e) of Tharoor’s bill restrict the application of the duty of non-refoulement to persons already on Indian territory. That would enact a large loophole through which frontier rejections and

---


325 The ten-year imprisonment threshold is too high because, for example, since the minimum sentence for rape is seven years, it could allow convicted rapists to slip through. But pushing down the threshold might exclude people who have committed victimless crimes and pose no physical harm to the community.

326 Absent a definition, courts would attempt a harmonious construction with the Foreigners Act with the result that a mid-ranking policeman might be a competent authority.


328 Clause 5(1)(c) of Tharoor’s bill is copied from Article 1E of the Refugee Convention which was designed to exclude post-war ethnic-German displaces from refugee status since they were accepted *en masse* by Germany on the basis of ethnic affinity alone. The Article was influenced by the proto-European view of nations being ethno-cultural homelands. Such a notion of nationality that was rejected by India’s founders. *Supra* notes 44, 46.

329 Such a view informs the Citizenship (Amendment) Bill, 2016, 172 of 2016, Lok Sabha, which makes Hindu and other non-Muslim illegal migrants eligible for citizenship in certain conditions. *See also* Garg, *supra* note 245.
entry refusals would take place. Pursuant to discussion in Part III, Subpart D, Section 5 of this paper, the gaps in protection can be closed by:

(i) extending the application of clause 8 to asylum seekers;

(ii) deleting the reference to “national territory” in clauses 2(1)(b) and (e) and clause 8 so that the principle of non-refoulement applies at the frontier;

(iii) deleting clause 10(2);

(iv) making clause 8 binding against all agents of the Indian government;

(v) specifically overriding immunity and non-enforceability provisions of military and naval law, to the extent that they pertain to refugees and asylum seekers; and,

(vi) expressly applying clause 8 to people whose entry into India constitutes a secondary movement.


Tharoor’s bill lacks the specialised institutions and procedures required to deal with mixed flows and mass influxes, which share many characteristics. Pursuant to the discussion in Part III, Subparts C and D of this paper, the bill requires fresh provisions to:

(i) mandate the swift identification of vulnerable persons;

(ii) identify and distinguish asylum seekers from economic migrants;

(iii) mandate screening of mixed flows and migrant groups;

(iv) set out procedures for prima facie group-based protection;

(v) set out fast-tracked procedures for short-term individualised protection;

(vi) enact a specific detention power for unauthorised arrivals who do not fall within any protection category; and,

(vii) enact a specific criminal offence for asylum-related people smugglers.

The bill also requires rule-making provisions to specifically empower the Centre to:
(i) establish consolidated processing centres for mixed flows and mass influxes at selected border areas;

(ii) spell out how the consolidated centres will function;

(iii) enable profiling-based identification methods;

(iv) create fair screening procedures;

(v) build a minimal regime of due process for group and individualised protection procedures; and,

(vi) create a due process regime for the detention power that stronger than what the Foreigners Act offers.

5. Provisions for Mass Influxes Only

Following the discussion in Part III, Subpart D of this paper, Tharoor’s bill requires dedicated provisions for mass influxes only. Such provisions should:

(i) define a mass influx based on an unambiguous numerical and time-bound threshold;

(ii) enact a specific bar against refugee militarisation;

(iii) recognise the overriding principle of family unity;

(iv) prohibit penalties against unauthorised arrivals who fall within a protection category; and,

(v) institute a work permit-based system to access formal employment.

6. A Right against Statelessness

India has signed neither the 1954 Convention Relating to the Status of Stateless Persons nor the 1961 Convention on the Reduction of Statelessness. There is a large incidence of statelessness in India. 332 It in-

332 See generally Sitharamam Kakarala, Deepika Prakash & Maanvi Tiku, India and the Challenge of Statelessness (Report submitted to UNHCR India, National Law University of Delhi, 2012), available at http://nludelhi.ac.in/download/publication/2015/India%20and%20the%20Challenges%20of%20Statelessness.pdf (Last visited on November 29, 2016); Raghu Karnad, Bhairav Acharya & Rajeev Dhavan, Protecting the Forgotten and Excluded: Statelessness in

July - December, 2016
cluded residents of the complex warren of enclaves and exclaves along the border with Bangladesh, which has ostensibly been settled through a political agreement. It continues to include descendants of Partition survivors, Chakma and Hajong refugees, members of the ethnic-Chinese community, and Tibetan refugees. Tharoor’s bill should set out a general right against statelessness, perhaps linked to a time-based residency threshold, as well as a procedure to acquire Indian citizenship to end statelessness.

7. Strengthened Institutions

Learning from the failures of the institutions, Tharoor’s bill should do more to protect the autonomy and efficiency of the bodies it seeks to create, namely the National Commission on Asylum and the National Appellate Board for Asylum. The bill should:

(i) make the President the appointing authority for the Commission’s Chief Commissioner and the Appellate Board’s Chairperson;

(ii) specify a minimum cooling-off period of at least three years between a judge demitting office and being appointed as Chief Commissioner or Chairperson;

(iii) contain an absolute bar against members of political parties and their proxies holding office in any capacity in either the Commission or Appellate Board;


(iv) require all members and staff of the Commission and Appellate Board, and their relatives, to fully disclose their assets on an ongoing basis;

(v) mandate an external audit of the functioning of the Commission and Appellate Board on a regular basis and publish the results widely;

(vi) mandate that all strategic and policy decisions regarding the Commission’s functioning, especially in relation to an ongoing asylum situation, are made after public consultations with experts and stakeholders;

(vii) specify a maximum time-frame for the Commission and Appellate Board to reach a final decision in relation to an applicant or asylee, enforced through punitive measures.