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REFUGEES AS “FOREIGNERS”: CONSTITUTIONAL PROTECTION, EXECUTIVE DISCRETION, AND THE LEGAL STATUS OF ROHINGYAS IN INDIA

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Abstract

In the wake of an anti-immigration drive against Rohingyas, and the Supreme Court’s pending consideration in Jaffar Ullah v. Union of India of critical questions concerning the legal status and protection of Rohingya refugees, this paper aims to analyse the absence of a comprehensive legal framework which enables the executive to expel refugees with near-total impunity. The absence of a statutory definition of “refugee” and the overriding authority of domestic legislation, particularly the Foreigners Act, over customary international law has led to discriminatory treatment of refugees along lines of religion, ethnicity, and origin. The paper examines the precarious status of refugees in India, with particular attention to the discriminatory logic underpinning the CAA and NRC, which selectively target Muslim refugees in contravention of constitutional guarantees of equality and liberty. It also assesses India’s disregard for the principle of non-refoulement, while advancing the argument that obligations under treaties such as the ICCPR and ICESCR, both ratified by India, continue to hold weight despite the overarching authority of the Foreigners Act and India’s non-accession to the 1951 Refugee Convention and its 1967 Protocol. Further, the study interrogates the scope of fundamental rights available to Rohingya refugees and the inconsistent judicial application of Article 14 and 21. The ambiguity with which courts have interpreted the right to life has led to an erosion of its protective value, as the judiciary oscillates between safeguarding refugees against unlawful deportation and deferring to executive discretion. Finally, the paper argues that the absence of a refugee framework is not confined to legislative gaps, but also permeates judiciary, administrative practices and deportation policies. It concludes by foregrounding the ethical stakes of this exclusionary regime and offering policy recommendations to address the urgent need for a coherent and rights-based refugee law in India.

Keywords: Executive Discretion, Non-Refoulement, Refugee Protection, Articles 14 and 21, Legalised Vacuum.

I. Introduction

In September 2024, over 100 Rohingya refugees in Assam’s Matia Transit Camp began

a hunger strike protesting their prolonged detention. Several had either served their term or were never legally charged but were still detained without any timely judicial oversight or

access to legal counsel.¹⁷³ This highlights the plight faced by the refugees in the absence of a designated legal framework. India remained dependent on colonial-era statutes such as the Foreigners Act, 1946, and the Passport (Entry into India) Act, 1920, which abandoned refugee governance to executive discretion and failed to distinguish refugees from other foreign categories.¹⁷⁴ These statutes have now been replaced by the Immigration and Foreigners Act, 2025 (referred to as the '2025 Act' further in the paper), which consolidates immigration, entry, and stay under a singular legislative framework but still fails to define or protect refugees as a distinct legal category, thereby diluting a rights-based approach to immigration.

Due to the absence of a comprehensive legal framework, several refugee groups, including Rohingyas, have turned to the judiciary for constitutional protection. While historic rulings have acknowledged the universality of Articles 14 and 21 to all persons, citizens and non-citizens alike, judgments in recent times, such as *Mohammad Salimullah v. Union of India* (2021) and *Mohammad Ismail & Anr. v. Union of India* (2025), have subjected procedural limitations over fundamental rights, especially in cases involving deportation and detention. The introduction of the Citizenship Amendment Act (CAA), 2019, through the process of extending fast-track citizenship to non-Muslim undocumented migrants from neighbouring countries, has raised questions about equal treatment and the exclusion of vulnerable groups like the Rohingyas.

The legal treatment of refugees in India presents a critical site of inquiry not only because it is a matter of great legal and humanitarian concern, but also because it

captures the larger and looming tensions between constitutional ideals and executive realities.

II. Definition of Refugees

The term 'refugee' is widely used in international discourse, humanitarian conversations and global legal instruments. The 1951 Refugee Convention defines a refugee as a person who, "owing to 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 [their] nationality and is unable or, owing to such fear, is unwilling to avail [themselves] of the protection of that country."¹⁷⁵ India has not ratified the 1951 Refugee Convention or its 1967 Protocol. Moreover, despite being a country hosting more than 2,00,000 "refugees", India does not recognise refugees as a distinct category and instead includes them under the broad term "foreigners" under the 2025 Act.¹⁷⁶ Their status is equivalent to the same frameworks as tourists and other foreign nationals. This paper will use the term *refugee* in accordance with the definition provided by the 1951 Refugee Convention, to ensure conceptual clarity and to distinguish refugees from other categories of foreign nationals under Indian law.

III. Historical and Background Context

Since independence, India has taken in people from neighboring and far-off countries. Tibetans fled to India beginning in 1959 and were granted asylum and settlement arrangements; Bengali Hindus and others arrived around the 1971-72 Bangladesh Liberation War period; Sri Lankan Tamils sought refuge in the 1980s and later decades; Afghan Sikhs and Hindus fled the Taliban after 1990s and 2001 onward; and various groups from Africa and West Asia (including Somalis,

¹⁷³ Steffen Angenendt, et al., *The Externalisation of European Refugee Protection: A Legal, Practical and Political Assessment of Current Proposals*, SWP Comment No. 2024/C 13 (Mar. 28, 2024), <https://www.swp-berlin.org/10.18449/2024C13>.

¹⁷⁴ In the Indian context, colonial administrative ordering created standardized categories (citizenship, and residency) that a nascent state inherited and repurposed for social provisioning and political legitimacy. The postcolonial state thus inherited a functional architecture (bureaucratic categorization, planning imperatives, and welfare programs) that enabled both inclusive citizenship and selective social engineering, depending on context and policy goals.

¹⁷⁵ UNHCR- UN Refugee Agency, <https://www.unhcr.org/in/about-unhcr/who-we-protect/refugees> (last visited 31st July, 2025).

¹⁷⁶ *India among top three host countries of international migrants, refugees and asylum seekers in South-East Asia region in 2020*, Econ. Times, <https://economictimes.indiatimes.com/news/india/india-among-top-three-host-countries-of-international-migrants-refugees-and-asylum-seekers-in-south-east-asia-region-in-2020/articleshow/93011530.cms?from=mdr> (last visited Aug. 10, 2025).

Sudanese, Iraqis, and Ugandan Asians) have sought safety in India at different times.¹⁷⁷ Though this is a testament to India's historically grounded practice of being accommodating, policy choices frequently mirrored broader political calculations, not purely neutral or universal governance.¹⁷⁸ Notably, the Tibetans were given land and domicile, while the others were given very little aid and no legal cover.

The United Nations High Commissioner for Refugees has been allowed to operate in India since 1981, however, its presence is contingent on formal government immersion and State Government's policy alignment. The UNHCR's refugee cards claim to help refugees access healthcare, education and rights including freedom of movement and access to work. However, these cards, as affirmed by the Supreme Court of India, have no legal status.¹⁷⁹ Several refugees, despite having this card, have been detained without due process.¹⁸⁰

The Citizenship Amendment Act of 2019 was the first to include religion as the criterion for conferring citizenship.¹⁸¹ To understand the selective discrimination of refugees in India, it is important to critically analyze the legal structures that enable selective discrimination against Muslim refugees.

IV. Role of Citizenship Amendment Act and National Registry of Citizenship

The Citizenship Act of 1955 prohibits an "illegal migrant" from acquiring citizenship in India.¹⁸² The Citizenship (Amendment) Act of 2019 redefined the term "illegal migrant," which facilitated access to Indian citizenship to persecuted religious minorities from

Afghanistan, Bangladesh and Pakistan who entered India before 2014. However, with respect to the amendment, the term "persecuted religious minorities" only included Hindu, Sikh, Christian, Jain and Parsi migrants and notably excluded Muslim migrants, including the ones getting persecuted like the Rohingyas and Ahmadis.¹⁸³ ¹⁸⁴ While it is believed that the legislative intent of the CAA was to provide a humanitarian port of refuge to the persecuted minorities who fled their country, the legislation has fundamentally failed to achieve its objective.¹⁸⁵ Refugees from non-Islamic states such as Sri Lanka and Myanmar are excluded, exposing CAA as 'a demonic rather than a benign legislation' that legitimizes the treatment of Muslims as mere perpetrators of violence and terrorism.¹⁸⁶ The "illegal migrants," therefore, often are minority communities that fear persecution in their countries and have no recourse to employment other than working as informal labour with no legal protection.¹⁸⁷ ¹⁸⁸

Among the most vulnerable refugee communities today are the Rohingya Muslims from Myanmar's Rakhine State, fleeing genocide and statelessness. An estimated 40,000 Rohingyas are believed to be in India by the Indian Home Ministry, who are undocumented and dispersed in Delhi, Jammu & Kashmir, Haryana, Rajasthan, and other parts of the country.¹⁸⁹

The National Registry of Citizenship (NRC) mandated by the 2003 amendment of the Citizenship Act, 1955 was meant to be a register of all Indian citizens.¹⁹⁰ On 31st August 2019, the Assam government published the final version of the NRC list, which excluded 1.9 million

¹⁷⁷ Mixed Migration Ctr., *Mixed Migration in Southeast and East Asia: 2017* (Oct. 2017), <https://mixedmigration.org/wp-content/uploads/2018/05/ms-asia-1710.pdf>.

¹⁷⁸ B. S. Chimini, *The Legal Condition of Refugees in India*, 7 J. of Refugee Studies, 378-401, (1994) <https://doi.org/10.1093/jrs/7.4.378>.

¹⁷⁹ 'Opened a Showroom...': SC Justice Surya Kant Taunts UNHCR For Issuing Refugee Cards in India, *The Wire*, Oct. 8 2025, <https://thewire.in/rights/opened-a-showroom-sc-justice-surya-kant-taunts-unhcr-for-issuing-refugee-cards-in-india>.

¹⁸⁰ Human Rights Watch, *Shadow of refuge: Rohingya refugees in India*, <https://www.hrw.org/report/2022/08/18/shadow-refuge-rohingya-refugees-india> (last visited July 28, 2025).

¹⁸¹ Ashraf Kunnummal, *Between Appeal to Citizenship and Biopolitical Fracture*, Vol. 8, No.2, *Islamophobia Studies Journal*, 261-272 (2024).

¹⁸² *Id.*

¹⁸³ Alyssa Ayres, *Human Rights and Democracy in South Asia*, COUNS. FOR. REL. 1, 1-14 (2020).

¹⁸⁴ India: Citizenship Amendment Act is a Blow to Indian Constitutional Values and International Standards, *Amnesty Int'l* (Mar. 14, 2024), <https://www.amnesty.org/en/latest/news/2024/03/india-citizenship-amendment-act-is-a-blow-to-indian-constitutional-values-and-international-standards/> (last visited June 25, 2025).

¹⁸⁵ *Id.*

¹⁸⁶ Kalpana Kannabiran, *The Shifting Sands of Citizenship: Disposessions, Constitutional Ruptures and Borderlands*, Vol 69: 3, *Sociological Bulletin*, 1-20 (Oct 2020).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Sup. Ct. Observer, *supra* note 4.

¹⁹⁰ Ashraf, *supra* note 1.

refugees, including 1.3 million from the Hindu community.¹⁹¹ However, 3 months after the NRC list was published, the Indian Parliament enacted the CAA, which facilitated access to citizenship to the 1.3 million Hindus identified under the NRC list.¹⁹² Hence, Muslim migrants were the primary community that took the brunt of the enacted legislation.

While these laws appear to be non-discriminatory in nature, they form the groundwork for discriminatory practices against Muslim refugees in India. A close analysis reveals that these laws which are putatively persecution-based, which discriminate by leaving out Myanmar basing this exclusion on historical linking and Partition of 1947, while it still includes Afghanistan. Moreover, it is crucial to understand that these laws cannot be analyzed independently. It is essential to situate them as part of a broader strategic agenda that focuses on ousting the disfavored groups from the country and stripping them of their rights. It is precisely the existence of this strategic agenda, along with the absence of refugee laws in India that warrants the government and other agencies to selectively discriminate against Rohingya refugees. As a result, they fall victim to denial of basic rights and employment opportunities, and are eventually rendered stateless.

The constitutional validity of these enacted legislations is also a topic of contention, particularly in the context of the constitutional values enshrined in Articles 14 and 21 of the Indian Constitution. The use of the phrase “any person” in Article 14 clearly indicates that it extends to not only the citizens of India but also to foreigners who fall under the jurisdiction of the Indian laws.¹⁹³ Therefore, the exclusion of Muslim refugees from the CAA and NRC is violative of Article 14, which states that the State shall grant everyone equal protection of the

laws within the territory of India. Similarly, Article 21 of the Constitution also extends to everyone residing within the territory of India. It guarantees the fundamental right to life and personal liberty, establishing that no one can be deprived of these rights.¹⁹⁴ However, the discriminatory nature of the enacted legislation subjects the refugees to the possible violation of human rights at the hands of the State, individuals and other actors. Therefore, the selective exclusion of Muslim refugees from protection granted under CAA and NRC lacks any intelligible differentia related to the legislative intent of the legislations, which is to protect the persecuted minorities.

V. Present Situation

The courts have rejected claims of abuse against Rohingyas and declined to halt the government from deciding to deport them, declaring that the right to reside in India was reserved only for citizens of the country.¹⁹⁵ In May 2025, Justice Surya Kant dismissed a writ petition as “fanciful” and “vague” and asked, “[Where] is this beautifully crafted story coming from?”¹⁹⁶ The petitioners had submitted evidence and UN reports that stated that large numbers of Rohingyas, including children and women, had been arrested in Delhi, taken to the Andaman Islands, and left at sea with life jackets, without due process.

Following the Pahalgam attacks in Kashmir in April 2025, government action on undocumented migration intensified, specifically against migrants from Bangladesh and Myanmar. The Ministry of Home Affairs (MHA) directed states and Union Territories to verify the citizenship status of suspected undocumented migrants from Bangladesh and Myanmar within 30 days. If citizenship could not

¹⁹⁴ INDIA CONST. art. 21.

¹⁹⁵ *Right to Reside Is Only for Indian Citizens, Not for Rohingyas, Rules Supreme Court*, Econ. Times (May 9, 2025), <https://economictimes.indiatimes.com/news/india/right-to-reside-is-only-for-indian-citizens-not-for-rohingyas-rules-supreme-court/articleshow/121019472.cms> (last visited June 20 2025).

¹⁹⁶ “UN Probes Claims of Rohingya Refugees Cast Into Sea from Indian Naval Vessel Even as SC Calls Plea ‘Beautifully Crafted Story’”, Hindustan Times (May 17, 2025), <https://www.hindustantimes.com/india-news/un-probes-reports-of-rohingya-refugees-cast-into-sea-from-indian-naval-vessel-sc-says-fanciful-claims-101747452106758.html> (last visited July 20 2025).

¹⁹¹ *Assam NRC: What next for 1.9 million 'stateless' Indians?* BBC, Aug. 31, 2019, <https://www.bbc.co.uk/news/world-asia-india-49520593>. (last visited Jul. 21, 2025).

¹⁹² Kamrul Hasan, *NRC, CAA, and Muslim Minority in India: A Source of Potential Conflict in South Asia?*, 47(1) JAHAN. REV. 103, 103-115 (2023).

¹⁹³ INDIA CONST. art. 14.

be confirmed, individuals were to be detained and deported, with instructions to establish detention centres at the district level.¹⁹⁷ In states such as Gujarat, Delhi, Assam, Maharashtra, and Rajasthan, individuals identified as “illegal migrants” were transported by Air Force aircraft to border areas in Assam, Tripura, and Meghalaya and dislocated across the Bangladesh border by the Border Security Forces. Reports indicate that over 2,500 Bangladeshi nationals were detained and deported.¹⁹⁸

In June 2025, the government set a deadline for deportations, and a hundred refugees, some of whom were born in India, were deported without due process.¹⁹⁹ Victims, mostly Bengali-speaking Muslims, said they were beaten, tied up, and pushed across the Bangladesh border. Rohingyas out of Assam were reported to have been pushed into the Bay of Bengal. The UN criticized this as a violation of the non-refoulement principle. Official numbers on how many people were pushed out was not given by the Indian government, but Border Guard Bangladesh reported over 1,500 Muslim men, women, and children were deported to Bangladesh from May 7 to June 15, including about 100 Rohingya refugees from Myanmar.²⁰⁰ HRW, in its July 2025 report, labeled these actions “arbitrary” and a threat to basic human rights²⁰¹.

“We are not ready to go back, until the situation improves in Myanmar... It is extremely distressing for us to be sent back to Myanmar against our wishes.” remarked a Rohingya

¹⁹⁷ Mahender Singh Manral & Deeptiman Tiwary, *How Latest Drive to Deport Illegal Bangladeshi Immigrants Stands Out*, Indian Exp., <https://www.indianexpress.com/article/explained/latest-drive-deport-illegal-bangladeshi-immigrants-10053676> (last visited June 14, 2025).

¹⁹⁸ Global Detention Project, *India Renews Efforts to Remove “Illegal Foreigners” in the Wake of Pahalgam Terrorist Attack*, Immigration Detention Monitor, <https://www.globaldetentionproject.org/india-renews-efforts-to-remove-illegal-foreigners-in-the-wake-of-pahalgam-terrorist-attack> (last visited June 15, 2025).

¹⁹⁹ *India: Hundreds of Muslims Unlawfully Expelled to Bangladesh*, Human Rights Watch (July 23, 2025), <https://www.hrw.org/news/2025/07/23/india-hundreds-of-muslims-unlawfully-expelled-to-bangladesh> (last visited June 20, 2025).

²⁰⁰ *Id.*

²⁰¹ *Id.*

refugee detained in Jammu.²⁰² These words lay bare the judicial and constitutional dilemma at the heart of India’s refugee regime: when survival itself is at stake, does the law stand with the vulnerable or recede behind procedure and politics? It is this unresolved tension between the constitutional promise and lived reality that animates the discussion that follows.

VI. Questions of Constitutionality and the Extension of Fundamental Rights to Rohingya Refugees

In the absence of a binding refugee-specific legislation, the courts have oscillated between granting protection and deferring to executive discretion, often with little doctrinal clarity. This raises the question of what legal rights foreigners or non-citizens enjoy within Indian territory. At the heart of India’s constitutional architecture lies the idea that certain rights, like life and liberty, are so fundamental that they apply not only to citizens but to all persons. The Supreme Court of India has consistently maintained that the constitutional rights available to foreigners are limited, primarily to the protection granted under Article 14 and Article 21 of the Indian Constitution, which ensure the right to equality and the right to life and personal liberty, respectively.

In this context, nearly every case concerning refugee rights that comes before Indian courts invokes Article 14 and Article 21 of the Constitution, arguing that it implicitly includes equality before the law, equal protection of the law, and the principle of non-refoulement which prohibits a State from expelling or returning an individual “in any manner whatsoever to the frontiers of territories where their life or freedom would be threatened” due to factors such as race, religion, nationality, membership of a particular social group, or political opinion.

However, as observed by B.S. Chimni, India’s refugee regime, marked by the absence of a codified legal framework, enables discretionary

²⁰² Human Rights Watch, *India: Halt All Forced Returns to Myanmar*, Human Rts. Watch (Mar. 10, 2021), <https://www.hrw.org/news/2021/03/10/india-halt-all-forced-returns-myanmar>.

and often politically driven treatment, permitting the organs of the government to protect some and exclude others without consistent legal oversight.²⁰³

The Supreme Court in *The Mailwand's Trust of Afghan Human Freedom v. State of Punjab and Others* (1986) and *N.D. Pancholi v. State of Punjab* (1988) stayed the deportation order issued against refugees.²⁰⁴ Similarly, in *Malavika Karlekar v. Union of India* (1992), the Court directed authorities not to deport 21 individuals from the Andaman Islands to Myanmar if their refugee status applications were pending and they posed no security threat, while clarifying that deportation on other grounds or in cases where refugee status was denied or not claimed would not be affected.²⁰⁵ This universality was affirmed in *Maneka Gandhi v. Union of India*, where the Supreme Court held that the "procedure" under Article 21 must be "just, fair and reasonable," not arbitrary or oppressive.²⁰⁶

This approach was reinforced in the case of *National Human Rights Commission (NHRC) v State of Arunachal Pradesh* (1996), where the Court emphatically stated as follows:

"20Every person is entitled to equality before the law and equal protection of the laws. So also, no person can be deprived of his life or personal liberty except according to procedure established by law. Thus the State is bound to protect the life and liberty of every human being, be he a citizen or otherwise..."²⁰⁷

The said case remains one of the most principled examples of constitutional hospitality, illustrating the idea that our Constitution opens its doors to the stateless and the suffering.

In *Louis De Raedt v. Union of India*, the Court similarly declared:

"Even an alien has a right to life under Article 21... They are entitled to equality and equal protection of law under Article 14."²⁰⁸

At this point in Indian jurisprudence, it was clear: the right to life was not contingent on citizenship and to a limit, also included the right to not be deported. However, in *Dongh Lian Kham v. Union of India* (2015), the Delhi High Court took a markedly more restrained approach. While it did protect the petitioners from immediate deportation and directed the FRRO to consult UNHCR and explore third-country resettlement options, it reaffirmed the executive's absolute discretion to grant or deny long-term visas.

"26. ...The power of the Indian Government to expel foreigners is absolute and unlimited and there is no provision in the Constitution of India or other law, putting fetters on the aforesaid discretion of the Government."²⁰⁹

However, the past decade has been characterised by significant transformation. In *Mohammad Salimullah v. Union of India* (2021), the Supreme Court heard a plea to prevent the deportation of Rohingyas detained in Jammu. While the Court admitted that Articles 14 and 21 apply to non-citizens, it added a crucial limitation:

"The right not to be deported is ancillary or concomitant to the right to reside or settle in any part of the territory of India under Article 19(1)(e), which is available only to citizens."²¹⁰

This effectively narrowed Article 21 by tying deportation protections to citizenship, allowing the Court to clear the way for deportation as long as "procedure" was followed, even if that procedure ignored international norms like non-refoulement. The critical question remains, what is the value of the right guaranteed under Article 21 if it does not extend to encompass the

²⁰³ B.S. Chimni, *The Legal Condition of Refugees in India*, vol. 7 Journal Refugee Stud. 378, 390–91 (1994).

²⁰⁴ *The Mailwand's Trust of Afghan Human Freedom v. State of Punjab & Others*, Writ Petition (Crl.) Nos. 125 and 126 of 1986.

²⁰⁵ *Dr. Malavika Karlekar v. Union of India & Anr.*, Writ Petition (Crl.) No. 583 of 1992.

²⁰⁶ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.

²⁰⁷ *National Human Rights Commission v. State of Arunachal Pradesh & Anr.*, (1996) 1 S.C.C. 742.

²⁰⁸ *Louis De Raedt v. Union of India*, (1991) 3 SCC 554.

²⁰⁹ *Dongh Lian Kham & Anr. v. Union of India & Anr.*, W.P. (Crl.) No. 1884 of 2015.

²¹⁰ *Mohammad Salimullah v. Union of India*, W.P. (C) No. 793 of 2017, Interlocutory Order (Apr. 8, 2021), <https://www.livelaw.in/top-stories/supreme-court-allows-deportation-of-rohingya-refugees-to-myanmar-as-per-procedure-prescribed-172302>.

right against deportation, especially where such deportation/ repatriation may endanger life or personal liberty?

In *Ktaer Abbas Habib v. Union of India* (1998), the Gujarat High Court had held:

“The principle of non-refoulement is encompassed in Article 21... No person can be deported to a country where they may face life-threatening persecution.”²¹¹

The Supreme Court’s shift in *Mohammad Salimullah* (supra) therefore, reflected a distinct jurisprudential orientation; a retreat from a rights-based constitutional vision to one shaped by national security and executive discretion. The Court noted that while the right to life under Article 21 applies to non-citizens, such rights are not absolute and must be balanced against the “compelling interests of the State.”

In *Subaskaran @ Jeevan @ Raja @ Prabha v. State rep. by the Additional Superintendent of Police* (2025), the Court rejected a plea by a Sri Lankan Tamil, who challenged an order of the Madras High Court directing him to leave India immediately after serving a seven-year sentence under various laws, including the Unlawful Activities (Prevention) Act, 1967 (UAPA). In the obiter dictum, it was remarked that India cannot be a “dharamshala” for all refugees and advised him to seek asylum in another country if he feared persecution in Sri Lanka.²¹² In *Mohammad Ismail & Anr. v. Union of India* (2025), the Court refused to pass interim relief in a plea alleging the forced and inhumane deportation of 43 Rohingyas, including minors and the ill, who were allegedly abandoned in international waters near Myanmar.²¹³ In *Yousif Haroun Yagoub Mohamed vs. Union of India & Ors*, the Court noted that UNHCR refugee cards were being issued too freely, calling it a “showroom.” While these obiter dicta do not

carry binding authority and are not essential to the outcome, they nevertheless reveal how the judiciary perceives and treats refugees within India’s constitutional framework. Despite the petitioner’s plea for protection from coercive action until the NHRC decided the case, the Bench refused, citing the growing number of similar petitions. The Court then disposed of the matter, noting that the petitioner’s case was already pending before the NHRC.²¹⁴

The question here is one of whether this is about protecting the sovereignty of the country, or yet again, it’s a pattern inclining towards selective constitutionalism. In refusing to acknowledge the force of non-refoulement or the evolving international consensus on refugee rights, the judiciary effectively sanctioned the State’s use of procedure to override protection. This may have allowed the constitutional promise of life and liberty to fade behind procedure. What emerges from this jurisprudential trajectory is a judiciary caught between its constitutional and moral commitment to life and liberty, and its increasing deference to executive sovereignty. In the absence of binding refugee-specific guidelines or legislation, courts have offered momentary relief in select cases but have increasingly failed to articulate a uniform standard for applying non-refoulement within Indian constitutional law. Across the decades, three broad patterns can be discerned.

First, the 1980s and 1990s saw an expansive and morally assertive reading of Article 21, with the Supreme Court and high courts stepping in to prevent deportations, often invoking broad human rights language. The courts drew from constitutional and international human rights norms to affirm the right to life and dignity of refugees (even in the absence of domestic refugee law). However, by the 2010s, there was a discernible shift. Courts began to anchor their decisions in executive discretion and refused to

²¹¹*Ktaer Abbas Habib Al Qutaifi v. Union of India*, 1998 SCC OnLine Guj 304.

²¹²*Subaskaran @ Jeevan @ Raja @ Prabha v. State rep. by the Additional Superintendent of Police*, S.L.P. (Cr.) No. 7898 of 2025, Diary No. 21310/2025.

²¹³*Mohammad Ismail & Anr. v. Union of India*, Writ Petition (Cr.) No. 204 of 2025.

²¹⁴“UNHCR has opened a showroom here to issue refugee certificates to everyone: Supreme Court”, Bar & Bench, (8 Oct 2025), <https://www.barandbench.com/news/unhcr-has-opened-a-showroom-here-to-issue-refugee-certificates-to-everyone-supreme-court>

move beyond procedural safeguards and instead reaffirmed the absolute authority of the executive in refugee matters. This judicial position hardened in the 2020s, marked by the securitization of refugee jurisprudence. The courts invoked national security and strategic concerns to justify deportations while remaining silent on humanitarian violations.

In the pending case of *Jaffar Ullah & Anr. v. Union of India* along with tagged matters, (thus far, at the time of publication) the Supreme Court has framed issues for determination, including whether the Rohingyas are to be declared as refugees, and if so, what protections flow from that recognition; if the Rohingyas are treated as illegal entrants, whether the Central and State Governments are constitutionally or legally obligated to deport them; whether such illegal entrants may be detained indefinitely or are entitled to release on bail; and whether Rohingyas in refugee camps are being provided with basic humanitarian amenities such as sanitation, drinking water, and education.²¹⁵

Collectively, these unresolved questions could shape the trajectory of refugee protection in India. The classification of the Rohingyas, for instance, will determine the legal threshold for applying the principle of non-refoulement and the degree of procedural safeguards they are entitled to. If refugee status is denied, the possibility of indefinite detention without trial would raise serious concerns under Article 21, which protects the right to life and personal liberty for “all persons.” Moreover, the inquiry into the conditions within refugee camps would force the State to confront its positive obligations under Article 14 and Article 21. Recent trends suggest that the judiciary is increasingly reluctant to challenge the executive on refugee matters, often preferring to frame such questions as issues of policy rather than rights. Whether the Supreme Court in *Jaffar Ullah* (supra) will rise to assert its constitutional role or further cede ground to the

executive remains to be seen, but its outcome will have far-reaching implications for the status, dignity, and legal protection of refugees in India. This paper will further make a case for why the Court should intervene in order to uphold constitutional safeguards and ensure the protection of refugee rights.

VII. A Case for Judicial Intervention

A. Article 142 and The Supreme Court's Power to Ensure Complete Justice

Article 142(1) grants the Supreme Court extraordinary power to pass any decree or order to ensure “complete justice” in “any cause or matter pending before it.” This provision embodies the Court's constitutional duty to act where legislative or executive inaction results in denial of justice. When statutes, such as the 2025 Act legalize vacuums or confer unrestrained power that violates fundamental rights, Article 142 empowers and obliges the Court to step in.

B. Fundamental Rights and Ethical Imperatives

India routinely imposes the criminal justice system on Rohingya refugees. They are arrested under the 2025 Act (Section 21) (previously the Foreigners Act, 1946 (Section 14)), remanded under the BNSS (previously the CrPC), and sometimes charged under the BNS (previously the IPC).²¹⁶ Ironically, this treatment implies their recognition as legal subjects: individuals who can be prosecuted under Indian law.

Yet when Rohingyas invoke their constitutional rights under Articles 14, 21, or 22, they frequently find those protections denied.²¹⁷ This creates a constitutional paradox where the State imposes mandatory criminal liability but limits fundamental rights. Under Article 13(3)(a), the BNS and BNSS are “laws in force,” and any legal process such as arrest or detention must comply with the standards of fairness and reasonableness mandated by Articles 14 and

²¹⁵ *Jaffar Ullah & Anr. v. Union of India & Ors.*, W.P. (C) No. 859 of 2013.

²¹⁶ Foreigners Act, No. 31 of 1946, § 14, India Code (1946) (penalizes visa violations and overstaying).

²¹⁷ INDIA CONST. art. 22 (provides protection against arbitrary arrest and detention).

21.²¹⁸ The Supreme Court in *Maneka Gandhi* (supra) held that the "procedure" under Article 21 must be "just, fair and reasonable," and in *I.R. Coelho v. State of Tamil Nadu*, affirmed that the rule of law is part of the Constitution's inviolable basic structure.²¹⁹

The Ministry of Home Affairs mandates that 'illegal foreigners' be held in detention centres until deportation.²²⁰ There are a few known immigrant detention centers (e.g. Lampur Complex in North Delhi, and a special facility at Shahzada Bagh, Inderlok), but numerous others operate in secrecy. Numerous refugees in immigration detention across India have no ongoing court cases or sentences pending.²²¹ Detainees, including recognized refugees, are sent to prisons or closed "Foreigners Cells," where basic rights are not guaranteed. A 2017 Delhi inquiry found "gross violations of human rights" at the Nirmal Chhaya women's centre, including denial of medical care to pregnant women and unsanitary conditions.²²² Refugee children have been held for years in juvenile homes long after their parents' release, with no schooling or family contact. Reports note Rohingya refugees often remain detained even after serving any sentence, in many cases "over a decade" with no end in sight.²²³ Although official court orders regarding every individual case are not publicly accessible, multiple sources confirm systemic failure.

In Delhi, Assam, and Jammu, Rohingya refugees, including many with UNHCR cards, have been held for months or years under CrPC

remand orders and Section 14 of the Foreigners Act. Most have no ongoing criminal proceedings and were not brought before a magistrate within 24 hours, nor provided legal counsel. UNHCR noted 676 Rohingya in detention as of late 2024, 608 of whom have no current court case or sentences pending, which shows indefinite detention without any procedural basis.²²⁴ Journalists and rights monitors reported that detainees with UNHCR documentation had completed their sentences but remained imprisoned.²²⁵

To register with the UNHCR, the asylum seekers must undergo a Refugee Status Determination (RSD) interview, framed as the applicant's opportunity to "tell your story." Applicants are expected to explain why they fled and why they fear return, ideally backed by identity documents, travel or work records, and educational certificates. However, this framework presumes access to formal records and documentation, a presumption that is often incompatible with the lived realities of displacement. The RSD interview is scheduled within two years of registration, with prioritisation mechanisms for the most vulnerable.²²⁶ In practice, however, this timeline is frequently exceeded. It is also unclear what the status of these asylum-seekers is during this time. While a negative decision may be appealed, such appeals are usually conducted without a rehearing or opportunity to present fresh evidence. Though UNHCR permits legal representation, this provision remains largely illusory due to financial constraints and the absence of systemic legal aid for asylum seekers. Compounding these structural concerns are the deteriorating accessibility of UNHCR helplines (011-4353-0444 remains

²¹⁸ INDIA CONST. art. 13(3)(a); see also General Clauses Act, No. 10 of 1897, § 3(29), India Code (1897) (defining "Indian law" to include pre- and post-Constitution laws).

²¹⁹ *Maneka Gandhi*, (1978) 1 SCC 248; *I.R. Coelho v. State of Tamil Nadu*, (2007) 2 SCC 1.

²²⁰ *Ministry of Home Affairs, Rohingya Illegal Foreigners* (Press Release, Aug. 17, 2022), <https://www.pib.gov.in/Pressreleaseshare.aspx?PRID=1852521>. (last visited July 11, 2025).

²²¹ Global Detention Project et al., *India: Joint Submission to the Universal Periodic Review*, 41st Session (submitted Apr. 1, 2022) <https://www.globaldetentionproject.org/india-joint-submission-to-the-universal-periodic-review#:~:text=grounds%20of%20overstaying%20their%20visa,the%20concerned%20authorities%2C%20i%20any.> (last visited June 20, 2025).

²²² *Id.*

²²³ Suchsmita Majumder, *Difficulty and Uncertainty: A Focus on Young Rohingyas in Children's Homes of West Bengal* http://www.mcrg.ac.in/RLS_Migration_2019/FULL_PAPERS_2019/MOD_ULE_E_Suchsmita.pdf (last visited June 15, 2025).

²²⁴ Reuters, *Rohingya Refugees in India Launch Hunger Strike Over Prolonged Detention*, <https://www.reuters.com/world/india/rohingya-refugees-india-hunger-strike-over-prolonged-detention-2024-09-12/> (last visited July 15, 2025).

²²⁵ Refugees Int'l, *A Lifetime in Detention: Rohingya Refugees in India*, Refugees International <https://www.refugeesinternational.org/reports-briefs/a-lifetime-in-detention-rohingya-refugees-in-india/> (last visited July 10, 2025).

²²⁶ UNHCR India, *Refugee Status Determination, Help*, <https://help.unhcr.org/india/refugee-status-determination-2/> (last visited June 11, 2025).

unanswered), long waits outside UNHCR offices, and minimal responsiveness from the agency.

These systematic failures violate Articles 14, 21, and 22, the basic constitutional safeguards for fairness, judicial oversight, and prompt legal access. To prosecute Rohingyas under Indian criminal law while denying them the protection of constitutional safeguards is not merely inconsistent, but also a legal paradox that erodes the legitimacy of the rule of law itself.

C. The 2025 Act and the Perils of Excessive Delegation

Further, the 2025 Act represents an extreme case of legislative abdication as it does not lay down the policy governing refugee protection, admissibility criteria, or the conditions under which foreign nationals may be detained or removed; instead, it vests these core legislative functions in the executive through open-ended grants of authority. The Act excludes judicial review, depriving affected individuals of remedies and courts of the authority to enforce constitutional limits.

Section 3 of the 2025 Act states that:

“ ...

Provided that notwithstanding anything contained in this sub-section, no foreigner shall be allowed to enter into or stay in India, if he is found inadmissible to do so on account of threat to national security, sovereignty and integrity of India, relations with a foreign State or public health or on such other grounds as the Central Government may, specify in this behalf.

Provided further that the decision of the Immigration Officer in this regard shall be final and binding

...”²²⁷

There are no legislative standards defining what constitutes a threat to national security, relations with a foreign state, or other grounds. The legislature has abdicated the essential

function of defining policy; instead, the executive may redefine it at will through notification. Similarly,

➤ Section 7 authorizes the Central Government to make provisions with respect to any particular foreigner or any specified class or description of foreigner, for prohibiting, regulating or restricting the entry of foreigners into India or, their departure therefrom or their presence or continued presence therein. The subsection then provides a non-exhaustive list (beginning with “in particular”) of orders or directions, which may include restrictions on movement, residence, associations, activities, and article possession. This is a blanket delegation of the power to regulate nearly all aspects of a foreigner’s life in India, with no legislative standards whatsoever.

➤ Finality clauses in Sections 15, 16, 17(4), and 19(4) effectively exclude judicial review, preventing affected individuals from challenging executive determinations on grounds of rationality, proportionality, or constitutional compliance. This compounds the problem of excessive delegation, as it leaves the executive unfettered and unaccountable.

➤ Section 27 authorizes the use of force “as may be reasonably necessary,” without prior hearing or clear limits.

➤ Section 28 of the 2025 Act too renders the Centre the power to delegate powers to officials on a case-to-case basis according to the preference of the Centre reducing the transparency of the process and frustrates the process of holding the officials who misuse power accountable.²²⁸

➤ Section 29 of the 2025 act also mentions an ‘adverse security report,’ which is vague and doesn’t pertain to a definition of what poses a threat to security. Deportations on the basis of threat to national security have been frequent in India, although there is no definition or framework which acts as a standard for

²²⁷ *The Immigration and Foreigners Act, 2025*, No. 13 of 2025 (India), enacted Apr. 4, 2025.

²²⁸ *Id.*

determining what constitutes a threat to the security of a nation.

➤ According to Section 33, the Central Government may declare that all or any provisions of the Act "shall not apply, or shall apply only in such circumstances or with such exceptions or modifications or subject to such conditions as may be specified" to any country or individual foreigner or class of foreigners. This grants the executive power to selectively suspend or modify the operation of the law itself, functioning as a quasi-legislative power.

The primary administrative body in refugee matters is the Ministry of Home Affairs (MHA) which implements these policies with minimal judicial intervention. The 2025 act neither provides an appellate mechanism nor does it issue any guidelines for officials to abide by in order to determine the procedure of deportation. Furthermore, in the policy manual for repatriation of illegal foreigners in the state of West Bengal, the 'standard operating procedure' is not defined reflecting the lack of transparency and accountability maintained in the process of deportation.²²⁹ The Puducherry police manual also maintains ambiguity on the deportation procedures minimizing the need for a legal or constitutional justification.²³⁰

In effect, such delegation transgresses the constitutional limits articulated in *In re Delhi Laws Act, 1951* and reaffirmed in *Harakchand Ratanchand Banthia v. Union of India* (1969).²³¹ The absence of legal criteria for assessing who qualifies as a security threat leaves vast room for arbitrary, and often discriminatory, enforcement. In such a vacuum, entire communities can be painted as existential risks, not because of any proven threat, but because the state says so (and the courts choose to believe it, or rather have no discretion to not

believe it). The divergence in judicial opinion is not merely academic. For the Rohingya, it marks the line between life and death.

D. The Relevance of International Precedents

It is well established in India that courts cannot enforce the principles of customary international law if they conflict with domestic statutes (2025 Act).²³² However, by vesting absolute and unfettered discretion in the executive, the 2025 Act fails to account for distinct categories of vulnerable persons, such as refugees, and risks arbitrary exclusion or detention. Consequently, it cannot be regarded as the definitive legal framework in situations where fundamental rights are engaged as far as constitutional morality and spirit is concerned. As held in landmark judgments like *Gramophone Company Of India Ltd vs Birendra Bahadur Pandey & Ors* and *Vishakha and others v. State of Rajasthan*, in the absence of a specific domestic law on a subject, courts may refer to international conventions and norms to formulate guidelines or principles, especially concerning human rights.

Therefore, India is bound by fundamental customary principles of the International Law concerning refugees and its treaty obligations under international human rights conventions, which it has ratified, all of which collectively establish a framework that protects refugees. At the core of refugee protection lies the principle of non-refoulement, which forbids the return of refugees to territories wherein their life or freedom would be under threat. It is widely considered as a fundamental principle of customary international law, meaning it is considered binding on all nations, including India, regardless of the ratification of the 1951 Geneva Convention.²³³ UN bodies have asserted that non-refoulement is "progressively

²²⁹ Government of West Bengal, *Repatriation/Deportation Procedure for Illegal Foreigners* (2016), <https://home.wb.gov.in/content/1470395885Content.PDF> (last visited July 30, 2025).

²³⁰ Puducherry Police, *Chapter IX – Foreigners, Puducherry Police Manual* (2012), <https://police.py.gov.in/Police%20manual/Chapter%20PDF/CHAPTER%2009%20Foreigners.pdf> (last visited July 30, 2025).

²³¹ *Delhi Laws Act, 1912*, (1951) 2 SCC 568; *Harakchand Ratanchand Banthia v. Union of India*, (1969) 2 SCC 166.

²³² *Vellore Citizens' Welfare Forum v. Union of India*, (1996) 5 S.C.C. 647; *Addl. Distt. Magistrate, Jabalpur v. Shivakant Shukla*, AIR 1976 SC 1207; *Jolly George Varghese v. Bank of Cochin*, AIR 1980 SC 470; *Gramophone Co. of India Ltd. v. Birendra Bahadur Pandey*, AIR 1984 SC 667.

²³³ U.N. High Comm'r for Refugees, Note on the principle of non-refoulement (1977), <https://www.unhcr.org/in/publications/note-non-refoulement-submitted-high-commissioner>.

acquiring the character of a peremptory rule of international law," a peremptory norm from which no derogation is permitted.²³⁴

While Article 34 of the Vienna Convention on the Law of Treaties (VCLT) asserts the *pacta tertiis* rule, which emphasizes that treaties do not create obligations for non-party states, Article 38(1)(b) of the Statute of the International Court of Justice (ICJ) acknowledges that treaty provisions can become customary norms in international law, which are binding even on non-party states.²³⁵ This means India is bound by fundamental, non-derogable principles like non-refoulement which is reinforced by the duty to ensure that refugees receive basic and fundamental rights. Further, India's membership in the Executive Committee of the United Nations High Commissioner for Refugees (UNHCR) reinforces its acknowledgment of this principle. In its 1982 General Conclusion No. 25 (XXXIII), the Committee expressly recognized non-refoulement as a non-derogable obligation under international law.²³⁶

Beyond customary international law obligations, India's commitments under various international treaties on human rights it has ratified have imposed obligations aligned with the principle of non-refoulement and broader refugee protection.²³⁷ These include:

International Covenant on Civil and Political Rights (ICCPR): Article 2²³⁸ of the ICCPR requires states to "respect and ensure" the Covenant's rights to all individuals within their territories, regardless of nationality and without any

discrimination. Importantly, Article 7²³⁹ of the ICCPR, which prohibits torture and other inhumane treatment, has been interpreted to implicitly include the non-refoulement obligation by the Human Rights Committee. In General Comment No. 20, the Committee has stated that "*parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.*"²⁴⁰

The International Covenant on Economic and Social Rights (ICESCR): India is also a party to the ICESCR, which requires states to ensure respect and protect the economic and social rights of everyone within its territories.²⁴¹ The Committee on Economic, Social and Cultural Rights has explicitly affirmed that the term "everyone" in the ICESCR encompasses non-citizens, including refugees. Accordingly, India is under obligation to provide basic essential rights guaranteed under the ICESCR such as access to food and housing to refugees. Moreover, any discriminatory expulsion of refugees will be considered a violation of the ICESCR.²⁴²

Convention on the Rights of Child (CRC): Under Article 22 of the CRC, India is obliged to ensure that the children seeking refugee status "shall receive appropriate protection and humanitarian assistance."²⁴³

International Convention on the Elimination of All Forms of Discrimination (CERD) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW): India's ratification of these treaties has resulted in its binding commitment to eliminate all forms of

²³⁴Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331, art. 53, [Indian Supreme Court's Stance on the Deportation of Rohingya Refugees Violates International Law](#).

²³⁵Vienna Convention on the Law of Treaties, § 34, Treaty Series, 1969. Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1031, T.S. No. 993, <https://www.icj-cij.org/statute>.

²³⁶Exec. Comm. of the High Comm'r's Programme, *General Conclusion on International Protection No. 17 (XXXI) – 1980*, UN High Comm'r for Refugees, <https://www.unhcr.org/us/publications/general-conclusion-international-protection-17> (last visited July 21, 2025).

²³⁷Mohd Ayan and Nabil Iqbal, *India's Problematic Stance on Non-Refoulement: The Deportation of Rohingyas*, Refugee Law Initiative (Jul. 19, 2025, 10:10 PM) <https://rli.blogs.sas.ac.uk/2021/06/07/indias-problematic-stance-on-non-refoulement-the-deportation-of-rohingyas/>.

²³⁸*International Covenant on Civil and Political Rights*, art. 2, Dec. 16, 1966, 999 U.N.T.S. 171, 172.

²³⁹*International Covenant on Civil and Political Rights*, art. 7, Dec. 16, 1966, 999 U.N.T.S. 171.

²⁴⁰UN High Comm'r for Refugees, *Note on the Principle of Non-Refoulement* (Nov. 1997),

<https://www.refworld.org/policy/legalguidance/unhcr/1997/en/36258> (last visited July 21, 2025); M. Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (1993), Article 7 para. 21.

²⁴¹*International Covenant on Economic, Social and Cultural Rights*, UNGA Res 2200 (XXI), December 16, 1966, 993 U.N.T.S. 3

²⁴²*Non-Refoulement of Uyghur Prisoners in India*, Oxford Human Rights Hub, (accessed July 21, 2025, 10:00 PM) <https://ohrh.law.ox.ac.uk/non-refoulement-of-uyghur-prisoners-in-india/>.

²⁴³*Convention on the Rights of the Child* art. 22, Nov. 20, 1989, 1577 U.N.T.S. 3.

discrimination, including those based on nationality, religion, race or gender. In the context of refugees, these treaties bound India to ensure that refugee admission and treatment cannot be selective or discriminatory.

Moreover, India has voted to adopt the Universal Declaration of Human Rights, which provides for certain fundamental rights for all persons, citizens and non-citizens alike.²⁴⁴ Articles 3, 5, 9, 13, 14, 25 and 26 of the UDHR represent fundamental rights, which are guaranteed to all persons, including refugees.²⁴⁵

The Supreme Court of India has established that international law forms part of Indian municipal law to the extent that it does not conflict with existing domestic law.²⁴⁶ Consequently, in the absence of any comprehensive national refugee law that directly contradicts India's international obligations related to refugee protection, these treaties and customary international law principles are considered binding on India.

Furthermore, Article 51(c) of the Indian Constitution directs the state to foster respect for international law and treaty obligations. The Supreme Court of India has reaffirmed the significance of even non-justiciable rights found in Part IV of the Constitution, stating that they are fundamental in the governance of the nation.²⁴⁷

VIII. Ethical Concerns and Policy Suggestions

In this section, we assess the moral consequences of having legalized a vacuum which renders refugees unrecognized and

surrenders them to the unaccountable discretionary whim of the executive. According to natural law theory, the authority derived by legal standards is from the merit of the morality it strives to maintain.²⁴⁸ Hence any legal framework which violates the very ethical principles which legitimize it should be considered self-defeating. We move away from examining the legality to probing the legitimacy of the framework by testing it against the ethical considerations and principles which shape law. By virtue of these concerns, we affirm a simple conclusion – this framework, which has now been standardized and made routine, is not ethically defensible and is a gross violation of the principles which underlie law itself.

A. Violation of Principles of Proportionality, Equity and Justice

In the 2025 Act, the term 'refugees' is explicitly absent where they have been categorized and held implicit in the overarching term of foreigners which doesn't just fail to recognize the risks faced by refugees in the country of persecution but is also not proportional to the apparatus required for appropriate treatment of refugees upon arrival in the country of refuge. Such categorization disproportionately trivializes the conditions at home as well as establish a framework which disregards a rights-based framework. This legal framework in place which recognizes refugees as merely foreigners leaves them vulnerable to arbitrary prosecution violating core principles of justice, equity and proportionality.

Furthermore, the demand to produce documents by the authorities to affirm the identity of the refugees who left home due to threat of life, places on them a disproportionate burden violating proportionality and equity. This injustice is both structural and intergenerational, as they are being persecuted and forced back into the country of persecution on the same grounds of belonging to a minority.

²⁴⁴ *India's Refugee Policy*, Indian Nat'l Bar Ass'n, <https://www.indianbarassociation.org/indias-refugee-policy/> (last visited July 21, 2025),

²⁴⁵ G.A. Res. 217 (III) A, Universal Declaration of Human Rights, U.N. GAOR, 3d Sess., U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

²⁴⁶ Dr. Ruchi Lal, *The Principle of Non-Refoulement in International Law and its Applicability in Protection of Refugees in India*, 10 Res. J. Humanities & Soc. Sci. 436 (2019), <https://www.rjhsonline.com/HTMLPaper.aspx?Journal=Research%20Journal%20of%20Humanities%20and%20Social%20Sciences:PID=2019-10-2-27> (last visited July, 20, 2025).

²⁴⁷ N. Malati & Priyanka Singh, *Perceptual Study of Employee Engagement Practices in IT Sector*, 10 Res. J. Humanities & Soc. Sci. 319 (2019), [The Principle of Non-Refoulement in International Law and its Applicability in Protection of Refugees in India](https://www.rjhsonline.com/HTMLPaper.aspx?Journal=Research%20Journal%20of%20Humanities%20and%20Social%20Sciences:PID=2019-10-2-27); *AIIMS Students' Union v. AIIMS and Ors.* (2002) 1 SCC 428; *P.A. Inamdar and Ors. v. State of Maharashtra and Ors.* (2005) 6 SCC 537.

²⁴⁸ Kenneth Einar Himma, *Natural Law*, Internet Encyclopedia of Philosophy (last updated Oct. 2014), <https://iep.utm.edu/natlaw/>.

B. Selective Constitutionalism and Erosion of Public Trust in Constitutional Values

The convenient absence of constitutional safeguards in the case of CAA as well as violation of non-refoulement principle reveals the baleful practice of selective constitutionalism by the executive.²⁴⁹ The non-refoulement principle captures the very spirit of Article 21 of the Indian Constitution. Regardless, the executive chooses to not invoke it basing it on fallacious intelligible differentia of persecuted minorities fleeing neighboring theocratic states while it fails to include Myanmar and Sri Lanka in CAA.²⁵⁰ This also exposes us to the risk of legitimizing political expediency, which, based on ideological bias, offers preferential treatment to refugees in the guise of undefined national interest. This is operationalized by means of a misleading reasonable classification allowed for Article 14 as well as linking the CAA to the history of partition while it included Afghanistan in the amendment, revealing its feigned nature. Taken together, given the incoherence of the reasonable classification, the CAA violates Article 14 and 21 of the constitution while the violation of the non-refoulement principle violates all articles of the golden triangle and the core moral universal of human dignity. Alongside this, even if the restriction on Article 21 is reasonable and violation of non-refoulement does not lead to its violation, the instrumentalization of these refugees by treating them merely as objects of regulatory control and not rights-bearing subjects violates the moral principle of human dignity. The political expediency, gaining legitimacy rapidly by means of vindication through nuanced constitutional intricacies, selective constitutionalism at the hands of the executive and judicial inconsistency in application of key constitutional protections in deference to the

executive is leading to erosion of public trust in the binding force of these constitutional values.

C. Mistrust in Rule of Law and Erosion of Democratic Legitimacy

The arbitrary exercise of power by the executive at discretionary whim without being held accountable and transparent in the name of national interest blinds the public to the lived realities of refugees leading to democratic backsliding and erosion of democratic legitimacy.²⁵¹ At the core of democratic legitimacy lies respect for public values, liberties and rights and when encompassed as one, rule of law which is the backbone of democratic societies.²⁵² Good governance implies well-being of all being governed without discrimination – a central component of democratic legitimacy – violated consistently by the executive while it normalizes exclusion of refugees diluting their dignity. The executive overreach and vagueness maintained throughout procedures of detention and deportation of refugees do not just create mistrust in rule of law but also exhibit clear lack of due process which is a guiding principle of law. The legislative through the legal framework delegates excessive authority to the executive risking arbitrary exercise of power where integral ingredients of rule of law like supremacy of law and equality before law are undermined. In addition, the underlying principle of separation of power – a central component of rule of law – is to diffuse authority to prevent the moral risk of abuse of power in the instance of its concentration. However, in cases of the legislature's function being absorbed into the executive, separation of power is violated *de facto*, yet necessarily not *de jure*.

D. Erosion of Trust in International Law and Tainting Global Image of India

²⁴⁹ *The Citizenship (Amendment) Act, 2019*, No. 47 of 2019, The Gazette of India (Dec. 12, 2019).

²⁵⁰ Shashi Tharoor, *The claims of CAA campaigner-in-chief Amit Shah fact-checked*, ShashiTharoor.in (Dec. 23, 2019), https://shashitharoor.in/writings_my_essays_details/179.

²⁵¹ *Democratic Legitimacy*, ScienceDirect Topics, <https://www.sciencedirect.com/topics/social-sciences/democratic-legitimacy> (last visited Jan. 1, 2026).

²⁵² *What is the Rule of Law?*, World Justice Project, <https://worldjusticeproject.org/about-us/overview/what-rule-law> (last visited Jan. 1, 2026).

The approach of selective compliance by India reveals a deeper and structural issue where countries can be found violating international law with near-total impunity in forms of treaties and customs despite ratification and no objection during its formulation respectively. This also strips ratification of its normative force rendering international law merely symbolic, leading to erosion of trust in international law. Moreover, this also taints the image of India as a law-abiding nation in the global eye while it actively violates international laws and creates mistrust in its international commitments and obligations.

To mitigate this, an attempt was made by Member of Parliament Shashi Tharoor to pass legislation for refugees called The Asylum Bill, 2015, which was introduced in the Lok Sabha as a private member's bill. This bill sought to address the absence of a comprehensive legal framework arising from the lack of specific legislation and policies concerning refugees. Refugees were defined under Section 2(u) of this bill to mean-

*"an applicant whose application for asylum has been determined to meet the criteria under section 4 by the Commission or the Appellate Board, as the case may be, under the terms of this Act or who has been declared to be a refugee by a notification under section 30."*²⁵³

In chapter II of the bill, the 'criteria for recognition as a refugee' had been defined as follows:

4. "1) A person qualifies as a refugee for the purposes of this Act if such person

(a) is outside his country of origin and is unable or unwilling to return to or avail himself of the protection of that country because of a well-founded fear of persecution on account of race, religion, sex, nationality, ethnicity, membership of a particular social group or political opinion; or

(b) has left his country owing to serious and indiscriminate threats to life, physical integrity or freedom resulting from generalised violence or events seriously disturbing"²⁵⁴

The Bill did not just stop at setting down this criterion, it expanded on the procedural aspects, defined the principle of non-refoulement, established relevant authorities, commissions and examined the rights that would be available to refugees. Therefore, a step towards creating an institutional framework was taken by the introduction of this Bill. Despite being introduced in 2015 at the Lok Sabha along with two other asylum bills, the bill was never debated. It was essentially ignored by the Lok Sabha. This reflects the broader political and legislative indifference and neglect. Though historically, not many private member bills, such as this one, have been passed. Until 2025, only 14 private member bills went on to become laws.²⁵⁵ Keeping this in mind, it doesn't seem unprecedented for the Asylum Bill to have never passed; however, what is extraordinary is for the bill to have been read only once and then not debated.

In light of the discussions, it is important to highlight the urgency to build an effective refugee management framework that will provide comprehensive guidelines on the procedures for refugee integration and the rights of refugees residing in India. By placing reliance on comparative international jurisprudence, this section provides policy suggestions that aim at enhancing the protection of refugees, promoting integration and enforcing legitimate state actions in the management of refugees. Although before that, it is worth noting that it is imperative for India to develop a policy framework with an explicit definition of 'refugee' distinguishing refugees from the category of 'foreigners' or 'migrants'.²⁵⁶

²⁵⁴ The Asylum Bill, 2015, § 4, Lok Sabha (India).

²⁵⁵ Sobhana K. Nair, *Private Members' Bills Get Short Shrift in Both Houses of Parliament*, The Hindu (Dec. 30, 2024, 10:34PM), <https://www.thehindu.com/news/national/time-allotted-for-private-members-business-in-parliament-on-the-decline/article69043851.ece>.

²⁵⁶ Abhinav Mehrotra & Chhaya Bhardwaj, *Need for a National Legislation on Refugees in India at 75*, 78 India Q. 170 (2022), <https://journals.sagepub.com/doi/10.1177/09749284221089531>.

This definition should be at par with India's international treaty obligations and international customary law, ensuring no discriminatory or arbitrary criteria are used to determine a refugee. Moreover, there is an urgent need for the installation of an Institutional mechanism for refugee claims. This policy should also encapsulate the establishment of a central quasi-judicial board to impartially examine asylum claims and hear appeals. This body should ensure that the cases are addressed efficiently, in a transparent and non-discriminatory manner, operating independently of political influence. Every border state, including maritime states, should constitute a subordinate quasi-judicial body which shall operate under the supervision of the central quasi-judicial board, in a similar hierarchy as that of high courts and the Supreme Court.

The primary aim of a statutory framework meant to promulgate an effective refugee framework should be to enhance the coordination between the State government and relevant international organisations such as the UNHCR. While the UNHCR should promote the right to work for refugees in accordance with Articles 17, 18, and 19 of the 1951 Refugee Convention,²⁵⁷ It should also encourage the State to issue the relevant documents, such as work permits and temporary identity cards, as this would open the local labour market to refugees. Additionally, relevant officials should be trained to ensure that such issued documents are accepted as a valid form of documentation. Moreover, the UNHCR, in collaboration with the State government, should also extend its support to urban refugees who possess professional qualifications but are not recognized by the national authorities in the country of refuge. For example, while South Africa faces an acute shortage of nurses, thousands of refugees who possess the nursing qualifications remain unemployed as the

qualification is not recognised by the country's officials.²⁵⁸ The recognition of such qualifications will not only help integrate the refugees into the mainstream labor market but also benefit the country of refuge by adding value through their work.

Furthermore, once the refugees have been allocated to respective asylums, lengthy procedures have evident harmful effects on the efforts of integration. Studies indicate that for every additional year the refugees spend waiting in asylums, there is a significant drop in employment rates due to psychological discouragement.²⁵⁹ Therefore, the policy reforms must give rightful priority to increasing efficiency through adequate staffing, streamlined procedures and statutorily imposed timelines on decision-making. Additionally, evidence from Sweden highlights the importance of early integration programs.²⁶⁰ Therefore, the policy should focus on allocating a specified budget to integration programs such as language training, skill recognition and re-certification for the refugees. It is also pertinent to note that such expenditures can be easily recovered through a reduced welfare budget and an increase in the number of tax contributors in the form of the integrated refugees.

Lastly, it is important to realize that the concern for national security and refugee integration are not mutually exclusive. They should be treated as parallel issues, where it is a proven fact that prolonged detention in asylums increases the risk of the refugees being linked to criminal networks, which increases their tendency to indulge in unwanted activities.²⁶¹ Through effective integration, the country of refuge can benefit by reducing the

²⁵⁷ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention), art 17, 18, 19.

²⁵⁸ Loren Landau, *Recommendations for Urban Refugee Policy*, *Forced Migration Rev.*, (2024), <https://www.fmreview.org/jacobsen-landau/> (last visited Jan 3, 2026).

²⁵⁹ Dominik Hangartner, et al., *Managing Refugee Protection Crises: Policy Lessons from Economics and Political Science* (Oct, 2021), <https://repec.iza.org/dp14821.pdf>.

²⁶⁰ *Id.*

²⁶¹ Donald Kerwin, *How Robust Refugee Protection Policies Can Strengthen Human and National Security*, *Center for Migration Studies*, 4 J. on Migration & Hum. Sec. (2016), <https://www.onlinelibrary.ihl.org/wp-content/uploads/2020/05/2016-C1-2.pdf>.

crime rate while also increasing the participation of refugees in labor markets, which will ultimately benefit the country. To ensure that the statutory mandates are abided by the concerned authority, the policy should mandate the establishment of a refugee protection and management institution to ensure improved coordination between international agencies and the national government, while also ensuring that the policy mandates are lawfully abided.

IX. Conclusion

The unjust treatment of Rohingya refugees in India exposes the failure of the Indian democracy, where executive arbitrariness overshadows the constitutional commitment to justice, rights and due process. India's once celebrated rich history of offering refuge is now merely rendered as an indicator of selective discrimination against a select group of refugees, reflecting the severe consequences of the absence of a legal framework for the protection of refugees. The Supreme Court, long considered to be the upholder of constitutional and moral principles, has repeatedly failed to protect the refugees from unjust treatment at the hands of the Indian government and other agencies, which manifests in the form of indefinite detention, denial of fundamental rights, and forceful deportation. Such acts are not only violative of India's obligations to international customary norms, but also explicitly undermine the constitutional values of equality and justice, which are deeply enshrined in Articles 14 and 21 of the Constitution.

India's deliberate ignorance of the legal vacuum in refugee laws and its instances of non-recognition of the principle of non-refoulement, coupled with the implementation of the CAA and NRC, reveal a deeper strategic agenda that reaches beyond India's concern of becoming a "dharmshala." It is formulated to selectively discriminate against a group of refugees based on religion as well as region. Such selective treatment underscores a systemic failure, where the principles of justice

and equality enshrined in the Constitution, along with international customary laws, are rendered irrelevant and hollow in the guise of "national security."

Each inconsistency and failure of the Indian democracy underscores a deep sense of urgency, a need for a codified refugee law that uniformly governs all refugees entering and/or residing in India. Moreover, such laws must reflect the principles of justice and equality while also aligning themselves with the internationally recognized laws and norms. By doing so, India will not only be able to maintain its credibility on the international front, but also provide the persecuted minorities who flee their country a humanitarian port of refuge. When executive discretion is invoked only to punish but never to protect, it becomes a mechanism for selective discrimination, underscoring the necessity of a legal reform.

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