



## FROM CIVIL DEATH TO CIVIL LIFE: THE CRISIS OF LEGAL AID FOR IMMIGRANTS AROUND THE WORLD

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### Abstract

There is an enormous unmet need for immigrant legal aid in the United States. Demographic changes over the past decades have forced a strong connection between the rights of the immigrants and the legal aid or the legal services as a policy and practice. Legal aid of immigrant is in crisis. The immigrants not only suffer from the same range of potentially devastating legal problems as citizens—eviction, fraud, discrimination, and domestic abuse—but also face a uniquely draconian penalty reserved for them alone: deportation. There is an enormous unmet need for immigrant legal aid in India. There is a need to expand immigrant access to counsel. There is a need of anatomizing some of the socio-economic and legal constraints faced by immigrants in India by dividing them into three different categories- illegal immigrants, legal immigrants, and refugees to work out two issues based on needs and requirements of different categories of immigrants; first, what are the legal aid requirements of immigrants and whether they are entitled to get legal aid. Second, whether legal immigrants are entitled to get legal aid in cases of refusal of citizenship and how far this is possible keeping in view section 14 of the Citizenship Act, 1955. As there is a turnaround in the human rights law at international level, hence, there is a need to study the international perspective and also to draw parallel with the Indian Law which may suit the Indian legal fabric. Therefore, it is the ripe time, as the tremendous and harmful effects of immigration enforcement and anti-immigrant policies around the world requires the immediate attention towards providing legal aid to the mixed-status immigrant families, therefore, avoiding pervasive and intense trauma and hardship faced by them. However, the step towards providing legal aid to immigrants would be a long-drawn process which would require specific legislation, discussions as to the range of supports required, possible risks and a comprehensive oversight mechanism. This is just the starting point of the debate – there is yet a long way to go and a lot to achieve.

### I. INTRODUCTION

*“The way a government treats refugees is very instructive because it shows you how they would treat the rest of us if they thought they could get away with it”*

*--Tony Ben<sup>1</sup>*

Immigrant legal aid is in crisis. Poor immigrants not only suffer from the same range of potentially devastating legal problems as citizens - eviction, fraud, discrimination, and domestic abuse<sup>2</sup>—but also face a uniquely draconian penalty reserved for them alone: deportation. According to the 2001 census, around 6,166,930 people migrated to India from other countries, based on place of birth. As per the last place of residence, the number came

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<sup>2</sup> Andrew F. Moore, Fraud, “The Unauthorized Practice of Law and Unmet Needs: A Look at State Laws Regulating Immigration Assistants”, 19 *Geo. Immigr. L.J.* 1-2 (2004).

out to be 5,155,423.<sup>3</sup> India is amongst the 10 countries with the largest immigration in the world, a significant number of which is illegal. For a nation which is largely made up of old immigrants, as observed by Markandey Katju and Gyan Sudha Misra, JJ., denying basic rights to the immigrants isn't what the nation stands for.<sup>4</sup> At present, the Legal Services Authorities Act, 1987 fails to secure the rights of the immigrants. The preservation of the legitimate interests of such people must be considered in consonance with the cultural fabric of India. This can only be achieved when they may receive adequate protection of our rights, a thought so recognized by the Hon'ble Apex Court in *The Railway Board v. Chandrima Das*,<sup>5</sup> and countless judicial precedents eschewing a similar strain of rights. Presently, there is no specific provision of the Act to provide foreigners, grappling with Indian citizenship, the privilege of a good legal defense in the court of law. A provision in the law guaranteeing the same shall be manifestly allowing for the acquisition of citizenship for well-meaning people living within the territory of India and similarly grant them the rights that are deservedly, universal.

The question of citizenry resolves itself over long periods of time, especially when pertaining to the acquisition of citizenship *via* naturalisation. But an even bigger preliminary issue faced by them is the provision restricting their access to courts in the very first place under section 14 of the Citizenship Act, 1955. To balm the wounds of those embroiled in these long legal battles, an amendment should provide for free legal aid and mark the way for harboring India's identity as a safe haven for immigrants.

The research paper thus employs the applied research methodology to work out two issues based on needs and requirements of different categories of immigrants; first, what are the legal aid requirements of immigrants and whether they are entitled to get legal aid. Second, whether legal immigrants are entitled to get legal aid in cases of refusal of citizenship and how far this is possible keeping in view section 14 of the Citizenship Act, 1955. For this purpose the paper is divided into three parts; the first part gives a broad overview by briefly discussing the history and the of the of the problems they face; the second part inquires into the adequacy of some of the provisions; the final part lists out the recommendations keeping in view the international perspective and the Indian scenario.

## II. THE HISTORICAL EVOLUTION OF LEGAL AID FOR IMMIGRATION IN INDIA

Historically, India has never been averse to the idea of providing legal aid. It has, in fact, been a part of our cultural fabric since the Vedic age. India has viewed a person's ability to gain access to court as a fundamental element of our democracy.

### **Vedic Period**

The origin of Vedas can be traced as far back as the 1500 BCE. It started when a large group of nomads known as the Aryans, crossed into the Hindu Kush Mountains, thus becoming part of one of the largest migration movement. It is nothing short of an irony that how a nation whose earliest known history bespeaks of immigration shall be so indifferent to their cause.

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<sup>3</sup>Census of India 2001 report, *available at*: at [http://censusindia.gov.in/Census\\_And\\_You/migrations.aspx](http://censusindia.gov.in/Census_And_You/migrations.aspx) (last visited on December 4, 2017).

<sup>4</sup>*Kailas v. State of Maharashtra* (2011) 1 SCC 793.

<sup>5</sup>2000 (2) SCC 465.

The source of all knowledge in India is considered to be derived from Vedas. They hold so much importance that this 3500 year old document is still referred to in all social, economic, and legal aspects. It is in Vedas itself that we find the traces of elements of legal aid. In the *Rig Veda* it is provided that aid and assistance should be provided in the form of strength and monetary help to those fearing or facing attacks. This is considered a form of 'danna'.<sup>6</sup>

### Medieval Period

*Vakils* were appointed and directed to give free legal aid and advice the poor free of cost on any legal issue. This practice gained momentum during the reign of Shahjahan and Aurangzeb who created a special position for such advocates and they were known as *vakil-e-sarkar* or *vakil-e-sharai* and these appointments were made by the Chief *Qazi* or the Chief Justice.<sup>7</sup>

### Vikramaditya Period

Vikramaditya has gone down in history as the king who uprooted cruel justice system and introduced, for the first time, legal aid known in the modern sense of the term. The judges of the highest order were paid as much as five thousand silver coins and were also given a furnished home free of charge. There existed an advanced law of administration similar to the one prevalent in modern India and the common man did not have to spend a penny for seeking justice. The panchayat system ensured that justice reached the doors of the poorest.<sup>8</sup> Never in Indian history has the claim for justice by a citizen distinguished from that of an alien. It is merely a modern construct which is amusing since there has never been a more dire need than today for a system of justice that doesn't differentiate.

## III. CONCEPTUALISING LEGAL IMMIGRANTS, ILLEGAL IMMIGRANTS AND REFUGEES

Before an argument is made in favor of or against immigrants it is necessary to define the line that separates their different categories. Immigrants predominantly belong to three different categories: Legal immigrants, illegal immigrants, and refugees. Each has their own rights in the international and domestic sphere, some of which have their origin in law and some in social justice. Since they have different rights they have different aspirations from the law. Neither immigrant nor refugee has been defined under Indian statutes. Terms such as "aliens" and "foreigners" are used as a blanket term to define all three categories of people:

### Legal Immigrants

In the most ordinary words, legal immigrants can be defined as any person who come to a country, not being a citizen of that country, carrying valid travel documents. Such individual's legal status extends only so far as the validity of his/her travel documents and a continuation of settlement in the country any longer than authorized, no matter how short, shall fall in the realm of illegality. The *Oxford dictionary* defines it as "A person who has been

<sup>6</sup> Govind Singh, *Hindi Translation of Important Parts of Rig Veda* 31 (Sadhna Pocket Books, New Delhi, 1992).

<sup>7</sup> Raj Kumar (ed.), *Essays on Legal Systems in India, Judicial Systems in Medieval India* 41-62 (Discovery Publishing House). ; Report of the Expert Committee on Legal Aid, 1973, Processual Justice to the People

<sup>8</sup> Evolution, Growth at Development of the Legal Aid System in India, Ch. 5 available at: [http://shodhganga.inflibnet.ac.in/bitstream/10603/12650/9/09\\_chapter%205.pdf](http://shodhganga.inflibnet.ac.in/bitstream/10603/12650/9/09_chapter%205.pdf) (last visited on December 4, 2017).

granted official permission to reside in a foreign country; opposed to illegal immigrant."<sup>9</sup> Legal immigrants pose no immediate threat to the nation and are their entry is therefore encouraged as it aids in the GDP growth and overall economic development of the country.

### Refugees

Article 1 of the Convention Relating to the Status of Refugees, 1951 defines the term "refugee" as any person who has

a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

### Illegal Immigrants

The reason that so little has been done to counter illegal immigration more efficiently, while simultaneously reinforcing respect for basic human rights of immigrants, is because of the prevalence of certain myths amongst the public and the parliamentarians alike, the most common of them, which makes people averse to the idea of allowing immigrants into a country is that immigrants do not pay taxes and still get benefits. Undocumented immigrants don't pay taxes but still get benefits. On the contrary, all immigrants, whether legal or illegal pay indirect taxes and many illegal immigrants even pay income tax, even though they can't benefit from most Central and State programs. Due to prevalent mistrust and no adequate data available there's a false belief amongst the people that illegal immigrants do not pay taxes. *Au Contraire*, illegal immigrants pay taxes even though they are not eligible to claim and social or economic benefits.<sup>10</sup>

Donald Trump's attempt to reinvent the immigration laws in America is well-known. His recent attempt to tighten border security courted a controversy resulting in worldwide debate; the main takeaway from this debate on illegal immigration is that its effect on economy is actually a sham. Most economists have agreed that illegal immigration is neither beneficial, nor harmful to any significant degree. For example, the Bangladeshi immigrants in the north-east of India have played their part in the rise in agricultural productivity. Problem arises because of State's inability to collect taxes. But a man cannot be made to pay for the incompetence of the Government. With all the resources at their disposal the prerogative is theirs alone.

<sup>9</sup> English Oxford Living Dictionary, *available at*: [https://en.oxforddictionaries.com/definition/legal\\_immigrant](https://en.oxforddictionaries.com/definition/legal_immigrant) (last visited on December 4, 2017).

<sup>10</sup> Alexia Fernández Campbell, "Trump says undocumented immigrants are an economic burden. They pay billions in taxes", *available at*: <https://www.vox.com/2018/4/13/17229018/undocumented-immigrants-pay-taxes/> (last visited on December 4, 2017).

#### IV. THE CURRENT STATE OF IMMIGRANT LEGAL AID AT GLOBAL LEVEL: EXCEPTION AND ACCOMODATION

None of the enactments in India make any distinction between the different categories of immigrants, thus putting well-meaning immigrants at risk of arrest by the immigration authorities and of their prosecution if their entry into India is found to be devoid of a valid passport or travel documents. Once a refugee is detained by the authorities for illegal entry into the country he is taken to the police to register a First Information Report against him. At this stage the individual may be forced to deport if found guilty. Alternatively, he may be held back for interrogation until the authorised officer arrives at a final decision with respect to a plea for asylum. The Registration of Foreigners Act, 1939 under section 5 provides for a penalty of imprisonment of up to one year or with a fine extending up to one thousand rupees or with both.<sup>11</sup>

Since a majority of the immigrants coming to India are poor they do not have a strong enough economic footing to pursue a legal remedy in case something was to transpire resulting in some injury. So, effectively, if an immigrant were to fall victim to rape they would be at the mercy of the State or an advocate to take notice of their case so as to approach the court or be economically sound enough to pursue the case themselves. Attacks against African nationals in India is not something that's not heard of. March, 2017 itself witnessed attack on several African nationals in Noida. Before that, in 2014, an official himself led a mob attack against African women.<sup>12</sup>

In 2015, 365 cases of crimes were reported against foreigners. Maximum cases were reported under thefts accounting for 61.1% (223 out of 365 cases) followed by assault on foreign woman with intent to outrage her modesty (23 cases), forgery (15 cases), rape (12 cases), robbery (10 cases) and cheating (9 cases).<sup>13</sup> These figures are, of course, not accurate representation of the true accounts since a large majority of these cases are never reported. The report also does not disclose any data on the number of cases of murders or homicides or of grievous hurt any many other offences. But the absence of such data cannot be concluded to mean the absence of such cases.<sup>14</sup> An immigrant who has been forced to deport, or who has been refused citizenship has no right against such decision of the authorities who can dismiss an application without even giving any reason.<sup>15</sup>

This situation is further complicated by institutionalised racial and cultural biases. New immigrants face the additional burdens of language barriers that often lead to misunderstandings, a lack of knowledge of the legal system and their rights in it.

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<sup>11</sup> S. 5: Any person who contravenes, or attempts to contravene, or fails to comply with, any provision of any rule made there this Act shall be punished, if a foreigner, with imprisonment for a term which may extend to one year or with fine which may extend to one thousand rupees or with both, or if not a foreigner, with fine which may extend to five hundred rupees.

<sup>12</sup> J. Balaji & Kritika Sharma, "FIR against 'unknown persons' for raid on African women", *The Hindu*, January 19, 2014.

<sup>13</sup> National Crime Records Bureau, Ministry of Home Affairs, Compendium on Crime against Foreigners, Crime in India, Chapter-25, 2015.

<sup>14</sup> Initiative on Rohingya Refugee, Human Rights Law Network, *available at*: <http://www.hrln.org/hrln/refugee-rights/the-initiative-.html>, (last visited on December 4, 2017).

<sup>15</sup> Citizenship Act, 1955, s. 14

## V. INADEQUATE PROVISIONS IN INDIA: LEGAL SERVICES AUTHORITIES ACT, 1987 READ WITH ARTICLE 39A

Every year a plethora of changes are made to the laws in India, new statutes are added, old statutes are made redundant, amendments are introduced, add to that the judgments of the apex Court interpreting and reinterpreting the laws, even legal professionals have a hard time keeping themselves abreast with these changes. Then what about the poor, ignorant, uncared for 'little Indians'?<sup>16</sup> If we read this observation one step ahead, it is even more difficult for an immigrant to be well versed with the laws of this land. Ignorance of law may not be an excuse when a person is guilty of its violation, but their ignorance cannot become an excuse for someone else to violate the law.

The Constitution (42<sup>nd</sup> Amendment) Act, 1976 added a significant provision which is article 39A of the Constitution of India.<sup>17</sup> The use of the word "citizen" instead of "person" makes it clear that article 39A is applicable only so far as citizens are concerned. Since, the Legal Services Authorities Act, 1987 flows from this article, immigrants cannot be read into section 12 by necessary implication. This should also be avoided since the legal aid requirements of immigrants are different from citizens given that immigrants are not entitled to all the rights to which a citizen is entitled.

The rulings of the Apex Court have also limited the ambit of article 39A to citizens only when read with article 21 which is applicable to citizens as well as non citizens alike. This can be inferred from the ruling in the case of *Manoharan v. Sivarajan*.<sup>18</sup> However in *NHRC v. State of Arunachal Pradesh*<sup>19</sup> the Apex Court recognized a foreigner's right to life guaranteed under article 21 which could not be violated by an act of the Government. This was a case where the Government exercised its absolute right to expel a foreigner but such cases of forced eviction were held to be violative of article 21.<sup>20</sup>

## VI. LEGAL AID: INTERNATIONAL PERSPECTIVE

### Canada

Those people detained in matters related to immigration have a right to be represented by a counsel or receive legal aid if they qualify for the same. Such persons have to be informed about legal aid services available to them.<sup>21</sup>

<sup>16</sup> P. Leelakrishnan, "Access to Legal Service and Justice", 6 *Cochin University Law Review* 473-483(2017).

<sup>17</sup> Constitution of India, art. 39A provides for equal justice and free legal aid— The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities."

<sup>18</sup> (2014) 4 SCC 163.

<sup>19</sup> (1996) SCC (1) 742.

<sup>20</sup> *Louis De Raedt v. Union of India*, MANU/SC/0422/1991.

<sup>21</sup> Canada Border Services Agency, "Information For People Detained Under The Immigration And Refugee Protection Act" 2, available at: <http://www.cbsa-asfc.gc.ca/publications/pub/bsf5012-eng.pdf> (last visited on December 4, 2019).

## France

France recognized the right to an attorney as a basic principle as far back as in 1976.<sup>22</sup> This right is also guaranteed under European Convention on Human Rights.<sup>23</sup> French law allows a person to apply for financial assistance if such person does not have the economic standing to hire a lawyer and does not differentiate between a citizen and a non-citizen.

## Germany

The right to legal representation is guaranteed to everyone and not just German citizens by application of rule of law, known as *Rechtsstaatsprinzip*. This principle has found its way into the German Basic Law in article 2.<sup>24</sup>

## South Africa

The South African Constitution provides the right to access to courts to every person whether citizen or immigrant<sup>25</sup>. Clause (1) of article 34 reads as follows:

(1) Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or tribunal or forum or where appropriate, another independent and impartial court, tribunal or forum.<sup>26</sup>

## United Kingdom (UK)

UK's Legal Aid Agency provides free legal aid to those embroiled in matters of immigration and do not have enough means to seek a professional legal assistance.<sup>27</sup>

## United Nations

The United Nations too supports the cause of legal aid. It regularly makes recommendations on how to empower and strengthen the capacities of rights holders, particularly for the poor and the marginalized groups. UN encourages nations to take up legal aid programmes, setup legal aid clinics and carry out public outreach campaigns. Apart from this, the UN has also launched a Global Study on Legal Aid, in order to collect data to assess the global legal aid situation.

The UN has acknowledged that access to justice is the basic principle of the rule of law. Without this right people are refused many other rights which flow from it such as right to be heard, right against discrimination and cannot hold the authorities accountable for their actions or inaction.

<sup>22</sup> Constitutional Council, Decision No. 76-70 of December 2, 1976, available at: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/1976/76-70-dc/decision-n-76-70-dc-du-2-decembre-1976.7477.html> (last visited on December 11, 2019).

<sup>23</sup> European Convention on Human Rights, art. 6, Nov. 4, 1950, 213 U.N.T.S. 221, available at: [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf) (last visited on December 11, 2019).

<sup>24</sup> Basic Law for the Federal Republic of Germany, unofficial English translation, available at: [http://www.gesetze-im-internet.de/englisch\\_gg/englisch\\_gg.pdf](http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.pdf) (last visited on December 11, 2019).

<sup>25</sup>The Constitution of the Republic of South Africa 1996, art. 34.

<sup>26</sup> *Ibid.*

<sup>27</sup> Legal Aid Agency “What We Do”, available at: <http://www.gov.uk/government/organisations/legal-aid-agency> (last visited on December 11, 2019).

The Declaration of the High-level Meeting on Rule of Law has, once again, emphasised the right of equal access to justice for all thus endorsing the commitment of member States to take steps which are necessary for the effective exercise of this right.

## VII. SECTION 14 OF THE CITIZENSHIP ACT, 1955

Section 14 of the Citizenship Act, 1955 lays down that any disposal of an application under sections 5 and 6 shall be presented to the prescribed authorities or the Central Government who can decide such applications without giving any reason for grant or refusal. Such decision is final and cannot be challenged in Court.<sup>28</sup>

### Constitutional Validity

The Constitution concedes a certain measure of overlapping in the performance of functional action among the three organs of the State in order to eliminate the possibility of a loophole in the system which may be taken advantage of and result in considerable hardships to those on its receiving end. What the makers of the Constitution envisaged was that wherever there appears to be a gap one of the three organs must step up to fill it. By virtue of the principle of separation of power, it is known that the Legislature enacts the law, the executive implements it and the Court interprets it and, and thus, decides on the validity of executive action and, under our Constitution, even judges the validity of the legislation itself. However, section 14 of the Citizenship Act, 1955 lays down a bar on that very basic structure by preventing the Courts from adjudicating on the actions of the Executive taken in exercise of its power under section 14 of the Citizenship Act, 1955. It infringes upon a person's fundamental right of access to justice guaranteed by article 14 and article 21 of the Indian Constitution. Since both articles have conveniently substituted the word 'citizen' with 'person' it must, by necessary implication, mean that this fundamental right extends to non-citizens just as much. Right to protection under arbitrary arrest (article 22), right to protect in respect of conviction of offences (article 20), right to approach Supreme Court for enforcement of Fundamental Rights (article 32) are some other fundamental rights available to non-citizens as well.

Immigrants are pushed into a "legal limbo" deprived of the "right to have rights" despite the presence of international humanitarian actors and the entitlements enshrined in international law. Courts are under to duty to ensure that the Government functions according to rule of law and cannot be allowed to misuse their power under the cover of 'finality' or 'ouster' clauses.<sup>29</sup>

### Rule of Law

The principle of rule of law endows an aggrieved person to approach a Court of law for redress. However, post independence history of our nation reads as a lesson on administration's attempt to gather absolute power for itself while at the same time excluding the review by courts. The growth of administrative tribunals itself is often quoted as an example of Government's attempt to exclude the jurisdiction of the judiciary. But the judiciary has been firm in upholding its position and not let it get sidelined because in a democratic state Courts

<sup>28</sup> *Supra* note 16, s. 14.

<sup>29</sup> M.P.Jain, "Judicial Response to Privative clauses In India, 1 *JILI* (1980).

are seen as the organ which extends its hand to all those who are aggrieved. This sentiment is well expressed by Romer, L.J as follows: "The proper tribunals for the determination of legal disputes in this country are the courts and they are the only tribunals which by training and experience and assisted by properly qualified advocates, are fitted for the task".<sup>30</sup>

The Apex Court made a strong argument against section 14 in one of its judgments<sup>31</sup> when it observed that no authority exercising statutory or executive power could be allowed to act arbitrarily or whimsically and that such a requirement did not arise out of the affected party being a citizen of this country. But instead it arose out of the nature of power being exercised by the authority in a country that is governed by rule of law with the power of judicial review vested in the judiciary. It further observed that arbitrariness or non-application of mind are an antithesis to the Constitutional creed and even when a foreigner may have no fundamental right to settle in this country, he still enjoys the right to demand a fair and proper consideration of his request according to law of the land.<sup>32</sup>

### Scope of Mr. Louis De Raedt's Judgment

The 1991 judgment of Supreme Court in the case of *Mr. Louis De Raedt v. Union Of India*<sup>33</sup> is often cited when the scope of exercise of power by the Executive is in question as in this case the Court decided to take a narrow view purposefully excluding its jurisdiction from certain administrative decisions. The relevant portions of the judgment have been referred.<sup>34</sup>

The scope of this judgment comes into question for several reasons. First, when the court observes that "there is no provision in the Constitution fettering this discretion", when in fact there are several Constitutional provisions which come to the aid of those who fall victim to the arbitrary decision of the authorities, namely, right to equality (article 14), right to life and personal liberty (article 21), right to protection under arbitrary arrest (article 22), right to protect in respect of conviction of offences (article 20), right to approach Supreme Court for enforcement of Fundamental Rights (article 32), are as much available to non-citizens, as they are to citizens.

The second issue arises with respect to the judgment when it recognises the right of a person to be heard but fails to recognise the fact that a person cannot be said to have been allowed that opportunity if his case has no guarantee of being decided on merits. The way section 14 works is that it allows the Executive to dismiss an application for citizenship without affording any reason. One may argue that it cannot simply be presumed that the Executive will exercise its discretion in an arbitrary manner. But that's not the only concern such a provision brings. A lot of immigrants coming to India are poor, uneducated and have no knowledge of the administrative system. When an application is refused without any reasons they cannot reasonably exercise their right to re-apply for citizenship. Not to mention the cost involved in

<sup>30</sup> *Lee v. Women's Guild of Great Britain*, (1952) 1 All. E.R.1175, 1188.

<sup>31</sup> *Azimusshan Haider v. Union of India*, (2008) 104 DRJ 604.

<sup>32</sup> *Ibid.*

<sup>33</sup> MANU/SC/0422/1991.

<sup>34</sup> "The power of the Government in India to expel foreigners is absolute and unlimited and there is no provision in the Constitution fettering this discretion. It was pointed out that the legal position on this aspect is not uniform in all the countries but so far the law which operates in India is concerned, the Executive Government has unrestricted right to expel a foreigner."

making such application which runs into a few thousand, may not be economically viable for them.

The third argument advanced against the tenability of this judgment based on some of the later decisions of the Supreme Court in *Azimushan Haider v. Union of India*<sup>35</sup>. Thus, even though the court refused to comment upon the constitutional validity of section 14, it exercised its power of judicial review, the one excluded by application of section 14, and held the decision of the authorities unsustainable.

In *Maneka Gandhi v. UOI*<sup>36</sup> again the Court observed that "...no person can be deprived of his right to life or personal liberty except according to procedure established by law. The procedure prescribed by law has to be fair, just and reasonable, not fanciful, oppressive or arbitrary."<sup>37</sup>

In *David John Hopkins v. The Union of India*<sup>38</sup> the Madras High Court was presented with the question as to the validity of section 14 in which regard it observed that section 14(1) of the Act was not ultra vires because foreign nationals had no fundamental right that guarantees grant of citizenship.<sup>39</sup>

What is being contested, however, is not a foreigner's right to get citizenship but foreigner's right to a fair chance of getting citizenship. When the Court observed that the Government has the absolute authority to refuse citizenship it cannot be read so as to allow for even arbitrarily exercised discretion.<sup>40</sup>

### VIII. WHEN CITIZENSHIP IS REFUSED: INTERNATIONAL PERSPECTIVE

The laws and conventions on refugees and immigrants are based on humanitarian principles founded on historical experience. For example, had the Jews not kept perpetually migrating starting with their expulsion by the Babylonians and Assyrians, and then the Romans and czars and Nazis, they would probably be extinct today. So would the Gypsies.<sup>41</sup>

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<sup>35</sup> 2008 (104) DRJ 604, "No authority exercising statutory or executive power can act arbitrarily or whimsically. That requirement does not arise out of the affected party being a citizen of this Country. It arises out of the nature of power being exercised by the authority in a country that is governed by the rule of law with the power of judicial review vested in the judiciary. Arbitrariness or non-application of mind is an antithesis to the Constitutional creed and even when a foreigner may have no fundamental right to settle in this country, he still enjoys the right to demand a fair and proper consideration of his request according to law of the land. That is the glory of the system prevalent in this Court which upholds the basic tenets of fair play and probity in public administration no matter the person complaining of the breach is a non-citizen. Viewed thus the rejection order passed by the Government of India is unsustainable not because the Government have not given reason in support of the order but because the reason given is not tenable."

<sup>36</sup> (1978) 2 S.C.R. 621.

<sup>37</sup> (1978) 2 S.C.R. 621.

<sup>38</sup> AIR 1997 Mad 366.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Louis De Raedt v. Union of India*, MANU/SC/0422/1991.

<sup>41</sup> Inderjeet Badhwar, "Immigrants have rights", Feb 18, 2017, India Legal, available at: <http://www.indialegallive.com/letter-from-the-editor-inderjit-badhwar/immigrants-have-rights-20259> (last visited on December 13, 2019).

## Canada<sup>42</sup>

If the application for citizenship is refused, the person may seek judicial review of the decision by the Federal Court of Canada other than filing or a new application. The limitation period for filing for a review is thirty days from the date of refusal. However, the applicant must satisfy the Court that the application:

- i. raises a serious issue; or
- ii. raises an arguable issue upon which the application might succeed.

If an arrest or detention is involved in an immigration context, the right to counsel is constitutionally guaranteed by section 10(b) of the Canadian Charter of Rights and Freedoms.<sup>43</sup> Section 10(b) stipulates that upon arrest or detention, everyone has the right “to retain and instruct counsel without delay and to be informed of that right.”

## France

The French National Assembly in 2015 approved legislation on immigration which addresses the issue of illegal immigrants and how to better protect their fundamental rights, amongst other things.<sup>44</sup> While a detailed study on the legislation is beyond the scope of this paper, what's of importance is the provision which provides for a fifteen day period of limitation to file an appeal before a court against the rejection of an application for asylum.

An application for citizenship is made to the "Court of First Instance". If the application for citizenship is refused, a disciplinary complaint may be made before the Ministry of Justice. Alternatively, an appeal may be filed before the Court of Appeals and consecutively to the final court of Appeal i.e. The French Supreme Court of Judicature.

France recognized the right to an attorney as a basic principle as far back as in 1976.<sup>45</sup> This right is also guaranteed under European Convention on Human Rights.<sup>46</sup> French law allows a person to apply for financial assistance if such person does not have the economic standing to hire a lawyer and does not differentiate between a citizen and a non-citizen.

## United Kingdom (UK)

An appeal can be filed against any decision made by Secretary of the State under section 40 of the British Nationality Act, 1981.<sup>47</sup>

Immigration Courts known as the First-tier Tribunal (Immigration and Asylum) have been established to deal with issues related to decisions made by the Home office for:

- i. permission to stay in the UK

<sup>42</sup>Refugee Appeal Division, Government of Canada, *available at*: <http://www.cic.gc.ca/english/refugees/reform-rad.asp> (last visited on December 11, 2019).

<sup>43</sup> Canadian Charter of Rights and Freedoms Section 10(b), Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.), *available at*: <http://laws-lois.justice.gc.ca/eng/Const/page-15.html#h-40>, *available at*: <https://perma.cc/CPJ2-X9CD> (last visited on December 15, 2019).

<sup>44</sup>The Library of Congress, Global Legal Monitor, *available at*: <http://www.loc.gov/law/foreign-news/article/france-national-assembly-adopts-immigration-bill/>; *available at*: <http://www.avocat-tall.com/obtaining-french-citizenship.html> (last visited on December 15, 2019).

<sup>45</sup>Constitutional Council, Decision No. 76-70 of December 2, 1976, *available at*: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/1976/76-70-dc/decision-n-76-70-dc-du-2-decembre-1976.7477.html> (last visited on December 15, 2019).

<sup>46</sup>European Convention on Human Rights art. 6, Nov. 4, 1950, 213 U.N.T.S. 221, *available at* [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf) (last visited on December 15, 2019).

<sup>47</sup>British Nationality Act, 1981, s. 40A; *The Secretary of the State v. Abdul Waheed Pirzada* (2017) UKUT 00196.

- ii. deportation from the UK
- iii. entry clearance to the UK

In addition to this, applications for grant of bail in immigration matters for people detained by Home Office is also decided. At Immigration Removal Centres, legal clinics are held on a regular basis and each detainee is entitled to thirty minutes of free legal advice.

### United States of America (USA)

The right to petition the government is guarantee of the First Amendment: "Congress shall make no law... abridging... the right of the people ... to petition the Government for a redress of grievances."<sup>48</sup>

All immigrants whether present legally or illegally are entitled to due process of law in USA. Under this reasoning, the court decisions in *Arteaga v. Allen*,<sup>49</sup> *Prassinios v. District Director of Immigration and Naturalization Service*,<sup>50</sup> recognized an immigrant's right to sue as an integral part of due process. The court opined that to deprive an alien of this right because of a violation of the immigration laws would not only deny him due process of law but would also impose upon him a severe penalty in addition to those actually prescribed by the Immigration and Nationality Act.<sup>51</sup>

The Immigrants' Rights Project was conceived in USA and implemented a nationwide strategy for litigation with the help of which denial of judicial review could be challenged. It was in the case of *Magana-Pizano v. INS*<sup>52</sup>, that the Court decided that the elimination of all judicial review of executive detention violates the Constitution.<sup>53</sup>

If a person applies for citizenship by naturalization and Immigration Services denies his/her application, the authorities are required to supply a written denial letter explaining why the application was rejected. Apart from this a leave to request a hearing against the denial is also granted. Half of the States in USA have provided for free legal aid for such people.

Special courts known as the Immigration Courts have been established to deal with immigration related issues and ensure speedy justice. The Judges have regularly upheld immigrant's right to fair process before facing deportation. The U.S. Supreme Court ruled that individuals who seek to reopen their deportation orders, on the ground of change in circumstances; have the right to appeal to the Federal Courts if the Immigration Court refuses to hear the appeal. This decision of the Court<sup>54</sup> ensures that a relationship of healthy checks and balances, on the exercise of power by government, is maintained.<sup>55</sup>

<sup>48</sup>The First Amendment states: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

<sup>49</sup>99 F.2d 509, 510 (5th Cir. 1938).

<sup>50</sup>366 U.S. 966 (1961).

<sup>51</sup>Peter S. Munoz, "The Right of an Illegal Alien to Maintain a Civil Action", 63 *Cal. L. Rev.* 762 (1975), available at: <http://scholarship.law.berkeley.edu/californialawreview/vol63/iss3/6> (last visited on December 11, 2019).

<sup>52</sup>200 F.3d 603, 614 (9th Cir. 1999) (Last visited on 18<sup>th</sup> December,2019).

<sup>53</sup>ACLU History: Access To The Courts: The Right To Judicial Review, available At: <https://www.aclu.org/other/aclu-history-access-courts-right-judicial-review> (last visited on December 11, 2019).

<sup>54</sup>*Kucana v. Holder* 558 U.S. 233(2010).

<sup>55</sup>Center for Immigration Studies, Immigration Courts, available at: <https://cis.org/Immigration-Courts> (last visited on December 11, 2019).

### International Conventions

Two main treaties govern immigrant protection, the Convention Relating to the Status of Refugees which lays out the major rights and obligations in refugee protection, and the Protocol Relating to the Status of Refugees. The 1951 Refugee Convention grants refugees equal access to important state institutions including courts.

Articles 10 of the UDHR declares that everyone is entitled to a fair and public hearing by an independent and impartial tribunal, in the determination of his legal rights and obligation and of any criminal charges against him.

Articles 14(1) of the international covenants on civil and political rights provide that all people shall be equal before the court and tribunals.

Article 16 of Convention relating to status of refugees ensures the right to access to courts:

- i. A refugee shall have free access to the courts of law on the territory of all Contracting States.
- ii. 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 *cautiojudicatum solvi*.
- iii. 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.

## IX. RIGHT TO ACCESS TO COURTS

Blackstone has stated that it is the function of the common law to "protect the weak from the insults of the stronger".<sup>56</sup> To ensure that this protection is accorded to the people, is why Courts are established in the very first place and when a community, group or an individual's access to a court is cut grave injustice is caused.

Chief Justice Marshall in *Marbury v. Madison*,<sup>57</sup> described the ability to obtain civil redress as the "very essence of civil liberty."<sup>58</sup> This principle has been followed thereafter in most countries, including India. This idea also resonated in the Fourteenth Report of the Law Commission.

Justice V.R. Krishna Iyer in a Report<sup>59</sup> expressed the view that as far as non-citizens are concerned, so long as they are within Indian territory they are, supposedly, entitled to the protection of laws prevalent in India and have equal access to courts.<sup>59</sup> While the Report acknowledges the State's power to deport or expel a foreigner, the power extends only so far as such a person is a threat to the security of the country and even then such an individual is entitled to a remedy against any injustice remitted to him in exercise of such procedure just as

<sup>56</sup>Blackstone, *Commentaries on the Laws of England* (Oxford University Press, London).

<sup>57</sup> 5 U.S. (1 Cranch) 137 (1803)

<sup>58</sup> *Ibid.*

<sup>59</sup> Report of Expert Committee on Legal Aid, *Processual Justice To The People* May (1973) 43, "...equality is the basis of all modern systems of jurisprudence and administration of justice.... In so far as a person is unable to obtain access to a court of law for having his wrongs redressed or for defending himself against a criminal charge, justice becomes unequal ad laws which are meant for his protection have no meaning and to that extent fail in their purpose. Unless some provision is made for assisting the poor man for the payment of court fees and lawyer's fees and other incidental costs of litigation; he is denied equality in the opportunity to seek justice."

much as in case of assault or theft. The only precondition is the satisfaction of the three tests laid down<sup>60</sup> be it for citizens or non-citizens.<sup>61</sup>

Accordingly, the National Commission for Review the Working of Constitution has recommended insertion of article 30A on the following terms:

"30A: Access to Courts and Tribunals and speedy justice

(1) Everyone has a right to have any dispute that can be resolved by the application of law decided in a fair public hearing before an independent court or, where appropriate, another independent and impartial tribunal or forum.

(2) The right to access to Courts shall be deemed to include the right to reasonably speedy and effective justice in all matters before the courts, tribunals or other fora and the State shall take all reasonable steps to achieve the said object."<sup>62</sup>

## X. RECOMMENDATIONS AND CONCLUSION

*"MENEDEMUS- Chremes, have you so much leisure from your own affairs that you can attend to those of others – those which don't concern you? CHREMES- I am a man<sup>63</sup>, and nothing that concerns a man do I deem a matter of indifference to me."*<sup>64</sup>

My research findings suggest that there is an immediate need to re-invent the system so as to make the administrative process more in consonance with the principles of natural justice and the rule of law. Two amendments in the system have become long drawn. First, in the Legal Services Authorities Act, 1987, by the addition of section 12A along with two schedules which will allow the authorities to exercise the necessary discretion but within the four walls of the Constitution. Second, in section 14 of the Citizenship Act, 1955, which is an unnecessarily harsh provision granting unfettered discretion to the Government, thus running the risk of being exploited arbitrarily. Whether or not it culminates into arbitrary action is not the question because "justice must not only be done; it must appear to have been done".<sup>65</sup>

### Recommendations

What's recommended is not geometrical congruence to the rights of the citizens for that is something that the Constitution has not visualised. But the encouragement of drafting of provisions which aid the immigrants in continuing their life with dignity and not let them be victims of their circumstances. If we do not stand for what's right today we are in effect digging an abyss for ourselves. No words can express these sentiments better than the words of Martin Niemöller:<sup>66</sup>

<sup>60</sup>Means test, prima facie test, and reasonableness test.

<sup>61</sup>Report of Expert Committee on Legal Aid, Processual Justice to The People May (1973) 43.

<sup>62</sup>Law Commission of India, 189<sup>th</sup> Report on Revision of Court Fee, Feb, 2004.

<sup>63</sup>"Homo sum: humani nihil a me alienum puto." St. Augustine says, that at the delivery of this sentiment, the Theatre resounded with applause; and deservedly, indeed, for it is replete with the very essence of benevolence and: disregard of self. Cicero quotes the passage in his work *De Officiis*, B. i., c. 9.

<sup>64</sup>P. Terentius Afer (Terence), *Heautontimorumenos: The Self-Tormenter*. Henry Thomas Riley, (ed.), available at: <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.02.0115%3Aact%3D1%3Ascene%3D1#note2> (last visited on October 19, 2018).

<sup>65</sup>*Aravali Power Company Pvt. Ltd. v. M/S. Era Infra Engineering Ltd.*, MANU/SC/1139/2017; *Ashok Kumar Yadav v. State of Haryana*, 1985 SCR Supl. (1) 657: AIR 1987 SC 454.

<sup>66</sup>*Martin Niemöller* (1892–1984), German theologian.

*"First they came for the Socialists, and I did not speak out— Because I was not a Socialist. Then they came for the Trade Unionists, and I did not speak out— Because I was not a Trade Unionist. Then they came for the Jews, and I did not speak out— Because I was not a Jew. Then they came for me—and there was no one left to speak for me."*

In 1930, the League of Nations established the Nansen Office after the death of Fridtjof Nansen<sup>67</sup>. The Nansen Office issues a *Nansen passport* which is a certificate issued for refugees as an international substitute for a passport, which allowed stateless persons or those deprived of their national passports to enter and transit other countries. A provision for issue of a similar passport could be incorporated in the Passport Act to be issued to illegal immigrants after a certain period of time as may be prescribed.

Section 14 of the Citizenship Act, 1955 may be amended so as to incorporate a provision for revision by a Court. A tribunal may be established for this purpose in order to ensure fast disposal of applications. It should be made mandatory for the authorised officer or the Central Government to give reasons before rejection of an application.

A new section, section 12A, may be added to the Legal Services Authorities Act, 1987 to specify under what circumstances an immigrant may be able to avail the service of free legal aid. This decision should be left to the discretion of an officer authorised in this regard who shall inquire into the following conditions, these may be added by way of a schedule to section 12A.

### **Discretionary Legal Aid**

Free legal aid cannot be demanded as of right by immigrants and may be made the discretion of the authorised officer upon being satisfied that the conditions prescribed under the statute are fulfilled. A foreigner who is an immigrant in India may be provided legal aid upon application provided that he or she:

- i. has not been sentenced for an unlawful act and is not subject to any court order imposing a measure of reform and prevention due to lack of criminal capacity;
- ii. is a minority group facing prosecution threats in his or her own country;
- iii. has not found a dwelling of his/her own or accommodation; and
- iv. Is unable to support himself or herself and his or her dependents.
- v. The requirements stipulated in this section may be waived on grounds of public interest or in order to avoid special hardship.

*Legal Aid shall not be allowed if:*

- i. There are justifiable grounds to assume that the immigrant is pursuing or supporting or has pursued or supported activities aimed at subverting the free democratic constitutional system, the existence or security of India or at illegally impeding the constitutional bodies of India or the members of said bodies in discharging their duties or any activities which jeopardize foreign interests of the Government of India through the use of violence or preparatory actions for the use of violence, or
- ii. he or she has been sentenced to at least two years of imprisonment for one or more intentionally committed offenses and the order has attained finality (an order shall be

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<sup>67</sup>Fridtjof Nansen (1861-1930), recipient of the Nobel Peace Prize for 1922.

said to have attained finality only after the decision of the High Court, unless no appeal has been preferred within one year of the decision of the lower court), or convicted of smuggling, or

- iii. convicted of a crime under section 172,<sup>68</sup> section 177,<sup>69</sup> section 182,<sup>70</sup> section 186,<sup>71</sup>, section 188,<sup>72</sup> of the Indian Penal Code, 1860, or
- iv. convicted under the Narcotic Drugs and Psychotropic Substances Act, 1985, or
- v. facts justifiably lead to the conclusion that he or she belongs to or has belonged to an organisation which support terrorism or supports or has supported such an organisation; (cases of conviction under Juvenile Justice Act shall also be covered).

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<sup>68</sup> Indian Penal Code, s.172- Absconding to avoid service of summons or other proceeding.

<sup>69</sup> *Id.*, s.177- Furnishing false information.

<sup>70</sup> *Id.*, s. 182- False information with intent to cause public servant to use his lawful power to the injury of another person.

<sup>71</sup> *Id.*, s. 186- Obstructing public servant in discharge of public function.

<sup>72</sup> *Id.*, s. 188- Disobedience to order duly promulgated by public servant.