



Himachal Pradesh National Law University, Shimla (India)



Journal Articles

ISSN:2582 1903

Shimla Law Review

2018

**STANDARDS OF REFUGEE PROTECTION: INTERNATIONAL LEGAL
FRAMEWORK AND EUROPEAN PRACTICE**

S.S. Jaswal

DOI: <https://doi.org/10.70556/hpnlulr-v1-l1-2018-06>

This article can be downloaded from: <https://www.hpnlulr.ac.in/page.aspx?page=35>

Recommended Citation:

S.S. Jaswal, STANDARDS OF REFUGEE PROTECTION: INTERNATIONAL LEGAL
FRAMEWORK AND EUROPEAN PRACTICE 1 SML. L. REV. 124 (2018).

<https://doi.org/10.70556/hpnlulr-v1-l1-2018-06>

This Article is published and brought to you for free and open access by Himachal Pradesh National Law University, Shimla. For more information, please contact shimalawreview@hpnlulr.ac.in

Contents

Volume I 2018 Shimla Law Review

<i>Articles</i>	<i>Page</i>
1. Address of Hon'ble Justice Shri Ranjan Gogoi on the Occasion of Second Orientation Programme, HPNLU Shimla	1
2. State and Equality from Sadācār(a) to Bazaar: Searching Alternative Impressions in Light of the Sanskriti Litigation <i>Chanchal Kumar Singh</i>	7
3. Right to Privacy in a 'Posthuman World': Deconstructing Transcendental Legacies & Implications of European Renaissance in India <i>Mrityunjay Kumar Singh</i>	52
4. The Unending Conundrum of Extra-Territorial Trade Measures and the 'Green Provisions' of the GATT: Deconstructing the Existing Approaches <i>Utkarsh Kumar Mishra</i>	89
5. Administrative Adjudication: A Comparative Understanding With Special Reference to Tribunals <i>Alok Kumar</i>	105
 <i>Notes and Comments</i>	
6. Standards of Refugee Protection: International Legal Framework and European Practice <i>S.S. Jaswal</i>	124
7. Contours of Right to Privacy in the Information Age: Some Random Reflections on the Puttaswamy Judgment <i>Meena S. Panicker</i>	136
8. In Re Muslim Women's Quest for Equality: Analysis of the Judgement of Supreme Court on Issues of Fundamental Rights and Personal Laws <i>Ritesh Dhar Dubey</i>	146
9. Principle of Proportionality: Extent and Application in Industrial Disputes <i>Namita Vashishtha</i>	158

10.	Biomedical Technology and Human Rights: The Emerging Milieu in Human Protection <i>Navditya Tanwar</i>	170
11.	Right to Freedom of Expression: An Evaluation of Theories of Self-fulfilment and Democratic Participation <i>Meera Mathew</i>	179
12.	An Anodyne Mode of Negotiation: Mediation in Dissension of Indian Family Matters <i>Rattan Singh & Shikha Dhiman</i>	190
13.	Formative Concept of 'Women Criminality' in Sexual Assault under IPC and POCSO: An Investigation into Judicial Decisions and Legislative Initiatives <i>Santosh Kumar Sharma</i>	199
14.	Appointment of Judges in India through Collegium System: A Critical Perspective <i>Varun Chhachhar</i>	208
15.	Analyzing the Role of Press in Bringing Dalits of India in the Social Mainstream <i>Sarita</i>	218
16.	Bid-Rigging and Role of Competition Commission of India: With Special Reference to its Impact on Infrastructure Development <i>Mahima Tiwari</i>	225
17.	Strategic Corporate Social Responsibility: Avenues by Jindal Steel and Power Limited <i>Avantika Raina</i>	235
18.	Food Safety Laws in India: A Critical Analysis of the Existing Legal Framework <i>Anurag Bhardwaj</i>	244

Standards of Refugee Protection:

International Legal Framework and European Practice

Introduction

It is phenomenal to the fact that ideally world is common home for all, yet refugees from different countries, remains uncertain for their status.¹ India, which receives regular influx of refugees, since time immemorial, there appears no definition of the term refugee in any of its official documents.² Nevertheless, India's obligation towards international law through various conventions, protocols, resolutions, declaration etc., coupled with constitutional mandate-affirms rights to non-citizens too. Therefore, the practical implication of the meaning of the term refugee can be said to be synonymous to the definition given in the Convention relating to the status of refugees, 1951 (1951 Convention) with regard to various practices of providing asylum.³ India is not a party to 1951 Convention and its 1967 Protocol, yet it accords prompts relief and rehabilitation measures through several piece of legislation, which administer entry, stay and removal of non-citizens.⁴ On these lines, the paper suggests formulation of consistent regime of

¹ Seyla Benhabib, *Claiming Rights Across Borders: International Human Rights and Democratic Sovereignty*, 103(4) AM. POL. SCI. REV. 691-704 (2009).

² In India there are primarily three categories of refugees, these are: (1) Refugees under the control and mandate of the Government of India who came from Tibet and Sri Lanka. Both these refugee communities are holding identity document provided by the Government as refugee. (2) Refugees under the control of Government of India who came from the minority communities of Pakistan and Bangladesh. These refugees are holding long term visa for their stay on the ground of being a minority in their country of origin and/or in cases of extreme compassion. But they do not have any identity document as refugee provided by the Government. (3) Refugees under the control and mandate of United Nations High Commissioner for Refugees (UNHCR), New Delhi who are mostly from Afghanistan, Myanmar, Somalia, Sudan, Iran, Iraq, and some other countries. It can be put in a different way that refugees from all other countries of the world except Tibet, Sri Lanka, Pakistan and Bangladesh are under the mandate of UNHCR, New Delhi. See Pia Oberoi, *Regional Initiatives on Refugee Protection in South Asia*, 11 JOURNAL OF REFUGEE LAW 193 (1999); Vitit Muntarbhorn, *THE STATUS OF REFUGEES IN ASIA* 52 (1992); Myron Weiner, *Rejected Peoples and Unwanted Migrants in South Asia*, 28(34) ECONOMIC & POLITICAL WEEKLY, 1745 (1993); B.S. Chimni, *The Legal Condition of Refugees in India*, 7 JOURNAL OF REFUGEE STUDIES, 378-40 (1994).

³ See Daniel J. Steinbock, *Interpreting the Refugee Definition*, 19 IMMIGR. & NAT'LITY L. REV. 137-220 (1998).

⁴ See Passport Act, 1920; The Registration of Foreigners Act, 1939; The Foreigners Act, 1946.

refugee protection system — much on the course of Common European Asylum System (CEAS).

Furthermore, many suggest the definition of refugee was deliberately left vague.⁵ The 1951 Convention sets out rules on the whole process of claiming asylum. These comprehended rules became too vague derogations, allowing States to keep and form their own rules, even if these went below basic agreed standards. At its outset one also needs to understand that the international refugee regime does not guarantee refugee's access to protection in any particular country. It is in this context every refugee crisis possesses multifaceted challenges, which requires holistic approach based on humanitarian obligations. This article discusses about the protection of refugees—meaning legal protection, which is associated with entitlements under law and, for effective redress of grievances, mechanisms to vindicate claims in respect of entitlements. The paper also examines the international standards of refugee protection or prominent international practices of refugee protection mechanisms, which may be resulted in formulating a refugee law for India with necessary modifications.

Standards of Protection under the 1951 Refugee Convention

It is important to approach refugee protection from a legal perspective. The social and political dimensions of refugee laws so far could not conclude any consistency or principled solutions.⁶ The 1951 Convention is the first of its kind in the modern world to provide protection for the refugees, which is heavily regarded by most of the countries of the world. This section of the paper shall discuss international practices of refugee protection followed in various parts of the world.

Non-Discrimination

The 1951 Convention for the first time among the earlier instruments on refugee protection includes an important provision on non-discrimination. The provision reads, “the contracting parties shall apply the provisions of this convention to refugees without discrimination as to race, religion and country of origin.”⁷ This particular provision was inspired by the Universal Declaration of Human Rights (UDHR) mandate⁸; nevertheless

⁵ David Kennedy, *International Refugee Protection* 8 (1) HUM. RTS. Q. 1-19 (1986); See also Shuvro Prosun Sarker, *REFUGEE LAW IN INDIA* (2017).

⁶ Colleen V. Thouez, *New Directions in Refugee Protection*, 22 FLETCHER FORUM OF WORLD AFFAIRS 89-105 (1998).

⁷ See Article 3, United Nations Convention Relating to the Status of Refugees, 1951 (Refugee Convention), U.N. T. S. No. 189.

⁸ Universal Declaration of Human Rights, G. A. Res. 217 (III) A, U. N. Doc. A/RES/217 (III) (Dec. 10, 1948). Article 2 claims that, “[E]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of

the protection against discrimination in the 1951 Convention is limited to the effect that it only prohibits discrimination between refugees. There are several essential tenets of the Article 3 of the 1951 Convention which can be documented as: the non-discrimination norm relates only to the provisions of 1951 Convention, as per this norm States cannot make difference between various racial, religious or national groups among refugees, the grounds on which non-discrimination is based are exhaustive in nature. In case of refugee protection in India, there exists discrimination on entitlements on the basis of race, religion and country of origin as found out in the previous chapter. So if there is any refugee law to be enforced in India the foremost provision would be to protect the refugees from discrimination.⁹ While this particular non-discrimination provision is the founding stone of the Chapter I of the 1951 Convention, there are several other provisions associated with this such as general obligations to the country of refuge, freedom to practice religion and religious education, rights granted as aliens under other conventions.

Access to Employment

In general States employ rules for obtaining work permit by the aliens to lawfully work in the country of residence. These rules for obtaining work permit are sometimes restrictive in nature to protect the national labor market. However, considering the plight of refugees in a foreign land, the 1951 Convention codified three important provisions with regard to earn livelihood by a refugee. Article 17(1) speaks about the mandatory obligation of States to allow refugees to engage in wage earning employment.¹⁰ The other provisions of Article 17 are for those refugees who are having some special relation with the country of refuge through the duration of residence or through spouse or children, and to protect those who have entered the country of refuge through labor recruitment or special immigration schemes.¹¹ The provision relating to self-employment of refugees is codified in the 1951 Convention through Article 18.¹² This is for the first time that a refugee protection instrument included a provision on self-employment, which actually in turn supplement the need of refugees a wage

the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

⁹ See James C. Hathaway & Anne K. Cusick, *Refugee Rights are Non Negotiable*, 14 GEO. IMMIGR. L. J. 481-539 (2000); Michael J. Parrish, *Redefining the Refugee: The Universal Declaration of Human Rights as a Basis for Refugee Protection*, 22 CARDOZO L. R. 223-267 (2000-2001).

¹⁰ *Supra* note 7; Article 17 provides that, 'the Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment'.

¹¹ *Id.* Articles 17 (2) and Article 17(3).

¹² *Id.* Article 18 provides that, 'the Contracting States shall accord to a refugee lawfully in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the right to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies'.

earning method apart from Article 17. Article 19 is far more progressive with regard to extending possibility of employment for the refugees while it includes the practicing of liberal professions.¹³ In this provision the word 'profession' suggests that the person concerned must possess certain qualifications from some institution and the word 'liberal' suggests that the person concerned acts on his own, not as an agent of the State or as a salaried employee. So this provision is meant for doctors, engineers, architects and lawyers to practice in their country of refuge, which actually gives it a novelty.

Access to Legal Remedies

The provisions related to access to courts as contained in the 1951 Convention tried to uphold the right to legal remedy for refugees.¹⁴ It is found that sometimes though refugees have right to access to courts but they do not have financial capacity in terms of *cautio judicatum solvi* and sometimes they require legal aid. So this provision is in fact tried to provide remedy from these two situations. All the three provisions of this Article 16 of the 1951 Convention means to extend refugees with the right to legal remedy by Court and in this regard they shall be assimilated to nationals of the country in which they have their habitual residence.¹⁵ However, Article 16 should have included some more attributes within its scope such as right of free and fair hearing, assistance of interpreter and the right against self-incrimination.

Access to Rationing, Housing, and Education

Provisions related to rationing, housing and education is provided in 1951 Convention under Chapter IV. In some countries the residents are provided with some items of prime necessity for essential use at a very subsidized price. The Article 20 of 1951 Convention puts obligations to those States who have rationing system to include the refugees within its operation.¹⁶ The provision related to housing puts obligation to the States to provide similar assistance in cases of providing housing or access to housing

¹³ *Id.* Article 19 mandates that, 'each Contracting State shall accord to refugees lawfully staying in their territory who hold diplomas recognised by the competent authorities of that State and who are desirous of practicing a liberal profession treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances'.

¹⁴ *Id.* Article 16 holds out the promise, (1) 'a refugee shall have free access to the courts of law on the territory of all Contracting States. (2) A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from *cautio judicatum solvi*. (3) A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence'.

¹⁵ See Kate Ogg, *A Sometimes Dangerous Convergence: Refugee Law, Human Rights Law, and the Meaning of Effective*, 12 MACQUARIE L. JOURNAL 109-130 (2013).

¹⁶ *Supra* note 7. Article 20 provides, 'where a rationing system exists, which applies to the population at large and regulates the general distribution of products in short supply, refugees shall be accorded the same treatment as nationals'.

schemes similarly to the nationals as well as to refugees.¹⁷ Getting the spirit from the Article 26(1) of the UDHR, the 1951 Convention in Article 22 puts obligation to the States to treat the refugees as nationals in cases of elementary education.¹⁸ This Article also provides for remission of fees in non-elementary education, awarding of scholarships and recognition of foreign degree and diplomas in cases of admission matters.¹⁹ Lastly this Chapter IV of the 1951 Convention added Article 23 for providing of public relief to the refugees and Article 24 to inclusion of refugees within its labor protection and social security schemes. The provisions discussed in this section are of great importance for day-to-day life of a refugee in the country of refuge along with the provision dealing with employment, in a way it can be said that with these fundamental accesses the life of refugees cannot be protected in the country of refuge.

Non-Refoulment and other Administrative Measures

Prohibition against refoulment is at the centre of all the provisions of the 1951 Convention. The provision states that, “no Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”²⁰ This provision has now become a part of customary international law which means it applies to a refugee who is present in the territory of any State irrespective of the entry of the refugee is lawful or unlawful. This provision in the 1951 Convention is further supplemented by Article 31, which stipulates that no penalties shall be imposed on a refugee for illegal entry or presence in the country of refuge. However in cases of expulsion of refugees the State has to follow due process and expulsion is permission only on the ground of national security or public order.²¹ Another important provision within the meaning of administrative measures is to facilitate the refugees with assistance for assimilation in the country of refuge and get naturalization, which is, will actually end the life as a refugee.²²

The provisions of the 1951 Convention are indeed the pioneering guidelines for providing protection to the refugees after the World War II. It is important to note that the provisions are relevant for the protection of refugees though a considerable amount

¹⁷ *Id.* Article 21 makes provision for, ‘as regards housing the Contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances’.

¹⁸ *Id.* Article 22 imposes a duty that, ‘the Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education’.

¹⁹ *Id.* Article 22(2).

²⁰ *Id.* Article 33(1).

²¹ *Id.* Article 32.

²² *Id.* Article 34: The Contracting States shall as far as possible facilitate the assimilation and naturalisation of refugees. They shall in particular make every effort to expedite naturalisation proceedings and to reduce as far as possible the charges and costs of such proceedings.

of time has passed after the entry into force of the 1951 Convention.²³ It can be argued that the provisions of 1951 Convention are the minimum standards for protection of refugees, and considering the emergence of new conflicts, which have several dimensions to make people refugee there have been emergence of some newer instruments.²⁴ These newer instruments are based primarily on the standards provided by the 1951 Convention, but modified in terms of need of the refugee along with the concerns of country of refuge.²⁵ For example the Organization of African Unity (OAU) Refugee Convention, 1969 is an early but modified replica of the 1951 Convention.²⁶ Though it is a regional instrument on refugee protection, the extension of the definition of the term refugee is highly regarded by the world community as it included a new provision along with the definition given in the 1951 Convention. The extended definition included a person as refugee who "owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality."²⁷ In this present world order of new models of conflict and persecution the extended definition should have much impact in the practices of providing international protection.

Common European Asylum System

In the special meetings of European Council for the first time the need to establish Common European Asylum System (CEAS) is taken into consideration.²⁸ The CEAS is based on the full and inclusive approach of the 1951 Refugee Convention with more clarity for member States of the European Union (EU) to follow in cases of granting asylum. Today the CEAS forms the body of the EU Asylum Law through Directives and Regulations of the EU and looks into common standards for recognition and refugee status and subsidiary protection through Qualification Directive,²⁹ fair and efficient

²³ See Bemba Donkoh, *A Half-Century of International Refugee Protection: Who's Responsible, What's Ahead?*, 18 BERKELEY JOURNAL OF INTERNATIONAL LAW, 260-267 (2000).

²⁴ See Ninette Kelley, *International Refugee Protection Challenges and Opportunities*, 19 INTERNATIONAL JOURNAL OF REFUGEE LAW, 401-439 (2007); GuenetGuebre-Christos, *State-building and Humanitarian Intervention: New Dimensions in Refugee Protection*, In *Defense of the Alien*, 24 INTERNATIONAL MIGRATION REVIEW, 33-39, (2001).

²⁵ Hugo Storey, *EU Refugee Qualification Directive: A Brave New World?*, 20 INTERNATIONAL JOURNAL OF REFUGEE LAW, 1-49 (2008).

²⁶ OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969, available at: <http://www.unhcr.org/45dc1a682.html> (last accessed on 31 September, 2017).

²⁷ OAU Convention 1969, Article 1(2).

²⁸ Presidency Conclusions, Tampere European Council, 15-16 October, 1999 (02 October, 2017) available at: http://www.europarl.europa.eu/summits/tam_en.htm#a

²⁹ Directive on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible

asylum procedure through Asylum Procedures Directive,³⁰ conditions of reception through Reception Conditions Directive,³¹ temporary protection through Temporary Protection Directive³² along with regulations on identification and member state responsible for providing international protection. The process towards a harmonized protection mechanism for the EU has first revealed in 1999 to 2005 with the previous versions of the directives and regulations mentioned above, and finally transformed into the CEAS after July 21, 2015.

Qualification Directive

The Council of the European Union adopted the Qualification Directive (QD) on 29 April 2004.³³ It entered into force on 20 October 2004 and the Member States had time till 10 October, 2006 to implement its provisions into their national legislation. Meanwhile, they have a duty not to adopt measures contrary to this directive and those countries that have already implemented the QD the judiciary will need to ensure compliance with it.³⁴ The present version of the QD is a recast version adopted in 2011, which has now been implemented throughout the EU since July 21, 2015 as the previous version maintained divergence in national asylum legislation and practices. The core of the QD is the inclusion of other persons entitled to asylum as per provisions of international human rights law as the directive combines refugee protection and subsidiary protection to institutionalize a common EU definition of persons in genuine need of international protection and to provide a status for these persons.³⁵

In the QD the term *international protection* is defined as refugee status or subsidiary protection status.³⁶ The definition of refugee in the QD is similar to the definition given in the 1951 Refugee Convention. It is important that the extended definition of international protection includes the term *subsidiary protection* which is available to a person who is a "third-country national or a stateless person who does not qualify as a

for subsidiary protection, and for the content of the protection granted (recast), 2011/95/EU of the European Parliament and of the Council, 13 December 2011.

³⁰ Directive on common procedures for granting and withdrawing international protection (recast), 2013/32/EU of the European Parliament and of the Council, 26 June 2013.

³¹ Directive on laying down standards for the reception of applicants for international protection (recast), 2013/33/EU of the European Parliament and of the Council, 26 June 2013.

³² Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, 2001/55/EC of the European Council, 20 July 2001.

³³ See Helene Lambert, *The EU Asylum Qualification Directive, Its Impact on the Jurisprudence of the United Kingdom and International Law*, 55 INT'L & COMP. L.Q., 161- 192 (2006).

³⁴ *Id.*, at 161.

³⁵ See R. Piotrowicz and C. van Eck, *Subsidiary Protection and Primary Rights*, 53 INT'L & COMP. L.Q., 107-138 (2004).

³⁶ See Jonah Eaton, *The Internal Protection Alternative Under European Union Law: Examining The Recast Qualification Directive*, 24 INTERNATIONAL JOURNAL OF REFUGEE LAW, 765-792 (2012).

refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm".³⁷ The term *serious harm* further consists of any of the following such as death penalty or execution, torture or inhuman or degrading treatment, threat to civilian life in situations of armed conflict.³⁸

The QD includes a provision about actors of persecution or serious harm.³⁹ The provision includes three actors of persecution or serious harm, such as the State, parties or organizations controlling the State and in some cases non-state actors. The QD also asserts that protection from persecution or serious harm must be effective and non-temporary in nature and the actors of protection are listed as the State and the parties or organizations or international organizations controlling the State.⁴⁰ The QD also sets the contents of international protection which mean the rights acquired through the refugee status or subsidiary protection status. The rights granted under these provisions of the QD are set to be effective without prejudice to the rights granted under the 1951 Convention.⁴¹

The main aims in coming up with the QD were to ensure a fully inclusive application of the 1951 Convention and compliance with human rights law, raise the standard of protection, increase the degree of harmonization and improve the effectiveness of the asylum law within the EU.⁴² Some critique suggests that the QD gone the way towards the first aim of a fully inclusive application of the 1951 Convention and compliance with human rights law, but failed in other issues.⁴³ However considering the strategic ambiguity in refugee protection in India, the codification of combined protection under 1951 Convention along with international human rights standard will be something India could learn.

Asylum Procedures Directive

The recast Asylum Procedures Directive (APD) was adopted on June 26, 2013 by the European Parliament and the European Council. Most of the provisions of the APD have been entered into force by July 20, 2015.⁴⁴ The purpose of the APD is to establish

³⁷ See Jane McAdam, *The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime*, 17 INTERNATIONAL JOURNAL OF REFUGEE LAW, 461-516 (2005).

³⁸ *Supra* note 29, Article 15.

³⁹ *Id.* Article 6.

⁴⁰ *Id.* Article 7.

⁴¹ *Supra* note 25 at 3.

⁴² See Steve Peers, Legislative Update 2011, EU Immigration and Asylum Law: The Recast Qualification Directive, 14 EUROPEAN JOURNAL OF MIGRATION AND LAW, 199-221 (2012).

⁴³ *Id.*, at 221.

⁴⁴ Doede Ackers, *The Negotiations on the Asylum Procedures Directive*, 7 EUROPEAN JOURNAL OF MIGRATION AND LAW, 1-33 (2005).

common procedures for granting and withdrawing international protection pursuant to the QD.⁴⁵

Access to the procedures under the APD is available to the applicants of international protection at the borders or in the territorial waters or in the transit zones of the member States of the EU.⁴⁶ The APD makes it mandatory that whenever any third country national is willing to apply for international protection, irrespective of his presence in detention centre or border posts, the members States of EU are obliged to provide the prospective applicant of international protection information related to the process and counselling.⁴⁷ At the same time, the applicants of international protection have the right to remain in the concerned member State till a decision is made on this behalf.⁴⁸ The members States have to ensure that an application for international protection is duly examined by the determining authority empowered to do so irrespective of the time taken by the applicant for making the application, and the determining authority has to ensure individual decisions are based on objectivity and impartiality.⁴⁹ The determining authority will preliminarily determine whether the applicant qualifies for refugee status, if not whether the applicant qualifies for subsidiary protection status. To make the decision, the determining authority will conduct personal interview of the applicant and in some cases where the medical condition of applicant is such that a personal interview is not possible then the determining authority may not take the interview.⁵⁰ The decision on the application for international protection has to be communicated to the applicant in writing, and in case international protection is rejected then the reasons in fact and in law along with the process for appealing that decision has to be stated in the written communication.⁵¹ At the same time while the determination process is undertaken the member States will guarantee that every communication made will be done using the language understood by the applicant, applicants will get the services of interpreter if required, the chance to communicate with the UNHCR or other organizations providing legal advice to the applicants and the chance to be represented by a legal practitioner and free legal services.⁵² As per the APD, member States are not allowed to detain any applicant of international protection solely on the ground that the application is pending for decision.⁵³ The member States will ensure that the decision of an application is taken by the six months of its submission, and in case of complexity of law and fact with regard to one application, or high volume of application is received

⁴⁵ Maria Panezi, *The 2005 Asylum Procedures Directive: Developing the European Asylum Law*, 13 COLUM. J. EUR. L., 501- 512 (2006-2007).

⁴⁶ *Supra* note 30, Article 3.

⁴⁷ *Id.* Article 8.

⁴⁸ *Id.* Article 9.

⁴⁹ *Id.* Article 10.

⁵⁰ *Id.* Articles 14-17.

⁵¹ *Id.* Article 11.

⁵² *Id.* Article 12.

⁵³ *Id.* Article 26.

by the determining authority then this term of six months can be extended to a further period term of nine months.⁵⁴

After analysing the various provisions of the APD, it can be said that it has detailed better procedure to be followed along with guarantying some procedural rights for the applicants in the member States of EU in terms of standards provided in various international law instruments.⁵⁵ At the same time, the concepts of inadmissibility have significance in terms of balancing refugee flow and the protection *vis-a-vis* overall refugee governance in terms of international burden sharing and maintaining human rights standards.

Reception Conditions Directive

The purpose of the Reception Conditions Directive (RCD) is to lay down standards for the reception of applicants for international protection in member States of EU.⁵⁶ It ensures that applicants have access to housing, food, health care and employment, as well as medical and psychological care. Reception Conditions are defined as the full set of measures that are granted to the applicants of international protection by the member States of EU.⁵⁷ Again *material reception conditions* include housing, food and clothing provided in kind, or as financial allowances or in vouchers, or a combination of the three, and a daily expenses allowance.⁵⁸

Under the RCD the member States are obliged to act on the various needs of the applicants for international protection. These needs are primarily material and welfare based. The material conditions have to be ensured to each applicant for international protection to provide an adequate standard of living for applicants, which guarantees their subsistence and protects their physical and mental health.⁵⁹ In case the member States providing financial allowances then the amount will be determined by the member States by law or by practice. While the member States have provided with housing facility that be on the form of premises used for the purpose of housing applicants during the examination of an application or accommodation centres or private houses adapted for housing applicants.⁶⁰ There shall be provision for schooling facility to the minors that is granted under the similar conditions like nationals, and in case of necessity such education opportunity can be provided in the accommodation centre.⁶¹ It is also obligatory to the member States to provide health care facilities to the

⁵⁴ *Id.* Article 31, *supra* note 30.

⁵⁵ See, Pieter Boeles and Ashley Terlouw, *Minimum Guarantees for Asylum Procedures*, 9 INTERNATIONAL JOURNAL OF REFUGEE LAW, 472-491 (1997).

⁵⁶ See Nicola Rogers, *Minimum Standards for Reception*, 4 EUROPEAN JOURNAL OF MIGRATION AND LAW, 215-230, (2002).

⁵⁷ *Supra* note 31.

⁵⁸ *Id.* Article 2(g).

⁵⁹ *Id.* Article 17.

⁶⁰ *Id.* Article 18.

⁶¹ *Id.* Article 14.

applicants of international protection.⁶² As per the RPD access to employment must be provided to the applicant of international protection within nine months of the application for international protection, and this access will continue till a final decision is made on the eligibility of the applicant for international protection.⁶³ At the same time, the member States can also grant access to vocational training to the applicants of international protection.⁶⁴

This is of importance for a new regime of refugee protection that an entire directive is provided for maintaining the standards of reception conditions. Reception conditions may not be looked like as important like qualification or asylum procedures, but at the same time it has to be understood that the essential materials for day to day living are highly importance during the first days of a refugee in a foreign land.

Temporary Protection Directive

The temporary protection directive (TPD) was adopted in July 20, 2001, but the provisions of this directive have not been used so far by the member States of the EU. It was adopted to make special procedure in times of mass influx with an aim to protect the displaced. The purpose of this directive is to establish minimum standards for giving temporary protection in the event of a mass influx from third countries and who are unable to return to their country of origin.⁶⁵ The pre-requisites to make this directive operational are mass influx situation, wherein persons are unable to return to their country of origin, possibility of overstraining of normal asylum system. Again displaced persons were defined under two categories, firstly who has fled armed conflict or endemic violence and secondly who are or have been victims of serious violation of their human rights in systematic or generalized form.⁶⁶ While defining mass influx the directive includes arrival of large number of displaced persons from one country or geographical area irrespective of spontaneous or aided arrival.⁶⁷ The directive guarantees temporary protection for a year initially and may be extended to one more year, and in case of grave situation the Council may extend the protection to one more year.⁶⁸

All person's enjoying temporary protection will be permitted to engage in employed or self-employed activities during the temporary protection regime subject to the rules applicable to the profession and member States shall take all necessary measures regarding the same.⁶⁹ The member States shall also take effective measures to provide

⁶² *Id.* Article 19.

⁶³ *Id.* Article 15.

⁶⁴ *Id.* Article 16.

⁶⁵ See Karoline Kerber, *The Temporary Protection Directive*, 4 EUROPEAN JOURNAL OF MIGRATION AND LAW, 193-214, (2002).

⁶⁶ *Supra* note 32, Article 2(c).

⁶⁷ *Id.* Article 2(d).

⁶⁸ *Id.* Article 4.

⁶⁹ *Id.* Article 12.

accommodation or provide the means to get housing to the beneficiaries of temporary protection.⁷⁰ Apart from that member States shall be required to act upon social welfare and medical care, education and opportunity of family reunification, etc.⁷¹ With these provisions the TPD makes it a part of the CEAS, above all in situation of mass influx the protection according to human rights standards make this directive the most notable among the CEAS. Since the armed conflict in former Yugoslavia the EU was in favour of providing a common system in times of mass influx, though during the present Syrian refugee crisis this Directive has not been used.

Conclusion

A careful analysis of various provisions for the protection of refugees reveals that after the 1951 Convention, the Common European Asylum System (CEAS) provides the most developed and detailed standards for protection of refugees. Also, it is comprehended how a bridge between refugee protection and protection from human rights violation could become the model for twenty-first century refugee protection regime. The concern arising out of temporary refuge status is another dimension, which needs a careful re-look. The CEAS mechanism brings several essential elements which are required for living a life with minimum standards such as material reception conditions, housing, education, health care, residence permit, employment or self-employment opportunity—thus the same can be extended to other refugee regimes of world.

- S.S. Jaswal*

⁷⁰ *Id.* Article 13.

⁷¹ *Id.* Articles 13-16.

* Professor of Law & Registrar, Himachal Pradesh National Law University, Shimla. Email: ss_jaswal@yahoo.co.in