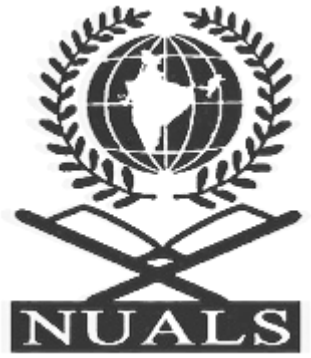
CONSTITUTIONAL SAFEGUARDS AND HUMAN RIGHTS OF REFUGEES AND ASYLUM SEEKERS IN INDIA

Dissertation submitted to the National University of Advanced Legal Studies, Kochi in partial fulfilment of the requirements for the award of LL.M. Degree in Constitutional and Administrative Law 2025



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DECLARATION

I Declare that this Dissertation titled **'CONSTITUTIONAL SAFEGUARDS AND HUMAN RIGHTS OF REFUGEES AND ASYLUM SEEKERS IN INDIA'** researched and submitted by me to the National University of Advanced Legal Studies in partial fulfillment of the requirement for the award of Degree of Master of Laws in Constitutional and Administrative Law, under the guidance and supervision of **DR. NAMITHA K. L.** is an original, bona-fide and legitimate work and it has been pursued for an academic interest. This work or any type thereof has not been submitted by me or anyone else for the award of another degree of either this University or any other University.

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PREFACE

The global displacement crisis, marked by unprecedented levels of human mobility due to conflict, persecution, and climate change, presents profound legal and humanitarian challenges. This dissertation emerged from a deep concern with the status of refugees and asylum seekers in India—a country that, despite being home to one of South Asia's largest refugee populations, remains a non-signatory to the 1951 Refugee Convention and its 1967 Protocol.

Against this paradoxical backdrop, the Indian judiciary has gradually emerged as a surrogate lawmaker, filling the void left by legislative inaction. Through progressive interpretations of constitutional guarantees—particularly Articles 14, 21, and 25—Indian courts have attempted to extend protection to displaced individuals in ways both bold and bounded. This judicial response, though noble, is neither uniform nor sufficient. It relies heavily on judicial discretion and often falls short in the face of political expediency and executive opacity.

This dissertation is the outcome of a sustained academic engagement with questions that lie at the intersection of constitutional law, international legal obligations, and the lived realities of refugee communities. The work critically examines the constitutional standards invoked for refugee protection in India, traces the evolution of jurisprudence on non-refoulement, and assesses whether judge-made law can substitute for comprehensive refugee legislation.

Comparative perspectives from countries like South Africa, Germany, and Canada further illuminate India’s distinctive, often improvised, approach to refugee management. By examining key legal doctrines, landmark judgments, and conceptual debates, the study aspires to contribute not only to scholarly literature but also to ongoing policy discourse on how India might formalize and strengthen its refugee protection framework.

I extend my deepest gratitude to the numerous jurists, scholars, and institutions whose writings and interventions have shaped this inquiry. Most importantly, I remain indebted to the courage of refugees themselves, whose stories—though often obscured by legal abstraction—are the true impetus behind this work.

ABBREVIATIONS

UNHCR	United Nations High Commissioner for Refugees
NHRC	National Human Rights Commission
ICCPR	International Covenant on Civil and Political Rights
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CAA	Citizenship (Amendment) Act
NRC	National Register of Citizens
SCC	Supreme Court Cases
HC	High Court
SC	Supreme Court
ALT	Andhra Law Times
PUCL	People's Union for Civil Liberties
FMR	Forced Migration Review
IHRL	International Human Rights Law
JILS	Journal of Indian Law and Society
OAU	Organization of African Unity
IOM	International Organization for Migration
UDHR	Universal Declaration of Human Rights
CRC	Convention on the Rights of the Child
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
PIL	Public Interest Litigation
SAARC	South Asian Association for Regional Cooperation
AALCO	Asian-African Legal Consultative Organization
ICESCR	International Covenant on Economic, Social and Cultural Rights
BPST	Bangkok Principles on the Status and Treatment of Refugees
NGO	Non-Governmental Organization

LIST OF CASES

INDIAN SUPREME COURT CASES

1. **National Human Rights Commission v. State of Arunachal Pradesh**, (1996) 1 SCC 742 *Landmark case establishing protection for Chakma refugees and affirming that Article 21 rights extend to non-citizens*
2. **Mohammad Salimullah v. Union of India**, (2021) 5 SCC 1 *Significant case concerning the constitutional rights and deportation of Rohingya refugees*
3. **S. R. Bommai v. Union of India**, (1994) 3 SCC 1 *Established secularism as part of the basic structure of the Constitution, relevant for religious persecution cases*
4. **Kesavananda Bharati v. State of Kerala**, (1973) 4 SCC 225 *Fundamental case establishing the basic structure doctrine, providing constitutional foundation for refugee protection*
5. **People's Union for Civil Liberties v. Union of India**, (1997) 1 SCC 301 *Important case concerning civil liberties of non-citizens and state accountability*
6. **Shayara Bano v. Union of India**, (2017) 9 SCC 1 *Established the doctrine of constitutional morality and transformative constitutionalism*
7. **Louis De Raedt v. Union of India**, (1991) 3 SCC 554 *Case examining the rights of foreigners residing in India*
8. **Vishaka v. State of Rajasthan**, (1997) 6 SCC 241 *Established the incorporation of international law principles into domestic jurisprudence*
9. **Maneka Gandhi v. Union of India**, (1978) 1 SCC 248 *Expanded the scope of Article 21 beyond procedural due process to substantive due process*
10. **Gramophone Company of India Ltd. v. Birendra Bahadur Pandey**, (1984) 2 SCC 534 *Established principles for incorporation of international law into domestic legal framework*
11. **Francis Coralie Mullin v. The Administrator, Union Territory of Delhi**, (1981) 1 SCC 608 *Expanded the scope of Article 21 to include dignity and basic necessities of life*
12. **State of Tamil Nadu v. K. Balu**, (2017) 2 SCC 281 *Emphasized the court's role in protecting fundamental rights through purposive interpretation*

HIGH COURT CASES

1. **Ktaer Abbas Habib Al Qutaifi v. Union of India**, (1999) Cri LJ 919 (Gujarat HC) *Gujarat High Court explicitly recognizing the principle of non-refoulement as part of Article 21*
2. **Dongh Lian Kham v. Union of India**, W.P. (C) No. 1884/2015 (Delhi HC) *Delhi High Court decision on refugee status determination and deportation protections*
3. **P. Nedumaran v. Union of India**, 1993 (2) ALT 291 *Case concerning Sri Lankan Tamil refugees and their right to legal representation*
4. **Bogyi v. Union of India**, (2015) 1 Gau LR 526 *Gauhati High Court ruling on the rights of asylum seekers*
5. **Indian Union Muslim League v. Union of India**, W.P. (C) No. 1470/2019 *Challenge to the Citizenship Amendment Act and its implications for asylum seekers*

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CHAPTER 1: INTRODUCTION AND RESEARCH METHODOLOGY

1. INTRODUCTION

The global displacement crisis has emerged as one of the defining 21st-century human rights crises, with millions of individuals displaced from their homes by war, persecution, and natural disasters. Amidst this crisis of humanity, India occupies a unique place in South Asia as a domicile of one of the largest refugee populations in the subcontinent in spite of its glaring absence from the list of signatories to the 1951 Refugee Convention and its 1967 Protocol. This absence in the realm of law is ironic in that India's liberal democratic constitutionalism is compelled to seek the protection of refugees in the absence of expert legislative guidance.

Indian constitutional jurisprudence, particularly judicially through judicial activism, has evolved to address this legislative deficiency. Courts, especially the Supreme Court, have construed provisions under fundamental rights to embrace non-citizens, including refugees and asylum seekers, in an effort to protect them. This dissertation critically examines how the Indian Constitution came to be interpreted to safeguard refugee rights, with particular emphasis being laid on Article 21—the right to life and personal liberty. By examining major court decisions, comparative frameworks of constitutional law, and international standards of law, this study highlights the unique nature of India's response to refugee protection.

2. STATEMENT OF THE PROBLEM

The lack of codified law governing refugees in India has created a huge protection deficit. In the absence of specialized law at home, refugee management is largely within the discretion of the executive and not that of ad hoc policies but an ongoing, rights-based one. This legal uncertainty has been the cause of many issues:

Firstly, it has resulted in the uneven and at times discriminatory treatment of various groups of refugees according to political convenience and diplomatic considerations and not humanitarian requirements. This imbalance can be seen from the differential treatment being given to Tibetan refugees versus Rohingya asylum seekers. Secondly, the life of the refugee in India continues to be uncertain and legally exposed to the whims of policy changes and susceptible to security-led discourses that tend to overwhelm humanitarian concerns far too often.

Moreover, the absence of a uniform refugee status determination process generates doubt concerning access to vital services, official documents, and protection from refoulement. All these problems cumulatively undermine India's constitutional promise of human dignity and equal protection under the law, thus necessitating sweeping, immediate legal reform.

3. RESEARCH QUESTIONS

Following are the main research questions to which this dissertation is geared:

To what degree are refugees and asylum seekers bestowed with enforcible rights by the Indian Constitution in the absence of refugee legislation? This question analyzes the extent and degree to which constitutional provisions, namely Articles 14, 21, and 25, safeguard refugee rights.

How has the Indian judiciary mediated international refugee norms and principles into domestic constitutional jurisprudence? This question follows the judicial bridging of international norms and domestic constitutional protection.

Can judge-made law under constitutional interpretation and judicial activism successfully replace specialized refugee legislation in a non-signatory country like India? This question questions the viability and sufficiency of judge-made refugee law in the absence of legislative action.

What are the comparative lessons that may be learned from other constitutional democracies with alternative strategies of protecting refugees like South Africa, Canada, and Germany?

4. RESEARCH OBJECTIVES

The general research objectives of the paper are multi-faceted and inter-linked:

To critically analyze the constitutional standards and provisions governing refugees in India, constituting the jurisprudential underpinnings of protection of refugees within the Indian legal framework. This shall entail rigorous analysis of constitutional provisions which have been held to be applicable to non-citizens.

For identifying patterns, principles, and boundaries of judicial reasoning to critically analyze major court rulings granting constitutional protection to refugees and asylum seekers, there will be an analysis of landmark cases for various classes of refugees and claims to other constitutional entitlements.

To carry out a comparative study of India's constitutional strategy for the protection of refugees and those of other constitutional democracies, like South Africa, Canada, and Germany. Comparative study will inform best practices and areas of possible reform.

To develop specific legal and policy recommendations to formalize refugee protection in India's constitutional and legal order. These recommendations will reconcile international commitments with domestic constitutional imperatives and pragmatically feasible factors of implementation.

5. HYPOTHESIS

…that with the lack of separate refugee law, the Indian Constitution—through judicial interpretations of Article 14 (equality before law), Article 21 (right to life and personal liberty), and Article 25 (freedom of religion)—has filled the gap with a surrogate rights-based approach to protecting refugees. This constitutional protection is, however, intrinsically circumscribed, patchy in operation, and largely subject to judicial discretion and not necessarily based on systematic legal principles.

The hypothesis also assumes that although constitutional jurisprudence has established significant precedents regarding the issue of refugee rights, it is insufficient to take the place of the lack of concrete legislation. This is because of numerous reasons: judicial rule-making case-by-case, which does not have the benefit of uniform application; the judicious solutions' tightness to deal with systemic questions within only burdensome policy structures; and court-granted protections' susceptibility to changing judicial philosophies as well as political pressures. Both doctrinal examination of constitutional jurisprudence and pragmatic assessment of application to different refugee categories should be undertaken in an attempt to test the hypothesis.

6. RESEARCH METHODOLOGY

The dissertation adopts doctrinal legal research methodology focusing on first-level legal source analysis and academic interpretation of legal concepts. Research is conducted in a systematic manner investigating:

Constitutional documents and their meaning by close examination of the Indian Constitution with specific focus placed on provisions for fundamental rights binding on non-citizens. This analysis of text provides constitutional basis for the safeguarding of refugees.

Supreme Court and High Court decisions on refugee rights, statelessness, and constitutional status of non-citizens. These decisions are real application of constitutional principles to refugee case law and show evolution of judicial thinking on protection of refugees.

International legal documents such as the 1951 Refugee Convention, human rights agreements, and principles of customary international law. Even though India is not a signatory to the Refugee Convention, international norms are applicable comparatively as well as for interpretative purposes in the adjudication of courts.

United Nations agency reports and publications and National Human Rights Commission that offer empirical facts and policy suggestions on India's refugee protection. Such materials offer factual background and normative expectations for appraisal.

Academic views based on books, journal articles, and research on constitutional rights, refugee law, and judicial activism. Secondary sources offer analytical frameworks and critical thinking necessary for assessing the sufficiency of constitutional safeguards.

The research also employs a comparative law approach, examining constitutional rights and judicial precedents in selected jurisdictions to compare different strategies of protection of refugees and deriving lessons for the strategy in India.

7. DATA SOURCES

The study utilizes varied primary and secondary sources in order to get the widest possible coverage of the topic under study:

The primary sources of law are the Indian Constitution, judgments of the Supreme Court and High Court on the rights of refugees and non-citizen protection, legislations by enacting such enactments as the Foreigners Act of 1946 and the Citizenship Act of 1955, international conventions and agreements even though India is not a signatory to them, and government notifications and policy documents on refugee management.

Secondary sources include academic books of constitutional law, refugee rights, and human rights jurisprudence; law journals articles examining the subject matter of refugee protection; UNHCR policy manuals, handbooks, and country operation reports; non-governmental publications related to refugee communities in India; parliament debates and committee reports discussing the problem of refugees; and comparative constitutional instruments in other jurisdictions.

This multi-perspective data gathering guarantees that the research takes on both normative legal analysis and practical implementation issues, filling the gap between refugee reality on the ground and constitutional theory.

8. STUDY LIMITATIONS

The study identifies a number of significant limitations:

Limitations placed on access to closed or classified government policy reports on refugee management and internal security matters significantly impede extensive exploration of executive decision-making procedures. The limitations imply dependence on policy statements presented publicly as well as court documents, which take into account only a limited perspective.

Empirical constraints rest on limited data on broad refugee experience, especially on excluded or undocumented refugees. The absence of formal refugee status determination procedures in India is yet another source of complexity for quantitative measurement of protection shortfalls.

Temporal constraints stem from the quickly changing political and legal environment of refugee issues in India. Legal trends at present, especially regarding citizenship legislation and immigration policy, can influence inferences from past tendencies.

Geographical limitations restrict vast field work in every area with refugees in India, and certain regional situations are forced to rely on secondary materials.

Methodological limitations inherent in doctrinal legal scholarship are challenges to quantifying the real-world impact of court rulings on refugee populations outside technical results of the law.

Notwithstanding these limitations, the study attempts to offer a broad doctrinal examination of constitutional protection of refugees with acknowledgment of areas wherein empirical work would further enhance knowledge on matters of implementation.

9. CHAPTERIZATION

The dissertation follows a logical chapter structure designed to progress from theoretical foundations to practical recommendations:

Chapter 1: Introduction and Methodology – Introduces the research problem, questions, methodology, and limitations, establishing the conceptual framework for subsequent analysis.

Chapter 2: Conceptual and Theoretical Framework – Examines foundational concepts of refugee protection, sovereignty, and constitutional rights, exploring theoretical tensions between universal human rights and state discretion.

Chapter 3: International Legal Framework for Refugee Protection – Analyzes global and regional refugee protection standards, including the 1951 Convention, customary international law, and non-refoulement principles.

Chapter 4: Constitutional Safeguards and Judicial Response in India – Provides a comprehensive analysis of how Articles 14, 21, and 25 have been interpreted to protect refugees, examining landmark Supreme Court and High Court decisions.

Chapter 5: Comparative Analysis: Germany, South Africa, and Canada – Contrasts India's approach with other constitutional democracies, identifying alternative models and potential best practices.

Chapter 6: Case Studies: Chakma, Rohingya, and Sri Lankan Tamil Refugees – Examines the practical application of constitutional protections to specific refugee communities, highlighting inconsistencies and implementation gaps.

Chapter 7: Challenges of Climate-induced Displacement – Explores emerging issues of environmental refugees and the adequacy of existing constitutional frameworks to address non-traditional displacement factors.

Chapter 8: Judicial Activism and the Doctrine of Non-Refoulement – Critically evaluates how Indian courts have incorporated international non-refoulement principles through constitutional interpretation.

Chapter 9: Recommendations and Policy Reforms – Proposes concrete legislative and policy measures to strengthen refugee protection within India's constitutional framework.

Chapter 10: Findings, Conclusion, and Way Forward – Synthesizes research findings, evaluates the hypothesis, and suggests directions for future development of refugee law in India.

CHAPTER 2: CONCEPTUAL AND THEORETICAL FRAMEWORK

INTRODUCTION

The protection of asylum seekers and refugees is arguably the most urgent humanitarian and legal issue facing international law today. The chapter addresses the conceptual and theoretical foundations that guide protection for displaced populations in India, a non-signatory state to the 1951 Refugee Convention that is at a critical juncture in refugee protection.

India's protection approach towards refugees has changed nearly entirely through judicial dicta and not through dedicated legislation, providing a rare constitutional environment to the protection of rights of the displaced person. The aim of the current chapter is to examine the prevailing conceptions, legal principles, and theoretical frameworks that inform such a protection regime and to explore specifically how international standards have been mainstreamed into domestic constitutional jurisprudence.

The chapter starts with defining and distinguishing between asylum claimants and refugees, the non-refoulement as a mantra for protectors, the role of constitutional guarantees, and the newer concerns like climate change and displacement. The chapter later progresses to the theoretical underpinnings—from human rights theory to constitutional constructs—that have informed Indian policy in the protection of refugees. Special focus is laid on how the Indian judiciary has developed protection standards through constitutional interpretation, particularly in the context of the principle of non-refoulement.

In gaining an understanding of these conceptual frameworks and theoretical foundations, we are most well placed to admire the subtleties, success, and failure of India's constitutional strategy for refugee protection, which shall serve as the basis for a more detailed analysis of discrete legal provisions and jurisprudence in later chapters.

2.1 KEY CONCEPTS AND DEFINITIONS

2.1.1 REFUGEES AND ASYLUM SEEKERS

The terms "refugee" and "asylum seeker" are legally dense but yet carry tens of millions of individual stories of displacement and survival. The etymological distinction between the two is the basis upon which to frame an appreciation for the protection regimes that surround these vulnerable groups.

The word's original definition can be found in the 1951 Convention Relating to the Status of Refugees, which provides that a refugee is someone 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 his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country."[1]

While seeming to be precise upon first read, this definition has been the cause of huge judicial interpretation and scholarly analysis since its enactment over decades. While contrasted with a refugee, an asylum seeker is one who has traveled from his or her country of origin and requested protection as a refugee whose claim has not yet been formally determined.[2] It is a useful distinction in practice—individuals are asylum seekers until they are formally recognized as refugees, often languishing in a state of legal uncertainty while their determination is being made.

Concept of the refugee have evolved in highly unprecedented ways since the 1951 Convention.Regional instruments expanded the definition in order to respond to regional contexts. The 1969 OAU Convention for Africa broadened the definition to include "every person who, by reason of external aggression, occupation, foreign domination or events seriously disturbing public order. is forced to leave his habitual residence."[3]

Similarly, the 1984 Cartagena Declaration broadened the concept further to include those fleeing due to "generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order."[4] There is usually an intriguing disconnect between these legal concepts and tangible classifications by states. Immigration authorities far too frequently blur the lines between economic migrants and refugees where each category has well-defined legal rules. This blurring of mind continues to complicate protection mechanisms around the world and affects enforcement of constitutional safeguards.

2.1.2 NON-REFOULEMENT

Non-refoulement is the cornerstone of international refugee protection. Without this minimum protection, refugee law would offer very little effective protection. Non-refoulement prohibits states from returning refugees to where their freedom or life is threatened.[5]

It is stated most clearly in Article 33 of the 1951 Refugee Convention and runs thus: "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to

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[1] United Nations, Convention Relating to the Status of Refugees, 28 July 1951, United Nations Treaty Series, vol. 189, p. 137, art. 1(A)(2).
[2] UNHCR, "Asylum-Seekers," https://www.unhcr.org/asylum-seekers.html (accessed March 10, 2025).
[3] Organization of African Unity, Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969, 1001 U.N.T.S. 45, art. 1(2).
[4] Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984, part III(3).
[5] Elihu Lauterpacht & Daniel Bethlehem, "The Scope and Content of the Principle of Non-Refoulement: Opinion," in Refugee Protection in International Law: UNHCR's Global Consultations on International Protection, ed. Erika Feller, Volker Türk, and Frances Nicholson (Cambridge University Press, 2003), 87-177.

the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[6]

What gives non-refoulement special force is the manner in which it evolved outside of classical refugee law. Human rights treaties like the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture (CAT) have codified this principle in their wording, sometimes in even more absolute language than the Refugee Convention itself.[7] The UN Human Rights Committee has construed Article 7 of the ICCPR to preclude return to a country where there are reasonable grounds to fear the person would be at risk of irreparable harm.[8]

The principle of non-refoulement has gained so much ground as to have a majority of the legal experts opine that it is a norm of customary international law binding even on those states which have not ratified the Refugee Convention.[9] India's judicial inclination in this direction has been expressed in Ktaer Abbas Habib Al Qutaifi v. Union of India, by the Gujarat High Court, with the court concurring that non-refoulement forms part of the customary international law and therefore also applies in India although India has not signed the Refugee Convention.[10]

Challenges of implementation persist, though. Security interests far too often trump protection concerns, with "push-back" initiatives occurring informally before asylum seekers can gain access to formal protection frameworks. The conflict between protection and security needs presents special challenges constitutional courts seeking to reconcile competing interests.

2.1.3 CONSTITUTIONAL SAFEGUARDS

Constitutional safeguards are the foundation of protection of refugees, particularly in non-signatory countries to international instruments concerning refugees. Constitutional guarantees, typically framed in general terms without specific reference to refugees, have been interpreted liberally to encompass basic safeguards to displaced persons. These safeguards are normally exercised in three forms: rights given directly to aliens, rights accruing to everyone regardless of their citizenship, and procedural protections from arbitrary state behavior.[11]

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[6] Convention Relating to the Status of Refugees, art. 33(1).
[7] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations Treaty Series, vol. 1465, p. 85, art. 3.
[8] UN Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 12.
[9] Cathryn Costello & Michelle Foster, "Non-refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test," 46 Neth. Y.B. Int'l L. 273, 273-327 (2015).
[10] Ktaer Abbas Habib Al Qutaifi v. Union of India, 1999 CriLJ 919 (Gujarat High Court).
[11] Stephen H. Legomsky, "Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection," 15 Int'l J. Refugee L. 567, 567-677 (2003).

Their range and meaning are rather dissimilar among jurisdictions, on account of differences in constitutional cultures and concepts of sovereignty. In India, Article 21 of the Constitution, which guarantees the right to life and liberty, has been interpreted by the Supreme Court to include some protection for refugees.[12]

The Court's progressive interpretation of Article 21 has increasingly provided a range of rights, incrementally constructing a constitutional framework for the protection of refugees in the absence of special legislation. Whereas the South African Constitution does entail express protection, Section 36 stating that "everyone has the right to have access to adequate housing," a right which the courts have recognized as extending also to refugees and asylum seekers.[13] More solid is protection under Germany's Basic Law, Article 16a making unmistakable in establishing the right of asylum to victims of persecution on grounds of politics.[14] Constitutional protections are particularly important in protecting refugees from arbitrary detention, ensuring access to the courts, and assuring minimum standards of treatment. Their effectiveness depends largely on judicial interpretation and enforcement mechanisms, which are highly variable across legal systems.

2.1.4 CLIMATE-INDUCED DISPLACEMENT

The contemporary refugee protection regime is facing an unprecedented test as millions of people are compelled to abandon their homes as a result of environmental degradation, natural disasters, and climate change—phenomena not explicitly captured under the classical refugee definition.[15] Climate-induced displacement represents a broad conceptual gap in the international protection regime, since such impacted individuals often do not fit under the persecution criteria embedded in the 1951 Refugee Convention.[16] Climate refugees more accurately termed as "climate-displaced persons" to prevent legal misconceptions are the individuals who have been compelled to move as a result of sudden or progressive changes in their natural environment because of climate change.[17]

These changes are sea-level rise endangering coastal communities and small island states, the exacerbation of extreme weather events, prolonged droughts impacting agriculture production-based livelihoods, and desertification making lands uninhabitable.[18] The International Organization for Migration (IOM) puts the number of individuals likely to be displaced as a result of climate change at 25 million to 1 billion by 2050, with 200 million

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[12] National Human Rights Commission v. State of Arunachal Pradesh (1996) 1 SCC 742.
[13] Government of the Republic of South Africa v. Grootboom, 2001 (1) SA 46 (CC).
[14] Basic Law for the Federal Republic of Germany, art. 16a.
[15] Jane McAdam, *Climate Change, Forced Migration, and International Law* 42-48 (Oxford University Press 2012).
[16] Walter Kälin & Nina Schrepfer, *Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches*, U.N. HIGH COMM'R FOR REFUGEES 13-17 (Feb. 2012), https://www.unhcr.org/4f33f1729.pdf.
[17] Int'l Org. for Migration [IOM], *Discussion Note: Migration and the Environment*, ¶ 6, MC/INF/288 (Nov. 1, 2007).
[18] Robert McLeman, *Climate and Human Migration: Past Experiences, Future Challenges* 96-120 (Cambridge University Press 2014).

most commonly mentioned.[19] This magnitude of displacement risks overwhelming current protection systems targeted primarily towards politically persecuted groups.

Protection issues under the law result from the inapplicability of the refugee definition to climate-displaced individuals in the majority of legal systems. The "persecution" focus of the 1951 Convention assumes human perpetrators of harm, while the effects of climate change often do not include this direct human agency factor.[20] Also, internal displacement (within the state) accounts for the bulk of climate-driven mobility, locating affected individuals beyond the scope of the Convention requiring cross-border movement. Progressive application has arisen to fill this protection gap. The New Zealand Immigration and Protection Tribunal in Teitiota v. Chief Executive of the Ministry of Business, Innovation and Employment weighed whether a citizen of Kiribati was owed protection on the grounds of sea-level rise endangering his home nation.[21]

Although the application was denied, the case reflected judicial recognition of climate change as a potential human rights issue. Similarly, the UN Human Rights Committee later noted that the effects of climate change have been found to violate the right to life under Article 6 of the ICCPR and potentially engage non-refoulement obligations.[22] Regional mechanisms present more encouraging evolutions. The Kampala Convention in the African continent openly cites individuals displaced by "natural or man-made disasters, including climate change."[23] The 2018 Global Compact for Safe, Orderly and Regular Migration accepts climate change as a migratory driver, although it is an unbinding instrument.[24]

India's stance on climate displacement is unclear. Without legislations to the contrary, environmental migrants are confronted with administrative loopholes and enjoy ad hoc humanitarian relief instead of definite legal protection.[25] Constitutional arrangements, in the form of the liberal interpretation of Article 21, constitute possible bases for protection, but this is practically theoretical with no judicial precedent involving climate displacement.[26] The conceptual problem of climate displacement requires a radical reconsideration of the refugee definition and protection systems. While the impacts of climate change quicken, the inefficiency of present frameworks becomes increasingly evident, with adaptive legal solutions acknowledging the complex causality of

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[19] Int'l Org. for Migration [IOM], *Migration and Climate Change* 9, IOM Migration Research Series No. 31 (2008).
[20] Matthew Scott, *Climate Change, Disasters, and the Refugee Convention* 29-35 (Cambridge University Press 2020).
[21] *Teitiota v. Chief Executive of the Ministry of Business, Innovation and Employment* [2014] NZCA 173 (N.Z.).
[22] U.N. Human Rights Comm., *Views Adopted by the Committee Under Article 5(4) of the Optional Protocol, Concerning Communication No. 2728/2016*, U.N. Doc. CCPR/C/127/D/2728/2016 (Jan. 7, 2020).
[23] African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) art. 5(4), Oct. 23, 2009, 49 I.L.M. 86.
[24] G.A. Res. 73/195, Global Compact for Safe, Orderly and Regular Migration, ¶ 18 (Dec. 19, 2018).
[25] Ritumbra Manuvie, *Climate Change, Migration and Legal Protection Gaps: Internally Displaced Climate Migrants in India*, 19 ASIA PAC. J. ENV'T L. 115, 125-28 (2016).
[26] Benoit Mayer, *The Relevance of the No-Harm Principle to Climate Change Law and Politics*, 19 ASIA PAC. J. ENV'T L. 79, 89-92 (2016).

environmental displacement without jeopardizing efficient protection to the concerned groups.[27]

2.2 THEORETICAL EXPLANATIONS

2.2.1 THEORY OF HUMAN RIGHTS

Theory of human rights is one of the central theoretical accounts for the protection of refugees. The interlinking of refugee law and human rights is a fascinating trend—refugee law evolved as a distinct specialist regime separate from human rights law, but nowadays the two are becoming more and more interdependent and complementary regimes. Human rights framework for the protection of refugees is grounded on the assumption that there are certain rights which inhere in all human beings regardless of their citizenship or legal status.[28]

This is as opposed to the traditional perceptions which greatly identified rights with citizenship within nation-states. Theory of human rights has influenced development of refugee protection in three fundamental areas. First, it extended protection beyond the 1951 Convention list of grounds of persecution so that major human rights breaches can be adjudged as persecution regardless of purpose.[29]

Second, it has ensured deeper procedural protection in refugee status determination, where due process hearings and effective remedies are preferred.[30] Third, it has enhanced refugee protection substance with human rights standards being elevated to treatment standards.[31] The complementary protection under the human rights law is specifically beneficial for asylum seekers who are not 1951 Convention refugees but would suffer extreme human rights abuses if they were to be sent back to their countries of origin.[32]

The protection complements gaps in protection of the Convention refugee definition. Critics of the human rights paradigm argue that limiting refugee protection to human rights risks stripping away the very political and social conditions causing refugee flows.[33] Others have argued that the individualistic character of human rights law is inadequate to address

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[27] Elizabeth Ferris & Jonas Bergmann, *Soft Law, Migration and Climate Change Governance*, 8 J. HUM. RTS. & ENV'T 6, 9-14 (2017).

[28] James C. Hathaway, The Rights of Refugees under International Law 154-192 (Cambridge University Press, 2005).

[29] Vincent Chetail, "Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law," in Human Rights and Immigration 19, 19-72 (Ruth Rubio-Marín ed., Oxford University Press, 2014).

[30] Thomas Gammeltoft-Hansen, Access to Asylum: International Refugee Law and the Globalisation of Migration Control 44-93 (Cambridge University Press, 2011).

[31] Alice Edwards, "Human Rights, Refugees, and The Right 'To Enjoy' Asylum," 17 Int'l J. Refugee L. 293, 293-330 (2005).

[32] Michelle Foster, "Non-Refoulement on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law," 2009 N.Z. L. Rev. 257, 257-310 (2009).

[33] B.S. Chimni, "Status of Refugees in India: Strategic Ambiguity," in Refugees and the State: Practices of Asylum and Care in India 443, 443-471 (Ranabir Samaddar ed., Sage Publications, 2003).

mass displacement scenarios.[34] These objections highlight the continued theoretical tensions between refugee protection regimes.

2.2.2 CONSTITUTIONAL THEORY

Constitutional theory provides a sophisticated tool of analysis with which to approach refugee protection, especially where international instruments are not directly applicable. There are some constitutional theories of especial relevance to models of refugee protection. Constitutional cosmopolitan theory presumes that constitutions must acknowledge certain universal rights that go beyond citizens and extend to every individual in a state's jurisdiction.[35]

Constitutional courts of nations such as India and South Africa have taken cues from the approach to transcend refugees even without any specific provision in the constitutions.[36] Constitutional dialogism is interested in how constitutional courts interact with international law, at times integrating international norms into domestic constitutional meaning.[37] This can be observed in the case of National Human Rights Commission v. State of Arunachal Pradesh, where the Indian Supreme Court referred to international human rights standards in interpreting constitutional safeguards for Chakma refugees.[38]

Constitutional theories of identity also influence refugee protection because courts weigh how the treatment of refugees represents a country's constitutional values and self-understanding.[39] Constitutional courts prefer to present their decisions not just as legal requirements but as statements of constitutional values and identity.

The proportionality theory, which underlies the majority of constitutional orders, has directly applied in weighing security interests against the rights of refugees.[40] Judges more often use proportionality analysis in determining whether there is justification for limiting refugee rights while imposing minimal harm to rights protected.

2.2.3 INTERNATIONAL PROTECTION REGIME

The international protection regime for refugees is a complex interaction of law, politics, and practices of institutions. The regime has transformed dramatically since its modern inception in the aftermath of the post-World War II period. The 1951 Refugee Convention and the 1967 Protocol form the basis of the regime, establishing the international legal

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[34] Ashok Kumar Chakma, "The Refugee Law of India: The Road from Ambiguity to Protection," 7 J. Indian L. & Soc'y 95, 95-116 (2016).
[35] Seyla Benhabib, "The Law of Peoples, Distributive Justice, and Migrations," 72 Fordham L. Rev. 1761, 1761-1787 (2004).
[36] Neerja Chaudhary, "Asylum Seekers and Refugees in India: Legal Position and Judicial Response," 12 Indian J. Const. L. 204, 204-231 (2021).
[37] Vicki C. Jackson, Constitutional Engagement in a Transnational Era 39-70 (Oxford University Press, 2010).
[38] National Human Rights Commission v. State of Arunachal Pradesh (1996) 1 SCC 742.
[39] Gary Jeffrey Jacobsohn, Constitutional Identity 133-172 (Harvard University Press, 2010).
[40] Aharon Barak, Proportionality: Constitutional Rights and Their Limitations 340-370 (Cambridge University Press, 2012).

framework for the protection of refugees.[41] The regime is, however, wider than these texts to encompass regional protection schemes, human rights instruments, soft law statements, and institutional arrangements. The theoretical underpinnings of the international protection regime are conflictual between state sovereignty and international responsibility.[42]

The regime attempts to reconcile these clashing principles on the one side by recognizing the initial responsibility of states for protection and on the other by requiring international standards and instruments for the protection gaps. There are several theoretical frameworks that explain the operation of this regime. "Regime complexity" theory argues that simultaneous and sometimes contradictory norms in refugee protection offer opportunities and challenges.[43] States can utilize vagueness to limit their obligations, but the same vagueness provides space for progressive standard-construction in protection.

The concept of "surrogate protection" remains at the centre of the question of how one can explain the functioning of the international regime.[44] In the absence of protection by the home state, the international community, states, and international institutions offer basic rights and security. Theorized positions on the nature of the international regime of protection remain of specific practical relevance.

There are those who suggest increased knowledge of international responsibility and who urge that protection duties should be more equally distributed between states.[45] There are others who hold to the continuing relevance of state sovereignty and agree to ensure the effectiveness of the regime. Theoretical standpoints are shaping present efforts at reform for the international protection system, e.g., the Global Compact on Refugees.

2.2.4 INDIAN JUDICIAL APPROACH ON NON-REFOULEMENT

While India is not a party to the 1951 Refugee Convention and its 1967 Protocol, Indian courts have evolved their own law on non-refoulement based on constitutional interpretation. This judicial approach has managed to integrate elements of international refugee protection into domestic constitutional law so as to evolve a parallel regime of protection alongside the administrative regimes evolved for particular categories of refugees.[46]

The leading case situating the position of non-refoulement within Indian law is Ktaer Abbas Habib Al Qutaifi v. Union of India, wherein the Gujarat High Court specifically situated

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[41] Guy S. Goodwin-Gill & Jane McAdam, The Refugee in International Law 35-61 (3d ed., Oxford University Press, 2021).
[42] Alexander Betts, "The Refugee Regime Complex," 29 Refugee Survey Q. 12, 12-37 (2010).
[43] Karen J. Alter & Sophie Meunier, "The Politics of International Regime Complexity," 7 Persp. on Pol. 13, 13-24 (2009).
[44] James C. Hathaway & Michelle Foster, The Law of Refugee Status 288-307 (2d ed., Cambridge University Press, 2014).
[45] Eiko R. Thielemann & Torun Dewan, "The Myth of Free-Riding: Refugee Protection and Implicit Burden-Sharing," 29 W. Eur. Pol. 351, 351-369 (2006).
[46] B.S. Chimni, *The Legal Condition of Refugees in India*, 7 J. REFUGEE STUD. 378, 380-82 (1994).

non-refoulement as a customary international law principle to which India is bound.[47] The Court held that Article 21 of the Constitution, which safeguards the right to life and liberty of the person, encompasses non-refoulement as a component of "life" and "personal liberty."[48] The Court justified: "The principle of 'non-refoulement' is encompassed in Article 21 of the Constitution of India. so long as the presence of refugee is lawful and not prejudicial to the security of India. [It] is not only a concept of International Law, but it has become part of Customary International Law."[49] This was a historic decision as it created the principle that even where there is no domestic law, refugees have a constitutional right to protection against forced deportation to countries where they risk persecution.

In National Human Rights Commission v. State of Arunachal Pradesh, the Supreme Court granted protection to Chakma refugees who were being evicted and subjected to possible deportation.[50] The Court directed the state government to ensure that Chakmas' applications for citizenship are referred to the appropriate organs and their life and personal liberty protected.[51] While not through direct invocation of non-refoulement, the approach of the Court embodied its principles by forbidding acts that would effectively compel refugees to go back to perilous situations. The Supreme Court then further refined such jurisprudence in Mohammad Salimullah v. Union of India, relating to Rohingya refugees being repatriated to Myanmar.[52]

The Court recognized the doctrine of non-refoulement but qualified it against national security interests, holding that while non-refoulement formed part of Indian law, it was not absolute and could be weighed against sovereign interests.[53] The Court held: "The National Courts can draw inspiration from International Conventions/Treaties, so long as they are not in conflict with the municipal law. Regarding the contention raised on behalf of the petitioners about the principle of non-refoulement, it is true that the said principle has been recognized as a part of customary international law. However, the principle of non-refoulement is not unconditional."[54] The Delhi High Court in Dongh Lian Kham v. Union of India entrenched the doctrine of non-refoulement in Indian law, by explicitly stopping the deportation of a Myanmarese refugee.[55] The Court ruled that the doctrine of non-refoulement applied regardless of whether the refugee entered legally or illegally, thus widening the ambit of protection.[56].

Another remarkable feature arose in P. Nedumaran v. Union of India, where Sri Lankan Tamil refugees were heard by the Madras High Court.[57] The Court noted that deportation of foreigners is at the government's discretion, which has to be exercised in accordance

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[47] *Ktaer Abbas Habib Al Qutaifi v. Union of India*, (1999) Crim LJ 919 (Gujarat HC).
[48] *Id.* at para. 17.
[49] *Id.* at para. 19.

[50] *National Human Rights Commission v. State of Arunachal Pradesh*, (1996) 1 SCC 742.
[51] *Id.* at para. 20.
[52] *Mohammad Salimullah v. Union of India*, (2021) 5 SCC 1.
[53] *Id.* at para. 38.
[54] *Id.* at para. 42.
[55] *Dongh Lian Kham v. Union of India*, Writ Petition (Civil) No. 1884/2015 (Delhi HC Sept. 21, 2015).
[56] *Id.* at para. 14.
[57] *P. Nedumaran v. Union of India*, 1993 (2) ALT 291.

with the provisions of the constitution, and more specifically, Article 21, which necessarily includes refoulement protection.[58] The courts have evolved in their methodology to distinguish between different categories of forced migrants. In Bogyi v. Union of India, the Gauhati High Court distinguished between economic migrants and migrants who flee persecution and accorded non-refoulement protection primarily to the latter.[59] But difficulties persist in the uniform application of non-refoulement. Lower judiciary has sometimes fallen prey to executive discretion regarding deportation, especially when drawing on national security reasons.[60]

The lack of clear-cut refugee law has resulted in divergent adjudication by different High Courts, with different views regarding the scope and boundaries of non-refoulement.[61] India's judicial approach to non-refoulement is a hybrid one, grafting international norms onto domestic law via constitutional adjudication. It does not always provide the universal protection envisioned by international refugee law, but it constructs basic protections against forced return. This judge-made jurisprudence has managed to build a constitutional net of protection for refugees in the absence of specialized legislation, though its application is subject to judicial discretion and access to courts.[62]

CONCLUSION

This chapter has explained the conceptual and theoretical foundations of refugee protection in India and exposed the dynamic tension between international norm and local constitutional construction. The analysis verifies that in the absence of India's accession to the 1951 Refugee Convention, an innovative regime of protection has developed through judicial innovation and constitutional protection.

Several significant conclusions may be inferred from this analysis. Firstly, the traditional dichotomies of "refugee" and "asylum seeker" continue to evolve to accommodate new challenges of displacement, above all those that are being created by climate change, which is stretching the limits of traditional definitions far wider than they were ever intended. Secondly, the law of non-refoulement has evolved beyond its treaty-based roots to become

[58] *Id.* at para. 25.
[59] *Bogyi v. Union of India*, (2015) 1 Gau LR 526.
[60] Bhairav Acharya, *The Future of Asylum in India: Four Principles to Appraise Recent Legislative Proposals*, 9 NUJS L. REV. 173, 180-85 (2016).

[61] Saurabh Bhattacharjee, *India Needs a Refugee Law*, 43 ECON. & POL. WKLY. 71, 73 (2008).
[62] Rajeev Dhavan, *Refugee Law and Policy in India* 115-20 (Public Interest Legal Support and Research Centre 2004).

customary international law, expressing itself through India's constitutional jurisprudence in an expansive interpretation of Article 21's right to life and liberty.

Theoretical origin of India's action traces a compound model of law that borrows from a variety of sites—human rights theory, cosmopolitan constitutionalism, and protection regimes globally—to build protection structures even in the absence of specialized law. This judicial method, while creative, remained limited by national sovereignty and security interests and therefore rendered unequal in application across contexts and categories of refugees.

The Indian judiciary's desire to translate norms of international refugee protection into national constitutional law is an important change in the protection climate. But the case-by-case solution is less systematic and predictable than would be provided by specific refugee legislation. The ongoing tension between needs for humanitarian protection and interests in sovereignty is a manifestation of broader theoretical problems in refugee protection globally.

As newer displacement challenges arise, including those of climate change, the constitutional order of India will be compelled under increasing pressure to respond and adjust appropriately. The theoretical and conceptual bases established in this chapter will similarly develop in the course of judicial interpretation to hopefully pave the way towards more institutionalized protection mechanisms in the future. The contradiction between universal human rights norms and sovereign rights lies at the heart of India's protection of refugees, revealing underlying tensions within international refugee law itself.

CHAPTER 3: INTERNATIONAL LEGAL FRAMEWORK FOR REFUGEE PROTECTION

INTRODUCTION

The international refugee protection system is the most evolved product in the post-World War II human rights system. Emerging from the devastation of international war and mass migration, the system developed from a Euro-centric ad hoc provision to a full-fledged global protection system. This chapter analyzes the constituent documents, regional innovations, and institutional mechanisms that form the international system of refugee protection. Starting from the 1951 Refugee Convention and its 1967 Protocol, the discussion follows the way that the vocabulary of original limited sphere of refugee protection has extended through international human rights treaties, regional protection regimes, and the changing mandate of the United Nations High Commissioner for Refugees (UNHCR).

The chapter also critically examines both the normative substance of such regimes and their challenges in real operation, pointing towards the endemic conflicts between state sovereignty and humanitarian necessities, universal norms and local interpretations, and institutional mandates and operational constraints. In analyzing this, the chapter sets the background for an understanding of India's response to refugee protection as well as the conflict between international obligation and domestic constitutional protection.

3.1 1951 REFUGEE CONVENTION AND 1967 PROTOCOL

The foundations of contemporary refugee protection were laid by the atrocities of World War II, during which millions of people were uprooted and driven out of their homelands into exile. That is the 1951 Convention Relating to the Status of Refugees, human solidarity's promise never again to send refugees back into harm's way. Originally confined to the protection of predominantly European displaced persons who became refugees before 1951, this spatio-temporal restriction reflected the origins of the Convention as a post-World War initiative and not an ageless initiative to an ageless international problem.

The Convention definition of "refugee" has itself become the norm worldwide: 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 his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country."[63] This masterfully crafted definition establishes five grounds of protection upon which today's decisions to grant refugee status are made throughout the world, though interpreted in terms of over four decades of jurisprudence. The most distinctive contribution of the text is perhaps Article 33, enshrining the principle

[63] Convention Relating to the Status of Refugees art. 1(A)(2), July 28, 1951, 189 U.N.T.S. 150. ↩

of non-refoulement-protecting refugees from being refouled to territories where they would be at risk to their life or liberty.[64]

The principle has since evolved into something greater than a genesis as a treaty obligation and became customary international law binding all states, even non-party states. When decolonization swept over the Asian and African continents in the 1960s, fresh refugee crises erupted that were beyond the original terms of the Convention. The 1967 Protocol to the Status of Refugees eliminated geographical and temporal limitations, rendering the protection of the Convention universal.[65] These instruments collectively provide an overall framework of rights of refugees, such as rights of access to courts, to education, to employment, and freedom of movement—admitting that refuge is something more than mere physical protection. The Protocol and Convention are measures of international agreement, 149 combined state signatories or to each. They are by no means perfect in the contemporary era, either: They are not on their face protections against worldwide warming or domestic violence against internally displaced individuals, and state enforcement is appallingly disproportionate by region. Flawed as they are, though, they are the building blocks on which everything that came later was based.

3.2 INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

3.2.1 UNIVERSAL DECLARATION OF HUMAN RIGHTS

Although not directly dealing with refugees, the 1948 Universal Declaration of Human Rights (UDHR) provided refugee protection fundamental foundation in its groundbreaking statement that "Everyone has the right to seek and to enjoy in other countries asylum from persecution."[66] This unambiguous but powerful declaration in Article 14 transformed asylum from an optional state discretion to a personal human right.

Even though not legally binding on adoption, the principles of the Declaration have become settled in customary international law by regular state practice. The total contribution of the UDHR to the protection of refugees cannot be overemphasized. Its characterization of human dignity as inherent and of rights as universal puts the idea of rights somehow grounded in citizenship itself in doubt. When Article 2 declares that everyone has rights "without distinction of any kind," it is actually pre-emptively denying the argument that transnational crossing reduces one's humanness or right to protection.[67]

Most importantly, the UDHR articulates the rights whose violation often generates refugee flows—freedom from torture, arbitrary detention, and discrimination, and rights to political participation, freedom of religion, and a fair trial. By establishing these standards, the

[64] Id. art. 33(1).
[65] Protocol Relating to the Status of Refugees art. 1, Jan. 31, 1967, 606 U.N.T.S. 267.
[66] G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 14(1) (Dec. 10, 1948).
[67] Id. art. 2.

Declaration provides the normative foundation on which persecution worthy of international protection can be recognized.

3.2.2 INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The International Covenant on Civil and Political Rights (ICCPR) made the aspirational norms of the UDHR binding legal obligations once it came into force in 1976. While it contains no express refugee provisions, the ICCPR powerfully affects refugee protection through a number of avenues.

First, the Covenant outlaws torture and inhuman treatment categorically, constituting a non-returning obstacle to such treatment that supports and enforces the principle of non-refoulement.[68] Second, its prohibition on arbitrary detention constrains how asylum seekers are treated upon first arrival.[69] Third, its guarantees of equal protection of the law have been construed by the Human Rights Committee as applying to all individuals who are present within a state's territory, both citizen and non-citizen alike, and therefore providing vital procedural protections to asylum seekers.

The ICCPR's provision in Article 12 guaranteeing freedom of movement has particular relevance for refugees, who often face restrictions on where they may live or travel within host countries.[70] While the Covenant permits some limitations on non-citizens' rights, the Human Rights Committee has emphasized that such distinctions must serve legitimate aims and remain proportionate—a standard that many restrictive refugee policies struggle to meet.

Aside from discrete provisions, the ICCPR itself enhances refugee protection through the offering of a stand-alone mechanism for reporting human rights violations leading to displacement. When systematic abuses are identified by the Committee in a country of origin, such identification can be used in assisting in refugee status determinations in receiving countries, making the "well-founded fear" necessary for recognition as a refugee.

3.2.3 CONVENTION AGAINST TORTURE

The 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) provides a parallel protection avenue for those who do not fit into the refugee definition of the 1951 Convention. Article 3 of CAT contains an express prohibition: "No State Party shall expel, return ('refouler') or extradite a person to another

[68] International Covenant on Civil and Political Rights art. 7, Dec. 16, 1966, 999 U.N.T.S. 171.
[69] Id. art. 9.
[70] Id. art. 12.

State where there are substantial grounds for believing that he would be in danger of being subjected to torture."[71]

This protection is distinct from refugee non-refoulement in three important respects. First, it arises for any reason for torture, and no assessment of persecution on a protected ground is necessary. Second, it is without exception—serious criminals or security risks cannot be sent back to be tortured, whereas under some interpretations of the Refugee Convention they can. Third, it is limited to the risk of torture itself, rather than the wider category of persecution, and thus establishes a more demanding threshold of harm but erases most evidentiary hurdles.

In fact, CAT is now a de facto safety net for victims of generalized violence, civil war, or private threats that are indirectly not Convention grounds. For instance, victims of non-state torture (i.e., domestic threat or violence from gangs) were found to be protected under CAT when refugee applications were denied based on grounds of inability to prove state responsibility or nexus to a protected ground. The Committee Against Torture understandings have increasingly developed protection.

The Committee has adopted the view that pain inflicted on discriminatory grounds amounts to torture, that states have a duty to evaluate torture risks even when they emanate from non-governmental sources, and that return to states with systematic patterns of torture invokes presumptive protection obligations.[72] These understandings have had an impact on domestic asylum systems, notably in North America and Europe, where "subsidiary protection" or "withholding of removal" commonly includes CAT standards.

3.3 REGIONAL PROTECTION MECHANISMS

3.3.1 EUROPEAN CONVENTION ON HUMAN RIGHTS

Though originally silent on refugee issues, the 1950 European Convention on Human Rights (ECHR) has developed through case law into an influential refugee protection tool. The European Court of Human Rights' landmark 1989 ruling in Soering v. United Kingdom determined that extraditing individuals to receive treatment contrary to the ban in Article 3 against torture or degrading treatment would in itself be a violation of the Convention.[73]

The principle was later applied in the refugee context in Chahal v. United Kingdom when the Court reaffirmed that protection against refoulement is absolute, even when dealing with terrorism.[74] The Convention's effect extends beyond non-refoulement. Article 5 protection against arbitrary detention has limited immigration detention policy, and Article

[71] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3(1), Dec. 10, 1984, 1465 U.N.T.S. 85.
[72] Comm. Against Torture, General Comment No. 4 (2017) on the Implementation of Article 3 in the Context of Article 22, ¶¶ 30-35, U.N. Doc. CAT/C/GC/4 (Sept. 4, 2018).
[73] Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1989).
[74] Chahal v. United Kingdom, 1996-V Eur. Ct. H.R. 1831.

8 right to family life has halted deportations that risk breaking up refugee families. Most importantly, Article 13 guarantee of effective remedies has been interpreted as mandating fair and accessible asylum procedures with substantive rights of appeal. Recently, the Court has also addressed institutional failures in the asylum system in Europe. In M.S.S. v. Belgium and Greece, it examined whether returning asylum seekers to those states with malfunctioning asylum systems could constitute inhuman treatment, suspending automatic transfers under the Dublin system.[75]

Through such cases, the ECHR has been serving as a supplement to the Refugee Convention, and also as a correction tool for its implementation shortcomings. The ambit of the Convention reaches further than membership of the Council of Europe because its terms have been transposed into European Union law through the operation of instruments such as the Qualification Directive and the Common European Asylum System. This regional approach illustrates how human rights structures can be built in order to complete protection deficits within the international refugee regime.

3.3.2 OAU CONVENTION RELATIVE TO THE SPECIFIC ASPECTS OF REFUGEE PROBLEMS IN AFRICA

Africa's special issues of displacement—due to decolonization conflicts and civil wars—prompted the continent's initial regional refugee instrument. The 1969 Organization of African Unity (OAU) Convention Governing Specific Aspects of Refugee Problems in Africa acknowledged the limited scope of the 1951 Convention's individualized model of persecution and expansively interpreted refugee definition to cover "every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order.is compelled to leave."[76]

This wide definition acknowledges that the majority of persecution is through generalized violence, not targeting, and thus distinction between claimants to flee targeting and those fleeing indiscriminate risk is impossible. By lowering the threshold for evidence of targeting, the OAU Convention provided group-based determination of protection that was closer to the realities of mass displacements where minimal administrative capacity would exist.

The Convention also enhanced protection in other ways. It underscored that asylum is a "peaceful and humanitarian act" not to be interpreted as hostility towards countries of origin, lowering diplomatic tensions surrounding refugee recognition.[77] It clearly banned rejection at borders, forced return, or denial of temporary admission—shutting loopholes in non-refoulement protection. It also defined burden-sharing principles and acknowledged the

[75] M.S.S. v. Belgium and Greece, 2011-I Eur. Ct. H.R. 255.
[76] Convention Governing the Specific Aspects of Refugee Problems in Africa art. 1(2), Sept. 10, 1969, 1001 U.N.T.S. 45.
[77] Id. art. 2(2).

essential significance of voluntary repatriation, prefiguring concerns that would become core to global refugee policy.

Notwithstanding issues of implementation and differential compliance, the OAU Convention is a necessary innovation in refugee protection. Its impact extends beyond Africa, as it has prompted similar regional reactions and shaped UNHCR's "prima facie" recognition policies in mass influx situations globally.

3.3.3 CARTAGENA DECLARATION ON REFUGEES LATIN

America's particular asylum strategy draws on a 19th-century tradition of territorial and diplomatic asylum. The 1984 Cartagena Declaration on Refugees responded to the refugee crises in Central America by transferring African advances to Latin American settings. The Declaration, even though technically not binding, has exerted dramatic influence through the incorporation of the Declaration into national legislation across the region. The Declaration's most significant contribution adopts the OAU Convention's broader refugee definition, including protection to those who flee from "generalized violence, foreign aggression, internal strife, massive human rights violations or other situations that have seriously disturbed public order."[78]

This expansive definition was absolutely vital to use in the civil wars of Central America, when it became practically impossible to discern the individual persecution within massive violence. Besides definitional broadening, the Declaration led in the harmonization of refugee law with broader human rights regimes. It asserted a clear linkage between protection of refugees and states' obligations under human rights, stressed the complementary character of refugee law and human rights law, and promoted harmonization of regional standards—later replicated internationally.

The Declaration procedurally also broke new ground, outlining refugee status determination processes that harmonize fairness and efficiency. Its focus on harmonizing international protection with development aid presaged the humanitarian-development nexus that characterizes contemporary global displacement response.

By means of later declarations (San José, Brazil, Mexico, and Brazil once more), the region has expanded its framework to address new challenges such as gang violence, climate displacement, and extraterritorial processing. Latin America's experience shows that legally non-binding instruments can nevertheless exert a dramatic effect through political commitment and incremental integration into national law—a regional cooperation model that has established one of the world's most generous protection regimes.

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[78] Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Nov. 22, 1984, Annual Report of the Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev. 1, at 190-93 (1984-85).

3.3.4 REGIONAL INSTRUMENT HAS MORE PRACTICAL PROTECTIONS: AN IMPLEMENTATION COMPARE

The relative comparative effectiveness of regional refugee protection instruments to illustrate stark variation in implementation results across different geopolitical settings is contingent. Although all of the regional regimes have made a distinctive contribution to refugee protection, success in operational implementation as a practical fact ought to be measured against both normative standards and operational challenges.

The OAU Convention: Breaking New Ground with Implementation Issues The OAU Convention's broader refugee definition was a pioneering breakthrough in how mass displacement situations were dealt with. By encompassing people who flee because of genocide, war, tribal fighting, and "events seriously disturbing public order," it created a better regime of protection appropriate to the African context of displacement.[79]

It has been tough times for implementation. Thirty-four African nations have ratified the Convention but effective incorporation into national legal frameworks is spotty, with implementation frequently dependent on budgetary considerations and institutional capacity limitations.[80] Though its conceptual strengths, operationally, application of the OAU Convention has been undermined by a number of factors: variable practices of refugee status determination by members, limited judicial interpretation of its provisions, and lacking any specific monitoring and enforcement mechanism.

These deficiencies have brought gaps in protection even where the normative regime itself seems exhaustive. The Cartagena Declaration: Flexible Implementation Through Progressive Integration The Cartagena Declaration, though originally non-binding, has registered higher implementation success through incremental absorption into domestic legal systems. Fifteen Latin American countries absorbed its widening definition of a refugee into national law and thus provided legally binding protection.[81]

The reason for the success in implementation of the Declaration is the incorporation method—operating within existing legal regimes as opposed to establishing parallel institutions. It has also been supported by follow-up processes such as the Brazil Plan of Action, which set specific targets for implementation and review processes. This style of evolution has ensured adaptive implementation, since states have increasingly built upon pledges with further commitments that adapt to evolving displacement issues such as gang violence and climate displacement.[82]

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[79] Eduardo Arboleda, "Refugee Definition in Africa and Latin America: The Lessons of Pragmatism," International Journal of Refugee Law 3, no. 2 (1991): 185-207.
[80] Marina Sharpe, "The 1969 African Refugee Convention: Innovations, Misconceptions, and Omissions," McGill Law Journal 58, no. 1 (2012): 97-147.

[81] Reed-Hurtado, Michael, "The Cartagena Declaration on Refugees and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in Latin America," UNHCR Legal and Protection Policy Research Series (2013): 24-29.
[82] Cantor, David James and Stefania Barichello, "The Inter-American Human Rights System: The Law and Politics of Institutional Change," The International Journal of Human Rights 17, no. 7-8 (2013): 751-786.

The European Framework: Institutional Strength with Implementation Inconsistencies The most firmly institutionally grounded implementation mechanism of the European protection regime, based on the ECHR and implemented through the Common European Asylum System (CEAS), is through the binding jurisprudence of the European Court of Human Rights.

Its judicial enforcement power has instituted tangible accountability procedures lacking in other regional regimes to enable individual refugees to challenge state practice directly. Notwithstanding this, implementation has turned out to be unbalanced within the area, and there exist large differences in rates of recognition, quality of procedures, and conditions of reception between member states.

The Court's decisions in the case of M.S.S. v. Belgium and Greece unveiled systemic implementation faults even under this advanced system.[83] Experience with the European system shows that robust institutional schemes do not ensure effective implementation when political will is lacking.

Comparative Implementation Assessment

On an implementation basis, the Cartagena framework is discovered to have the highest real-world relevance above resources and institutional constraints. Its success comes in the form of several features favorable to implementation that have yielded concrete protection effects:

Several windows of opportunity for integration: In allowing incremental domestic uptake above rigid application requirements, the Declaration has opened windows for state involvement.

Evolutionary development: By virtue of follow-up procedures and regular declarations, the system evolved responsiveness to new protection issues.

Regional ownership: Regional agreement-based development of the Declaration has fostered commitment to implementation free from external compulsion.

Practical orientation: Focus on down-to-earth solutions rather than on abstract rights has enabled transference of principles into practice.

Complementary approach: Integration within more comprehensive human rights systems has legitimized implementation through various channels of law.

[83] M.S.S. v. Belgium and Greece, App. No. 30696/09, European Court of Human Rights (2011).

The Cartagena process demonstrates that effectiveness in implementation is not so much a function of normative completeness but also of the institutional mechanisms of functional integration that go with legal instruments. Its success punctures traditional expectations that legally binding treaties in themselves will always perform better than non-binding declarations in implementation.[84] The experience of Cartagena provides useful lessons for future regional protection regimes, including potential future South Asian initiatives applicable to India, in overcoming the divide between protection ideal and implementation reality.

3.4 ROLE AND MANDATE OF UNHCR

UNHCR, the United Nations High Commissioner for Refugees Office, was established in 1950 as a temporary organization for a three-year mandate to resolve European post-war displacement. Three quarters of a century on, it has become the lead international institution for safeguarding refugees, operating in 135 states and responsible for looking after more than 100 million uprooted people.[85] UNHCR's mandate derives from its Statute, which empowers it to extend international protection and pursue durable solutions for refugees.[86]

The mandate has been enlarged by subsequent UN General Assembly resolutions to cover stateless persons, returnees, conflict-displaced persons, and others "of concern." This development is an expression of increasing awareness that inflexible categorization ill serves protection requirements. The agency fills three unique roles in the global refugee regime.

First, it offers direct action to refugees, working in those states with deficient government capacity or political will. Second, it oversees state practice of the Refugee Convention, giving interpretive advice through handbooks, guidelines, and legal views. Third, it coordinates international responses to displacement crises, activating resources and securing cooperation between states, NGOs, and other UN agencies.

UNHCR protection activity involves several functions: registration of refugees, determination of status, prevention of refoulement, promotion of detention alternatives, promotion of reunification of the family, and promotion of solutions durable. Its legally authoritative interpretations, although technically not binding, have a strong influence on state practice. The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, for example, is frequently quoted in domestic judicial rulings on refugee matters.[87]

Structured separately as it may be, UNHCR remains constantly caught in the middle between its protection mandate and voluntary state contribution. On occasion, its

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[84] James C. Hathaway, "The Architecture of the UN Refugee Protection Regime," Journal of International Humanitarian Legal Studies 8, no. 1 (2017): 225-251.
[85] UNHCR, Global Trends: Forced Displacement in 2023, at 2 (2024).
[86] G.A. Res. 428 (V), Statute of the Office of the United Nations High Commissioner for Refugees (Dec. 14, 1950).
[87] UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, U.N. Doc. HCR/IP/4/Eng/REV.4 (2019).

dependence prevents it from criticizing state policy or actively pursuing unpopular causes. Despite all this, however, the agency possesses great moral authority and has been able to push protection norms in non-signatory states without formally exercising jurisdictional authority over them.

Through these several mechanisms—binding treaties, human rights instruments, regional compacts, and institutional monitoring—international law has built up a high-tech regime for the protection of refugees. The regime is an articulation of a growing consensus: that protection of those who flee persecution is not charity or humanitarian sentiment, but a straightforward legal duty drawn from our common humanity.

CRITICAL APPROACH UNHCR

The Office of the United Nations High Commissioner for Refugees was created in 1950 as an ad-interim agency with a three-year mandate to end European post-war displacement. Three-quarters of a century later, it has developed into the primary international agency that protects refugees, working in 135 countries and caring for over 100 million displaced individuals.[88] The mandate of UNHCR comes from its Statute, which empowers it to provide international protection and work towards solutions for refugees that are durable.[89]

The mandate has been expanded by later UN General Assembly resolutions to include stateless persons, returnees, conflict-displaced persons, and others "of concern." This recognizes increasing realization that strict categorization weakens protection needs. The agency provides three distinctive functions in the global refugee regime. On the one hand, it provides direct assistance to refugees, operating in states with weak government capacity or political will. Secondly, it monitors state practice under the Refugee Convention, providing interpretative guidance in the form of handbooks, guidelines, and juridical opinions.

Thirdly, it orchestrates international responses to crises of displacement, mobilizing resources and obtaining cooperation among states, NGOs, and other UN agencies. UNHCR protection activity encompasses a set of functions: registration of refugees, status determination, prevention of refoulement, promotion of alternatives to detention, promotion of family reunification, and promotion of durable solutions. Its legally authoritative interpretation, although technically non-binding, exert a powerful influence on state practice. The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, for instance, is often quoted in domestic court decisions pertaining to refugees.[90]

3.4.1 POLITICAL LIMITATIONS AND FUNDING CONSTRAINTS

[88] UNHCR Global Trends: Forced Displacement in 2023 (Geneva: UNHCR, 2024), 2.
[89] Statute of the Office of the United Nations High Commissioner for Refugees, G.A. Res. 428(V), U.N. Doc. A/1775 (Dec. 14, 1950).
[90] Guy S. Goodwin-Gill, "The Dynamic of International Refugee Law," International Journal of Refugee Law 25, no. 4 (2013): 651-666.

Despite its wide mandate, UNHCR is constrained by significant political limitations which erode its effectiveness. The organization is obligated to operate in terms of state sovereignty, often being helplessly unable to enforce obligations on states that refuse to honor their commitments towards refugee protection. This structural limitation is best exemplified in non-signatory countries like India, where UNHCR must operate at the vagaries of the host state with minimal space for operation and jurisdictional authority.[91]

The organization's funding mechanism is also an essential deficiency. Dependent almost solely on voluntary contributions by donor governments, UNHCR is caught in an eternal dilemma between the protection mandate and donor governments' political agendas. Such dependence can undermine its capacity to firmly criticize governments' actions that violate refugees' rights or embark on protection activities that are not approved by donor governments. The result is a significant accountability gap, where UNHCR may prioritize maintaining relationships with donor governments over rigorous advocacy for refugee protection standards.[92]

This model of financing has assisted in sustaining what has been referred to by critics as the "humanitarian alibi" phenomenon whereby UNHCR's mass scale field presence is used to camouflage the inability of states to address the root causes of displacement or offer durable solutions. When donor governments finance humanitarian aid alongside enacting restrictive asylum policies, UNHCR finds itself in the contradictory role of supporting a system that contains, rather than resolves, refugee crises.

3.4.2 OPERATION ISSUES AND INSTITUTIONAL LIMITATIONS UNHCR

It is also has profound operation issues that constrict its effectiveness. The agency's bureaucratic configuration, which was set up for refugee settings during the mid-20th century, is failing to cope with the current displacement settings that include mixed migration flows, protracted refugee situations, and climatically driven displacement. Its method of processing refugee status determination in most states has been faulted with inconsistency, backlog processing, and inadequate procedural protection.[93]

The expansion of the mandate of UNHCR to IDP protection, statelessness, and mixed migration has over-stretched its resources, diluting its traditional refugee protection role. The "mission creep" points to the lack of any other effective international mechanism to deal with these challenges but raises questions about the institutional capacity and ability of UNHCR to perform these expanded roles effectively.

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[91] Gil Loescher, "UNHCR and Forced Migration," in The Oxford Handbook of Refugee and Forced Migration Studies, ed. Elena Fiddian-Qasmiyeh et al. (Oxford: Oxford University Press, 2014), 215-226.
[92] Alexander Betts, Gil Loescher, and James Milner, UNHCR: The Politics and Practice of Refugee Protection, 2nd ed. (London: Routledge, 2012), 137-142.
[93] Michael Kagan, "We Live in a Country of UNHCR: The UN Surrogate State and Refugee Policy in the Middle East," New Issues in Refugee Research, Research Paper No. 201 (Geneva: UNHCR, 2011).

3.4.3 UNHCR IN THE CONTEXT OF INDIA

In the Indian situation, these constraints are acutely cutting. Acknowledging its absence of official sanction in the guise of a Memorandum of Understanding instead of a fuller legal architecture, UNHCR's effort in India is a lesson in institutional responsiveness under duress. The organization has to navigate India's intricate political landscape, where refugee protection overlaps with national security, bilateral diplomacy, and internal politics.

India's policy of selective aid to refugees—granting differential rights access to various groups of refugees based on political expediency—is a challenge to UNHCR's non-discrimination principles. It is thus obligated to maintain operational links with state governments to provide the space for operations, leading to compromises with its policy of keeping the government side as it oftentimes entails softening its public criticisms of government policies falling below international standards.[94]

In spite of these constraints, UNHCR has promoted new models of refugee protection in India that involve collaboration with civil society organizations, strategic support to litigation, and community-based protection. These are innovative responses to institutional deficits but demonstrate the underlying tension between UNHCR's protection role and the political environment in which it must conduct its operations.

3.4.4 TOWARDS INSTITUTIONAL REFORM

The criticism of UNHCR operation and mandate demands would need institutional change. Various proposals have been put on the table, ranging from reforming the financing system in an attempt to cut the reliance on voluntary state funding, improving mechanisms of accountability, increasing participation of refugees in decision-making, and further developing current burden-sharing arrangements between states. The 2018 Global Compact on Refugees is a bid to tackle some of these structural issues by encouraging more predictable and fair responsibility-sharing between states. But its voluntary nature and weak implementation modalities leave one to wonder if it can transform the international refugee protection regime in a significant way.

Ultimately, even if UNHCR is still a vital institution in the international regime of refugee protection, closer examination of its mandate discloses built-in limitations that detract from its effectiveness. They are not administrative hurdles but evidence of inherent contradictions in the international refugee regime between human rights protection and state sovereignty, between humanitarian response and political solution, and between institutional mandates and operating realities. To resolve such tensions will require not only

[94] Jessica Field, "Bureaucratizing Protection: Refugee Registration and Integration in Urban India," Journal of Refugee Studies 35, no. 1 (2022): 347-366.

UNHCR reform but a general rethink by the international community of how it approaches refugee protection.

CONCLUSION

The global normative order for refugee protection is a testament to the growing dedication of humanity to shielding those who are compelled to escape violence and persecution. From the inaugural 1951 Convention to contemporary regional novelties and the increasing UNHCR mandate, the regime has proven exceedingly resilient in meeting emerging displacement challenges. However, as the chapter has shown, significant norm-practice gaps persist. The success of regional initiatives, such as the Cartagena process in Latin America, shows that protection success relies not just on a good balanced legal framework but also on politically committed implementation mechanisms and contextually adjusted implementation mechanisms.

Concurrently, the cogent critique of UNHCR's role demonstrates how institutional limitations—like dependency on resources, political constraints, and operational impediments—can impede protection success even in a good legal framework.

For India and other non-acceded countries, this international system continues to shape refugee protection in the form of customary international law, human rights norms, and UNHCR presence. The contradictions of the international refugee regime—between sovereignty and human rights, security and humanitarianism—are reflected in India's response to refugee protection. As later chapters will examine, India's constitutional structure and juridical evolution have yielded surrogate protection mechanisms similar to but distinct from international norms.

The challenge is to aggregate such protective measures higher while bracing against implementation deficiencies leaving most refugees at risk. Ultimately, successful refugee protection is not so much a question of legal tools as of political will, institutional capability, and of understanding that protecting those who flee persecution is not a display of charity but an elemental responsibility born of our common humanity.

CHAPTER 4: CONSTITUTIONAL PROTECTION OF REFUGEES: COMPARATIVE ANALYSIS

INTRODUCTION

The constitutional safeguard of refugees is one of the most profound locations of convergence between universal norms of human rights and state sovereignty. Constitutional frameworks are at this point key mediating tools in determining the functional scope and effectiveness of refugee entitlements in national legal systems. Comparative studies of constitutional methods of protecting refugees in various jurisdictions and the manner in which constitutional provisions, judicial interpretations, and broader legal systems construct national regimes of refugee protection are discussed in this chapter.

The constitutional protection of refugees is especially important because it raises the level of refugee rights from the realm of normal politics and legislative discretion. Compared to statutory protection that can still be susceptible to being altered or even revoked by simple majority actions, constitutional protection infuses refugee rights with a stronger basis that can resist political upheavals and fleeting outbursts of anti-refugee sentiment. By viewing this through a comparative filter, we can make out patterns, recognize best practices, and draw useful lessons for consolidating India's constitutional response to protecting refugees.

The chapter starts with classifying and examining the main mechanisms of constitutional protection used in the jurisdictions: direct constitutional provisions absolutely dealing with asylum rights, mechanisms of applying international law under the constitution, and innovative judicial extension of general guarantees of rights. Each approach reflects various history, legal culture, and political accommodations of the status of the refugee within regimes of the constitution.

The comparative inquiry then goes on to analyze three exemplar case studies—Germany, South Africa, and Canada—that have been chosen due to their unique constitutional strategies and relevance to the Indian political and legal environment. Germany shows the difficulties and development of a strong textual constitutional right to asylum; South Africa exemplifies the potential and constraints of entrenching refugee protection within an universalist system of rights; and Canada reveals how effective protection can be built through judicial construction without the need for specific constitutional wording.

By this comparative analysis, the chapter will unearth transferable principles and practices that can ultimately help shape the development of India's constitutional law of refugee protection. Observing how other constitutional democracies have attempted to balance universal human rights obligations with sovereignty powers in the realm of refugees, we can better critically evaluate the possible and boundaries for constitutional protection of refugees in India's particular history, geopolitics, and jurisprudence.

4.1 CONSTITUTIONAL PROTECTION MEASURES

4.1.1 DIRECT CONSTITUTIONAL PROVISIONS

The most effective type of protection for refugees comes when constitutions themselves enshrine asylum as an unalienable right. Unlike regular law, constitutional clauses safeguard refugee rights against the winds of political convenience and popular whim. Provisions differ wildly in form—some make individual rights and others declare state obligations—but they have in common that they bring refugee protection to the highest point of national legal power. Germany's Basic Law offers perhaps the most famous instance of direct constitutional protection, stating merely that "persons persecuted on political grounds shall have the right of asylum."[95]

This unqualified language, taken in 1949 in the shadow of Nazi persecution, deliberately casts asylum as a personal right and not a discretionary state policy. The same article appears in the constitutions of France, Italy, and many Latin American nations, though usually accompanied by qualifying phrases not found in the German original. More recently prepared constitutions are more advanced in their strategy. The 1976 Portuguese Constitution provides asylum for "foreigners and stateless persons who are suffering persecution or are gravely threatened with persecution, as a result of their actions in favor of the cause of democracy, national and social liberation, peace among people, freedom and human rights."[96]

This definition narrows the sphere of protection as well as enlarging it beyond the normal refugee definition by stressing the cause of democratic ideals rather than grounds of persecution. Their real effect in actual life relies significantly on the phrasing of provisions precisely. Provisions stating justiciable individual rights in a constitution (with phrases such as "shall have the right" or "is guaranteed") are stronger protection than provisions only requiring the state to provide asylum in accordance with the law. Likewise, provisions stating groups protected to be broad are more adaptable than those depending on general persecution standards. Even where there are constitutional provisions, they can be subject to implementing legislation and judicial interpretation. The Italian constitutional guarantee of asylum was in effect dormant until stimulated by European Union efforts at harmonization in the 1990s. In contrast, Hungary's constitutional guarantee of asylum has been increasingly drained of substance by restrictive implementing legislation despite the provision's otherwise strong textual language.

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[95] Grundgesetz [GG] [Basic Law] art. 16a, translation at http://www.gesetze-im-internet.de/englisch_gg/index.html (Ger.).
[96] Constituição da República Portuguesa [Constitution] art. 33(8) (Port.).

4.1.2 INTEGRATION OF INTERNATIONAL LAW

Most constitutions indirectly safeguard refugees by enacting international law as part of the domestic law of the country. This is not a direct reference to asylum or refugee status but rather makes international refugee commitments constitutional commitments. The Dutch Constitution also pursues this policy by enacting that "provisions of treaties and of resolutions of international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published."[97] This provision is providing direct effect to the 1951 Refugee Convention in Dutch law with constitutional status.

The degree and type of integration vary greatly among legal systems. Whereas some constitutions, e.g., Austria's and Switzerland's, automatically incorporate ratified treaties into domestic law, others, e.g., Spain's, require implementing legislation but prioritize treaties over ordinary statutes. The strongest protection systems, e.g., Portugal's and some Latin American countries', grant human rights treaties constitutional rank or even priority over constitutional provisions themselves. Constitutional engraftment possesses a number of advantages over specific provisions for asylum. It refreshes national safeguard at regular intervals as and when international standards advance with new protocols or interpretations. It provides broader coverage through protection of the whole range of rights of refugees except non-refoulement.

Above all, it connects domestic refugee protection with international standards in a manner that international progress turns out to be pertinent to constitutional interpretation. But incorporation also causes issues. Experienced domestic courts applying domestic law might find it difficult to interpret international instruments accurately. The tension between incorporated treaties and other provisions of the constitution can cause interpretative challenges, especially when the treaty obligations seem to be incompatible with other constitutional values. Additionally, in dualist legal systems where implementing legislation is necessary, the constitutional incorporation of treaties may not generate immediately enforceable individual rights without legislation.

The success of incorporation also depends greatly on judicial willingness to give effect to international commitments. In Sweden, despite post-constitutional incorporation of the European Convention on Human Rights, courts were reluctant initially to apply Convention provisions directly. Germany's Constitutional Court has, however, successfully applied international commitments to refugees and asylum seekers despite a lack of express language of incorporation, showing that judicial culture will often be more significant than constitutional wording.

[97] Grondwet voor het Koninkrijk der Nederlanden [Constitution] art. 93 (Neth.).

4.1.3 JUDICIAL INTERPRETATION

Courts have found refugee protection in general constitutional principles without the necessity of formal constitutional provisions or treaty incorporation. This approach uses creative judicial interpretation to extend existing rights to the refugee case. The United States Supreme Court's INS v. Cardoza-Fonseca ruling is a prime example of this approach, interpreting the Due Process Clause of the Constitution as requiring effective protection against return to persecution.[98] Constitutional courts have found protection as a refugee in a range of constitutional provisions. The right to life underpins non-refoulement duties, since to send someone to probable death would be an infringement of this most basic of rights.

Constitutional prohibitions against torture or inhuman treatment logically apply to exclude return to torture. Even procedural protections such as due process and equality before the law have been interpreted to mandate fair refugee status determination processes. The Indian Supreme Court led the way in doing so in its seminal NHRC v. State of Arunachal Pradesh ruling, holding that the constitutional right to life guaranteed refugees protection against forced repatriation even in the absence of India's accession to the Refugee Convention.[99]

Likewise, the Constitutional Court of Colombia has construed the right to asylum as inherent in constitutional guarantees of human dignity and international solidarity, in effect constitutionalizing refugee protection even in the lack of express wording. This interpretative framework enables to evolve constitutional protection based on emerging displacement challenges. When Ecuador's Constitutional Court was faced with Venezuelan displacement, it construed the constitutional right to migration to include broader protection than the narrow Convention definition, enabling humanitarian protection on wider grounds than tight Convention stipulations.[100]

Such flexibility is a significant strength compared to rigid constitutional texts. Despite the formal commitment of rights-protecting jurisprudence, judicial interpretation remains susceptible to shifting court composition and political pressure. The broad Israeli Supreme Court interpretation of constitutional protection of asylum seekers a few years ago has narrowed since then with increasing political hardening.

Likewise, the U.S. Supreme Court has swung between liberal and conservative interpretations of constitutional refugee protection based on its membership. Notwithstanding these constraints, judicial interpretation must enforce effective constitutional protection. Even the clearest constitutional terms must be interpreted if they are to be applicable to intricate refugee cases. Courts have to decide what amounts to persecution, how refugee rights must be weighed against security interests, and how international commitments are to be balanced against domestic constitutional values. These

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[98] INS v. Cardoza-Fonseca, 480 U.S. 421 (1987).
[99] Nat'l Human Rights Comm'n v. State of Arunachal Pradesh, (1996) 1 SCC 742 (India).
[100] Corte Constitucional [C.C.] [Constitutional Court], agosto 5, 2019, Sentencia T-344/19 (Colom.).

4.2 COMPARATIVE ANALYSIS OF CONSTITUTIONAL SAFEGUARDS

4.2.1 GERMANY

Germany's constitutional protection of refugees has a special place in comparative constitutional law—both because of its historical origin and because of what followed. Article 16a of the Basic Law initially established an absolute right of asylum by simply declaring that "persons persecuted on political grounds shall have the right of asylum."[101] This extremely sweeping formulation was a reflection of Germany's historical guilt for producing refugees in the Nazi era and was the product of heated constitutional debate as to how to avoid persecution in the future.

The Basic Law's asylum provision established a directly enforceable individual right separate from most constitutional provisions that only guide state policy. The Federal Constitutional Court interpreted this provision broadly, in a series of landmark rulings determining that the right applied no matter how the asylum seeker had traveled to Germany, that it encompassed protection against non-state persecution, and that it mandated individualized review of each case.[102] This broad interpretation drew half a million or more asylum seekers to Germany during the early 1990s after the Soviet Union dissolved.

This influx precipitated a constitutional compromise in 1993 that retained the right of asylum but imposed substantive limitations. The amended Article 16a included exclusion provisions from asylum for arrivals from "safe third countries" or from "safe countries of origin."[103] These restrictions effectively steered Germany's system of asylum towards European harmonization rather than unilateral protection. Despite such curbs, Germany's constitutional system is still one of the freest in the world. The Federal Constitutional Court has continued to scrutinize asylum limitations stringently, nullifying provisions effectively excluding protection from those whose claims are legitimate. In its landmark 1996 airport procedures case, the Court held that expedited procedures remain necessary in order to afford meaningful opportunity to file claims and access legal advice.[104]

Likewise, the Court has demanded that "safe country" determinations be based on objective criteria and be subject to individual rebuttal. Germany's experience indicates the longevity and constraints of constitutional asylum promises. The constitutional guarantee established an energetic protection regime that survived extraordinary political pressure but eventually had to be altered in order to work within a regional setting. Most of all, it judicialized

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[101] Grundgesetz [GG] [Basic Law] art. 16a, translation at http://www.gesetze-im-internet.de/englisch_gg/index.html (Ger.).
[102] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 10, 1989, 2 BvR 502/86, 2 BvR 1000/86, 2 BvR 961/86 (Ger.).
[103] Grundgesetz [GG] [Basic Law] art. 16a(2)-(3), translation at http://www.gesetze-im-internet.de/englisch_gg/index.html (Ger.).
[104] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 14, 1996, 2 BvR 1516/93 (Ger.).

4.2.2 SOUTH AFRICA

Protection by South Africa of refugees in its constitution followed having moved from apartheid to democracy and reflecting on the history of forced expulsion in South Africa and respect for human rights. Section 36 of the 1996 Constitution refers to "everyone" and not specifically refugees but states that "everyone" enjoys constitutional rights—the Constitutional Court has interpreted this to include non-citizens such as refugees and asylum seekers.* The protection of refugees under the Constitution is largely based on Section 7(2), where the state has an obligation to "respect, protect, promote and fulfill the rights in the Bill of Rights."*

This positive obligation is extended to the refugees in South Africa, which imposes constitutional obligations of over a mere non-interference. The Constitutional Court has interpreted this provision to impose on the government a positive obligation to ensure the protection of refugee rights, including access to social services, protection from xenophobic attacks, and fair status determination procedures. South Africa's model is unique in the manner in which it incorporates refugee protection within universal rights protection. Instead of establishing a distinct regime of refugee rights, the Constitution encompasses refugees within its universal regime of rights. This has enabled the Constitutional Court to borrow mature constitutional jurisprudence in addressing refugee cases, applying principles developed in housing, health care, and education cases to enforce refugee rights. The Union of Refugee Women decision of the Court illustrates this position.*

When Parliament banned refugees from work in security jobs, the Court subjected such exclusion to test under the Constitution's equality provisions, requiring rational basis for differential treatment. While ultimately upholding the restrictions, the Court ruled that legislative distinction on grounds of immigration status was open to review under the Constitution—a test subsequently followed in other refugee cases. Perhaps most notably, South Africa's constitutional climate has conditioned implementing law. This 1998 Refugees Act formally evokes constitutional norms and encompasses wider protections than the 1951 Convention necessitates.*

The coincidence of constitutional norms and statute has created a cohesive refugee protection regime in spite of challenges in implementation. The South African experience discloses the ways in which constitutional protection can work effectively without specific asylum guarantees. In putting refugees within its general system of universal rights, the Constitution establishes elastic protection that responds to evolving displacement patterns. But it also discloses the limitation of constitutional protection when there is limited implementation capacity—court victories are empty where administrative machinery has no resources to realize them in practice.

4.2.3 CANADA

Canada's constitutional protection of refugees is an example of the manner in which rights guarantees may be crafted through judicial interpretation even in the absence of explicit constitutional language. There is no asylum provision in Canada's Charter of Rights and Freedoms, yet the Supreme Court has developed strong refugee protections by creative interpretation of general rights guarantees. The Court's Singh v. Minister of Employment and Immigration decision effectively reformed Canadian refugee protection by the conclusion that the Charter's Section 7 right of "everyone has the right to life, liberty and security of the person" would extend to refugee claimants who were present in Canada.*

The decision enshrined refugee protection in the Constitution by the assurance that claimants would be afforded fundamental justice prior to removal to persecution. The Court subsequently broadened this protection in Suresh v. Canada, finding that deportation to torture would "generally" be contrary to Section 7 rights even for those not protected as refugees* In granting a limited theoretical exception for extreme cases, the Court created a presumption against refoulement beyond the commitments under the Refugee Convention. This constitutional prohibition is separate from statutory refugee protection and provides an alternative regime of protection for those facing serious harm. The Canadian practice demonstrates how constitutional values can shape statutory interpretation even in the absence of direct application.

In Pushpanathan v. Canada, the Court restricted the exclusion clauses of the Refugee Convention to align them with Charter values on the premise that constitutional protection of life and security was the basis for international obligations.* Such an interpretative strategy guarantees that refugee legislation operates in conformity with constitutional standards even when the Charter does not apply directly. The Canadian experience also highlights the importance of constitutional procedural protections. The Court has consistently held that procedures for deciding refugees have to be in accordance with principles of fundamental justice, including the right to be informed of the case to meet, the opportunity to present evidence, and access to meaningful appeal.

These procedural protections have been as important as substantive protections in ensuring effective protection for refugees. Despite these strengths, Canada's constitutional tradition is shown to have some weaknesses. The Court has generally deferred to legislatures on policy choices on immigration matters, only interceding where core rights are threatened. This deference has allowed Parliament to implement restrictive policies like the Safe Third Country Agreement with the United States, to which the Court has given assent despite objections on a rights basis.* Such a balancing act between protecting core rights and allowing policy liberty is typical of constitutional refugee protection in liberal democracies.

4.2.3.1 CANADA'S MODEL: A PROCEDURAL FAIRNESS ANALYTICAL APPROACH

Canada's constitutional protection of refugees is the paradigm example of a unique procedural fairness analytical methodology that has been at the very centre of its jurisprudence on refugees. The methodology is marked by the Supreme Court's systematic building of procedural protections as the main manner in which substantive rights to refugees are established and enforced. [105] Although Canada does not have explicit constitutional provisions on refugee rights, the Court has built systematically a strong procedural framework that constitutionally ensures refugee protection through interpretive mechanisms. The institutional framework of procedural fairness in Canadian refugee law functions through three interconnected mechanisms.

First, the Court has governed that procedural safeguards are not side matters but are constituent features of constitutional justice wherein fundamental rights such as life, liberty, and security of person are implicated. In Singh, the Court held that oral hearings were constitutionally necessary where credibility was in issue, essentially constitutionalizing procedural requirements.[106] This was a departure from more traditional administrative law practice that had long given substantial deference to government decision-making in the face of immigration cases. Second, the Canadian approach is founded on an analytical continuum of procedural safeguards that aligns with the seriousness of potential effects on rights.

The Court formulated this principle in Suresh, where it stated that "the greater the effect on the life of the individual by the decision, the greater the need for procedural protections to meet the common law duty of fairness and the requirements of fundamental justice under s. 7 of the Charter." [107] This framework has enabled the Court to adjust procedural protections to the severity of the possible consequences, with refugee and non-refoulement proceedings being the object of the highest order of procedural safeguards due to the life-altering implications of faulty decisions. Third, the Canadian model uses what has been called "procedural substantiation"—utilizing procedural requirements as a lever to indirectly apply substantive rights protection.[108] That is on display in decisions such as Nemeth v. Canada, where the Court insisted that extradition procedures include consideration of refugee protection and used procedural measures effectively to safeguard substantive human rights protections.[109]

Likewise, in Febles v. Canada, the Court's interpretation of exclusion clauses entailed procedural conditions that operationallyizable limited government discretion to exclude refugees based on criminality without adequate individualized consideration. [110] The procedural fairness approach has been well-suited to the Canadian environment for a

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[105] Audrey Macklin, *Standard of Review: Back to the Future?*, in *Administrative Law in Context* 381, 410-15 (Colleen M. Flood & Lorne Sossin eds., 3d ed. 2018)
[106] Singh v. Minister of Emp. & Immigr., [1985] 1 S.C.R. 177, 213-14 (Can.)
[107] Suresh v. Canada (Minister of Citizenship & Immigr.), [2002] 1 S.C.R. 3, para. 118 (Can.)
[108] David Dyzenhaus & Evan Fox-Decent, *Rethinking the Process/Substance Distinction: Baker v. Canada*, 51 U. Toronto L.J. 193, 229-32 (2001)
[109] Nemeth v. Canada (Just.), [2010] 3 S.C.R. 281, paras. 50-51 (Can.) (holding that extradition procedures must incorporate consideration of refugee protection factors to comply with constitutional requirements).
[110] Febles v. Canada (Citizenship & Immigr.), [2014] 3 S.C.R. 431, paras. 60-62 (Can.)

number of reasons. It lends judicial legitimacy by enabling courts to intervene on ostensibly technical grounds of procedure rather than ostensibly challenging executive policy choices in the field of immigration directly. It is also flexible in enabling courts to scale the intensity of review according to the particular factual circumstances and right implications of the case before them.

More significantly, it has system-wide implications beyond individual cases by creating procedural frameworks that then limit administrative discretion throughout the refugee determination process. There are criticisms of the procedural fairness model as well. It is claimed that, in focusing on procedural concerns, courts will at times sidestep the challenge of confronting substantive rights breaches head-on. The method also imposes heavy burdens on refugee claimants to navigate progressively more complex procedural regimes, sometimes necessitating legal representation they do not have.

Lastly, as the Safe Third Country Agreement examples illustrate, procedural fairness can even be inadequate to avoid violations of rights where the policy architecture itself systematically exposes refugees to danger.[111] Yet Canada's procedural fairness model is a valuable one for constitutional refugee protection, especially for countries like India that have no explicit constitutional provisions for the safeguarding of refugees' rights. The Canadian model illustrates how broad constitutional provisions and procedural mechanisms can be employed by courts to develop substantive refugee protections and, in doing so, constitutionalize refugee rights through interpretive mechanisms rather than express textual acknowledgment.

4.3 CONSTITUTIONAL LIMITS OF PROTECTION

Constitutional protection of refugees, though strong, has natural limitations that curb its application. These are due to constitutional design, problems in implementation, and the conflict between universal rights and sovereign discretion. The first main limitation is geography—constitutional guarantees usually depend on territorial presence to activate guarantees of rights. This ban challenges states to discourage asylum seekers from arriving on their soil through visa imposition, carrier sanctions, naval intercepton, and extraterritorial processing. Australia's "Pacific Solution" is an example, processing asylum claims in offshore centers in order not to have constitutional duties that would follow on Australian soil.*

The European Union's deal with Turkey and Libya serves the same purpose of discouraging arrivals that would attract constitutional protection in member states. Constitutional protections also fail to fill gaps between judicial language and administrative practice. South Africa's Constitutional Court has enforced strong refugee rights, but they remain largely on paper because of failures in asylum system administration. Ecuador's liberal constitutional safeguards for immigrants have not been translated into compliance in the context of rampant discrimination and exclusion in practice. This failure in enforcement

[111] Canadian Council for Refugees v. Canada (Immigr., Refugees & Citizenship), 2020 FC 770 (Can.)

demonstrates the limitations of constitutional rights in the absence of concomitant administrative capability and political will.

The counter-majoritarian quality of constitutional protection also generates additional obstacles. In applying refugee rights over the opposition of the majority, courts risk political retribution that can destroy constitutional authority generally. Hungary's constitutional court largely gave up careful consideration of refugee limits once it had been politically attacked, and Poland's constitutional tribunal increasingly refused executive security rulings in asylum matters. This tension between democratic governance and protection of rights is particularly acute in cases of refugees in which nationalist zeal is likely to be high. Perhaps most basically, constitutional protection cannot reconcile the tension between universal rights and sovereignty over territory.

Constitutions protect universal human rights and national self-determination alike, and therefore there is a basic contradiction in refugee cases. Courts have dealt with this tension mostly by offering procedural rights and a safeguard against extreme harm but leaving legislative discretion over the general policy of refugees to the government. This compromise offers necessary protection while maintaining democratic control over immigration.

In spite of these limitations, constitutional protection is still indispensable in refugee crises. It provides countercyclical protection whenever the political mood swings against asylum seekers, guarantees that even in the absence of international mechanisms for enforcement, there are minimum standards, and creates institutional protection against rights abuse. Above all, it shifts refugee protection from humanitarian charity to legal obligation, ensuring that even non-citizens possess some basic rights which states are obligated to uphold.

The comparative study demonstrates that effective constitutional protection is more a function of general constitutional culture than detailed textual provisions. Germany's clear wording asylum right conferred robust protection but needed amendment to work in the European regional context. Canada's broad guarantees of rights, under purposive judicial interpretation by a rights-affirming judiciary, have built similarly robust protection without clear asylum language. South Africa's universalist rights framework has been thwarted by implementation despite robust constitutional underpinnings.

Such diverse experience implies that constitutional protection works most effectively within a multi-layered protection framework encompassing international commitments, regional action, and national law. Constitutional provisions set minimum norms and interpretive standards, and implementing legislation adds requisite detail and administrative organization. This complementary interaction makes refugee protection responsive to shifting displacement patterns while still providing essential guarantees against return to persecution.

4.4 INSTITUTIONAL TENSIONS: DOMESTIC COURTS AND PARLIAMENT IN REFUGEE PROTECTION

4.4.1 INSTITUTIONAL CONFLICT THEORETICAL FRAMEWORK

Constitutional protection of refugees tends frequently to provoke institutional tension between the judiciary and legislature, a reflection of the inherent tension between universal human rights norms and sovereign authority over immigration.[112] This tension is seen in what scholars have termed "counter-majoritarian difficulty" as courts defending rights against democratic majorities, most dramatically felt in cases of refugees where nationalist impulses are typically intense.[113]

The tension between the judiciary and legislature over refugee protection derives from three primary sources: institutional sense of role responsibility, approach to interpretation, and the implicit tension between rights protection and policy discretion. Courts generally view their role as protectors of constitutional rights irrespective of citizenship, while legislatures are interested in sovereign control of borders and are responsive to constituent anxiety regarding immigration.[114] These institutionally different perspectives generate a tension of structure in the cases of protection for refugees. Over and above this, courts and legislatures use effectively different approaches to interpretation of the law of refugees—courts generally exercising general, rights-oriented constructions of constitutional provisions, and legislatures seeking narrow constructions that preserve room for policy maneuver.[115]

Most importantly, refugee protection is the ultimate test of weighing state sovereignty and individual rights. Constitutional courts insist that refugees have essential rights regardless of citizenship, whereas legislatures argue that immigration control is a fundamental sovereign right.[116] This sub-section explores how institutional confrontations played out in various constitutional regimes and compares alternative strategies of protecting rights with democratic governance.

4.4.2 GERMANY: CONSTITUTIONAL COURT VERSUS BUNDESTAG

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[112] David A. Martin, *Constitutional Rights and Unauthorized Migrants: Comparative Perspectives from the United States and Europe*, 40 Geo. J. Int'l L. 301, 307-12 (2009)
[113] Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 16-23 (1962)
[114] Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 Sup. Ct. Rev. 255, 260-78 (1984)
[115] Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 Yale L.J. 545, 560-75 (1990)
[116] Catherine Dauvergne, *Sovereignty, Migration and the Rule of Law in Global Times*, 67 Mod. L. Rev. 588, 592-98 (2004)

Germany's experience most clearly demonstrates the institutional tension between courts and legislature in safeguarding refugees. The Federal Constitutional Court's liberal interpretation of the Basic Law's asylum article during the 1980s and early 1990s—providing protection to victims of persecution at the hands of non-state perpetrators and mandating individualized hearings—faced the Bundestag squarely in its post-Soviet migration crisis policy decisions.[117] The Court's broad rulings essentially took policy power out of the hands of the legislative and placed it in the hands of the judicial, triggering political resentment.

The following 1993 "asylum compromise" was a melodramatic bill to counter judicial activism, amending Article 16a of the Basic Law to include "safe third country" and "safe country of origin" ideas.[118] The constitutional amendment was parliament's show of muscularity to reclaim refugee policy from the Court. The amendment did no more than rearrange the terrain of the institutional battle. The Court subsequently asserted jurisdiction over enforcement of the new provisions, testing "safe country" designations and procedural protection.[119] In its landmark 1996 Airport Procedures ruling, the Court established that speedy proceedings in transit zones were still constitutionally acceptable but only with robust procedural safeguards such as access to representation and meaningful rights of appeal.[120]

Likewise, in Dublin Convention and EU asylum procedures cases, the Court has continued capacity to oversee transfers to third states in the European Union to ensure minimal low standards of human rights compliance.[121] This constant judicial review of legislative and executive implementation demonstrates how institutional tension continues to be clear even in the wake of seeming legislative triumph. The German case illustrates that constitutional courts have been able to respond to legislative counterattack not by withdrawing in its entirety but by establishing procedural limits against legislative arbitrariness. Even partial concord on the nature of legislative policy choices, courts maintain control over procedural fairness and minimal protection of rights.[122] The procedural recourse provides a middle solution to the counter-majoritarian dilemma in maintaining democratic guidance of policy while protecting basic rights through the judiciary.

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[117] Gerald L. Neuman, *Buffer Zones Against Refugees: Dublin, Schengen, and the German Asylum Amendment*, 33 Va. J. Int'l L. 503, 520-25 (1993)

[118] Grundgesetz [GG] [Basic Law], Art. 16a, translation at http://www.gesetze-im-internet.de/englisch_gg/index.html (Ger.)

[119] Kay Hailbronner, *Asylum Law Reform in the German Constitution*, 9 Geo. Immigr. L.J. 159, 169-73 (1995)

[120] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 14, 1996, 94 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 166 (Ger.)

[121] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 17, 2019, 2 BvR 1380/19 (Ger.)

[122] Christian Joppke, *The Judicial Construction of Immigration*, in Immigration and the Judiciary: Law and Politics in Britain and America 49, 60-65 (1998)

4.5 INSTITUTIONAL TENSIONS: DOMESTIC COURTS AND PARLIAMENT IN REFUGEE PROTECTION

4.5.1 THEORETICAL FRAMEWORK OF INSTITUTIONAL CONFLICT

Constitutional protection of the refugee has the tendency to produce institutional tension between the legislature and the courts, an expression of the inherent tension between universal human rights norms and sovereign power over immigration.[123] This tension appears in what has been expressed as "counter-majoritarian difficulty"—courts imposing rights on democratic majorities, a tension most acutely felt in refugee cases where xenophobic emotions are usually at their highest.[124]

The court-legislative conflict in enforcing refugees has three major sources: perception of the institution's role, interpretation approach, and the inbuilt tension between discretion in policy and protection of rights. Courts in general view their function as protectors of constitutional rights without respect to citizenship status, while legislatures prefer to keep sovereign authority over borders and respond to constituent concern over immigration.[125]

These different institutional views put a tension in form on cases of refugee protection. In addition, courts and legislatures interpret refugee law in effectively different manners—courts by and large using broad, rights-based interpretations of constitutional provisions, while legislatures resort to limiting interpretations that do not foreclose policy flexibility.[126] Most basically, protection of refugees is the ultimate line of tension between state sovereignty and human rights.

Constitutional courts maintain that refugees possess inalienable rights that baffle citizenship, while legislatures maintain that control of immigration is a core sovereign prerogative.[127] This subsection explores how these institutional tensions have been worked out through alternative constitutional designs and considers various models for reconciling rights protection and democratic choice.

4.5.2 GERMANY: CONSTITUTIONAL COURT VERSUS BUNDESTAG

Germany's history possibly best illustrates the institutional conflict between courts and legislature in safeguarding refugees. The established general interpretation of the Basic Law's asylum clause by the Federal Constitutional Court during the 1980s and early

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[123] David A. Martin, *Constitutional Rights and Unauthorized Migrants: Comparative Perspectives from the United States and Europe*, 40 Geo. J. Int'l L. 301, 307-12 (2009)
[124] Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 16-23 (1962)
[125] Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 Sup. Ct. Rev. 255, 260-78 (1984)
[126] Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 Yale L.J. 545, 560-75 (1990)
[127] Catherine Dauvergne, *Sovereignty, Migration and the Rule of Law in Global Times*, 67 Mod. L. Rev. 588, 592-98 (2004)

1990s—enlarging protection to victims of non-state persecution and mandating individualized hearings—pragmatically forced the policy preferences of the Bundestag during the post-Soviet migration crisis.[128]

The Court's expansive rulings effectively pushed policy-making from the legislative to the judiciary. Political backlash was invited. The subsequent 1993 "asylum compromise" was a far-reaching legislative overreaction to judicial activism, modifying Article 16a of the Basic Law to introduce "safe third country" and "safe country of origin" provisions.[129] The constitutional amendment served to show how far the legislature would go to reclaim jurisdiction of refugee policy from the Court. But instead of bringing the institutional battle to closure, the amendment only changed its ground. The Court then assumed jurisdiction over the enforcement of the new provisions, reviewing "safe country" designations and procedural protections.[130]

In its seminal 1996 Airport Procedures ruling, the Court held expedited procedures in transit zones constitutional, but only where substantial procedural protections, such as access to counsel and meaningful appeal rights, existed.[131] Likewise, in Dublin Convention and EU asylum rule rulings, the Court has continued to assert jurisdiction to determine whether removals to other European nations are minimally compliant with human rights standards.[132]

This continued judicial oversight of legislative and executive implementation is an unmistakable example of how institutional tension persists even when there appears to be legislative success. The German experience also shows that constitutional courts can counter legislative resistance not by withdrawing but by exercising procedural restraints on legislative discretion. Accepting the legislature's substantive policy choices to some extent, courts maintain jurisdiction over procedural justice and bare minimum protection of rights.[133] This procedural remedy provides a partial solution to the counter-majoritarian dilemma by maintaining democratic control over policy while guaranteeing courts' protection of fundamental rights.

4.5.3 UNITED KINGDOM: PARLIAMENTARY SUPREMACY AND JUDICIAL REVIEW

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[128] Gerald L. Neuman, *Buffer Zones Against Refugees: Dublin, Schengen, and the German Asylum Amendment*, 33 Va. J. Int'l L. 503, 520-25 (1993)

[129] Grundgesetz [GG] [Basic Law], Art. 16a, translation at http://www.gesetze-im-internet.de/englisch_gg/index.html (Ger.)
[130] Kay Hailbronner, *Asylum Law Reform in the German Constitution*, 9 Geo. Immigr. L.J. 159, 169-73 (1995)
[131] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 14, 1996, 94 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 166 (Ger.)
[132] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 17, 2019, 2 BvR 1380/19 (Ger.)
[133] Christian Joppke, *The Judicial Construction of Immigration*, in Immigration and the Judiciary: Law and Politics in Britain and America 49, 60-65 (1998)

The United Kingdom presents a contrasting institutional paradigm where parliamentary supremacy has traditionally limited judicial authority in refugee matters. Without a written constitution, UK courts historically lacked power to invalidate legislation affecting refugee rights.[134] However, the incorporation of the European Convention on Human Rights through the Human Rights Act 1998 created new tensions between Parliament and courts. House of Lords (now Supreme Court) established a quasi-constitutional protection for refugees by wide interpretation of ECHR's Article 3 prohibition against torture and inhuman treatment.[135]

In R v. Immigration Officer at Prague Airport, the Law Lords decided that government pre-entry screening procedures of prospective asylum seekers were a violation of the non-refoulement principle.[136] In like manner, in Regina v. Secretary of State for the Home Department, ex parte Limbuela, the court decided that refusal of assistance to asylum seekers amounts to inhuman treatment pursuant to Article 3.[137]

Parliament's reaction has become increasingly assertive legislation that tries to restrain judicial engagement. The Nationality and Borders Act 2022 is the latest in this institutional conflict, with measures that are explicitly designed to preclude judicial determination of refugee law, for instance, statutory definitions of "persecution" and "particular social group" capping court-determined protection.[138]

The Act clearly sought to constrain certain removals from judicial review and to impose a statutory presumption against late evidence on asylum claims.[139] This is an illustration of how even in parliamentary supremacy regimes, courts have developed mechanisms to safeguard refugee rights from legislative overreach. UK courts have employed interpretive presumptions of parliamentarians' intent that they are obliged to adhere to international obligations, construing narrow negative provisions where this can be done.[140]

Courts have also demanded increasingly forcefully the factual underpinning of ministerial determinations of safe countries, effectively limiting executive discretion even under formal parliamentary supremacy.[141] The UK model illustrates how institutional tension between safeguarding refugees can be institutionalized even without constitutional judicial review because there are other channels through which the courts can restore rights protection against legislative intrusion.

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[134] Geoffrey Marshall, Constitutional Theory 57-61 (1971)
[135] R v. Immigration Officer at Prague Airport [2004] UKHL 55, [2005] 2 AC 1

[136] Id. at 51-53
[137] Regina v. Secretary of State for the Home Department, ex parte Limbuela [2005] UKHL 66, [2006] 1 AC 396 (appeal taken from Eng.)
[138] Nationality and Borders Act 2022, c. 36, §§ 29-32 (UK)
[139] Id. §§ 19-22
[140] Colin Harvey, *Time for Reform? Refugees, Asylum-seekers, and Protection Under International Human Rights Law*, 34 Refugee Surv. Q. 43, 51-54 (2015)
[141] R (G) v. Immigration Appeal Tribunal [2004] EWCA Civ 1731, [2005] 1 WLR 1445 (Eng.)

4.5.4 INDIA: JUDICIAL ACTIVISM IN A STATUTORY VACUUM

India is an exceptional example of institutional tension where judicial innovation has managed to constitutionalize refugee protection in the face of legislative apathy. India's Parliament has repeatedly refused to pass comprehensive refugee legislation or join the 1951 Refugee Convention on the premise that current immigration legislations offer adequate powers for refugee administration.[142] This vacuum in legislation has necessitated atypical judicial intervention. The Supreme Court of India, in a line of landmark decisions, has established a constitutional regime of refugee protection on the basis of common basic rights provisions.

In NHRC v. State of Arunachal Pradesh, the Court ruled that Article 21 constitutional right to life includes protection from being forcibly returned by state action to persecution and constitutionalized non-refoulement on a statutory basis.[143] The Court interpreted Article 21's provision that "no person shall be deprived of his life or personal liberty except according to procedure established by law" to cover all individuals physically present within India, both citizens and non-citizens.[144]

Thus, in Louis De Raedt v. Union of India, the Court held that Article 14 (equality before law) procedural safeguards apply even to determination of refugee status, mandating fair hearings even for foreign nationals.[145] Particularly strongly, in Nandita Haksar v. State of Manipur, the Manipur High Court invoked constitutional norms to prohibit deportation of Myanmar refugees escaping military rule despite a central government policy of non-interference.[146]

This constitutionalization by the courts has placed a tremendous amount of pressure on Parliament and the executive branch. The government has consistently asserted that refugee protection and acceptance is an option for policy outside judicial review, proclaiming that the courts are institutionally incapable of determining foreign policy implications of refugee admissions.[147] Parliament's tactical failure to pass refugee legislation has been read by the executive as maintaining discretionary powers, which judicial decisions have eroded incrementally.

The Indian case illustrates perhaps the most extreme manifestation of tension between institutions—courts imposing procedural and substantive safeguards in contradiction to the legislative choice not to provide such safeguards by law. This judicial legislation has been defended on the grounds that constitutional protections override legislative silence, creating

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[142] B.S. Chimni, *The Legal Condition of Refugees in India*, 7 J. Refugee Stud. 378, 382-87 (1994)

[143] NHRC v. State of Arunachal Pradesh, (1996) 1 SCC 742 (India)
[144] Id. at para. 20
[145] Louis De Raedt v. Union of India, (1991) 3 SCC 554 (India)
[146] Nandita Haksar v. State of Manipur, (2021) SCC Online Mani 234 (India)
[147] Rajeev Dhavan, *Refugee Law and Policy in India* 25-31 (2004)

a singular dynamic in which courts have essentially substituted interpretive and policy-making roles in refugee protection.[148]

4.5.5 CANADA: PROCEDURAL SOLUTION TO INSTITUTIONAL CONFLICT

Canada has evolved possibly the most advanced institutional compromise between legislative policy discretion and judicial review in safeguarding refugees. As elaborated in Section 4.2.3.1, the Canadian Supreme Court has been more concerned with procedural requirements of fairness than with restraints on policy content, establishing a more durable balance between institutional roles.[149] The procedural method started with Singh v. Minister of Employment and Immigration, in which the Court ruled that Section 7 of the Charter right to "life, liberty and security of the person" necessitated oral hearings in refugee status determinations where credibility was in question.[150] Instead of determining who is protected in terms of claimants, the Court attempted to compel procedurally fair determination procedures—a less intrusive means of judicial review preserving substantive policy options to Parliament. Parliament responded by establishing the Immigration and Refugee Board as a freestanding tribunal of quasi-judicial process, importing the Court's requirements of procedure into institutional shape while reserving Parliament control over the substance of refugee policy.[151] This was a bargain that left both branches' respective prerogatives intact—courts ensuring procedural justice, and Parliament deciding substantive criteria for protection.

The Canadian response has not completely eliminated institutional tension. In security cases, such as Suresh v. Canada, the Court has imposed substantive constraints on removal decisions, determining that deportation to torture would "generally" violate Charter rights even for those who are excluded from refugee protection.[152] Parliament has responded with legislation aimed at accelerating removal in security cases, creating continuing institutional discussion.[153]

But the Canadian model has been successful to a large extent to redirect institutional conflict into positive constitutional debate rather than confrontation. By being concerned with procedural protection instead of ultimate policy outcome, the courts have been sensitive to the legislative need for policy making while upholding a least minimum protection for rights.[154] The model is an acknowledgement that although Parliament gets to decide who the refugees are, the courts establish making refugees constitutional in terms of fairness.

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[148] Bhairav Acharya, *The Future of Asylum in India: Four Principles to Appraise Recent Legislative Proposals*, 9 NUJS L. Rev. 173, 176-81 (2016)
[149] See supra Section 4.2.3.1
[150] Singh v. Minister of Emp. & Immigr., [1985] 1 S.C.R. 177, 213-14 (Can.)
[151] Immigration Act, R.S.C. 1985, c. I-2, amended by S.C. 1992, c. 49 (Can.)
[152] Suresh v. Canada (Minister of Citizenship & Immigr.), [2002] 1 S.C.R. 3, para. 76 (Can.)
[153] Immigration and Refugee Protection Act, S.C. 2001, c. 27, §§ 77-87 (Can.)
[154] David Dyzenhaus, *The Politics of Deference: Judicial Review and Democracy*, in The Province of Administrative Law 279, 293-99 (Michael Taggart ed., 1997)

4.5.6 COMPARISONS AND CONSTITUTIONAL LESSONS

These comparative experiences suggest a variety of trends in institutional conflict over refugee protection. Intensity of conflict, to begin with, depends on the level of specificity in constitutional provisions—Germany's categorical right of asylum elicited more incisive confrontation than Canada's general Charter protections.[155] Specific constitutional guarantees enhance the courts with greater textual jurisdiction to overturn legislative tendencies, whereas general rights provisions invite courts toward more deferential, procedurally-oriented review.

Secondly, institutional conflict will be of a cyclical rather than linear nature with judicial activism followed by legislative pushback and judicial reinterpretation of newly legislated provisions.[156] Such a pattern leads one to suggest that institutional tension can be a long-standing component of constitutional protection of refugees and not a short-term phenomenon, purely because it captures the unavoidable tension between universal rights and democratic rule. Third, institutional adaptation has taken place to contain but not eradicate such conflict. These adaptations are:

Proceduralization: Courts more concerned with procedural protection than substantive results, as in the case of Canada;[157]

Margin of Appreciation: Courts showing more deference to legislator decisions in fields of policy competence or democratic sensibility, as in the European model;[158]

Constitutional Amendment: Constitutional wording altered to balance rights protection and policy flexibility, as in Germany's asylum compromise;[159]

Institutional Dialogue: Establishing forums for inter-branch discussion of refugee policy, as institutionalized in Australia's post-Plaintiff M61 reforms.[160]

These shifts make constitutional protection have to be institutionalized and not purely judicial or legislative discretion. The most secure models are what scholars have described

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[155] T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 Yale L.J. 943, 981-87 (1987)
[156] James B. Kelly & Michael Murphy, *Shaping the Constitutional Dialogue on Federalism: Canada's Supreme Court as Meta-Political Actor*, 35 Publius 217, 220-25 (2005)

[157] Martha Jackman, *Protecting Rights and Promoting Democracy: Judicial Review Under Section 1 of the Charter*, 34 Osgoode Hall L.J. 661, 668-73 (1996)
[158] Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 Eur. J. Int'l L. 907, 912-17 (2005)
[159] Kay Hailbronner, *Asylum Law Reform in the German Constitution*, 9 Geo. Immigr. L.J. 159, 169-73 (1995)
[160] Plaintiff M61/2010E v Commonwealth (2010) 243 CLR 319 (Austl.)

as "weak-form judicial review"—courts providing a minimum of rights protection with plenty of legislative discretion in policy selection retained.[161]

The constitutional design lesson is that refugees are most effectively protected, not by absolute constitutional protections that create institutional resistance, but by ones demanding procedural justice and safeguard against severe harm and maintaining democratic control over overall immigration policy. Constitutional systems that affirm both the refugee rights and the legitimate governance prerogatives of democratically chosen majorities are more enduring protection regimes than those enforcing absolute strictures in either direction.

4.5.7 IMPLICATIONS FOR INDIA

For India, these comparative lessons offer a variety of possible directions of advancement in ungridlocking the institutional deadlock between legislative passivity and judicial activism. The best strategy would be for Parliament to legislate master refugee law codifying the constitutional protection already articulated by the Supreme Court as well as setting out sharp procedures for determining status.[162] The law would lend democratic legitimacy to refugee protection without precluding judicial review of procedural implementation.

Without legislative intervention, Indian courts might consider adopting more evidently the Canadian model of procedural fairness—emphasizing creating stronger procedural requirements for settling refugees and deferring more to policy decisions on categories of refugees to accept.[163] This would preserve constitutional safeguards while minimizing direct institutional conflict on substantive policy determinations.

The institutional conflict between Indian protection of refugees and international ones reflects the underlying conflicts between democratic politics and universal human rights norms. Constitutional systems that better manage this tension understand that judicial protection is needed for refugee rights but that the very implementation of such rights is facilitated by democratic deliberation and policy expertise. Effective protection of the constitution does not flow from institutional dominance but from complementary institutional functions—courts providing for minimal standards and equitable procedures, legislatures determining broad policy designs, and executives executing the designs with necessary flexibility.[164]

This institutional compromise acknowledges the special refugee status in constitutional systems—neither citizen nor alien but individuals with special rights to state protection

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[161] Mark Tushnet, *Forms of Judicial Review as Expressions of Constitutional Patriotism*, 22 Law & Phil. 353, 355-58 (2003)

[162] Ninette Kelley, *International Refugee Protection Challenges and Opportunities*, 19 Int'l J. Refugee L. 401, 409-13 (2007)

[163] Audrey Macklin, *Standard of Review: Back to the Future?*, in Administrative Law in Context 381, 410-15 (Colleen M. Flood & Lorne Sossin eds., 3d ed. 2018)

[164] Stephen Legomsky, *Immigration and Refugee Law and Policy* 155-60 (6th ed. 2015)

short of formal membership. The constitutional challenge is to respect those rights without relinquishing democratic control over the national community, a balance achieved not through final resolution among branches of government but through continuous institutional dialogue.

4.6 THE NEED FOR INCORPORATING INTERNATIONAL LAW IN INDIA

The comparative examination of constitutional refugee protection regimes offers sharp lessons for India, which stands at a crossroads when it comes to its refugee protection strategy. Although it takes massive influxes of refugees from neighbouring states, India has no legislation on refugees or even explicit constitutional provisions for asylum seekers[165] This part discusses the need to incorporate principles of international refugee law into India's constitution, through lessons of comparative experience and consideration of India's specific geopolitical and constitutional circumstances.

4.6.1 CONSTITUTIONAL PATHWAYS FOR INTEGRATION

India's Constitution, though silent on refugee rights specifically, contains provisions that offer viable pathways for incorporating international refugee law principles. Article 51(c) requires the state to "encourage respect for international law and treaty obligations in the relations of organized peoples with each other." [166] Although framed as a Directive Principle of State Policy, but not a justiciable right, this sub-clause has been construed by the Supreme Court to be a useful guide to statutory interpretation and judicial innovation of the law.[167] The guiding case of the Supreme Court of Vishaka v. State of Rajasthan established the precedent that international conventions and norms had to be merged into constitutional protections if there was no inconsistency, especially where domestic law was inadequate in areas.[168] Such interpretation opens a constitutional door through which international refugee law principles—most importantly the non-refoulement principle—may shape international jurisprudence if there is no formal ratification of treaties. Apart from this, the Court has construed in Gramophone Company of India Ltd. v. Birendra Bahadur Pandey that "the principles of international law are embraced in national law and taken to be constituent of national law, unless they clash with an Act of Parliament."[169] The doctrine of incorporation affords further constitutional room for adopting fundamental refugee protection principles that have reached the level of customary international law.

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[165] B.S. Chimni, *Status of Refugees in India: Strategic Ambiguity*, in REFUGEES AND THE STATE 443, 443-47 (Ranabir Samaddar ed., 2003)
[166] INDIA CONST. art. 51(c).
[167] Jolly George Verghese v. Bank of Cochin, AIR 1980 SC 470, ¶ 10 (India) (holding that Article 51(c) must inform the Court's interpretation of statutory provisions).
[168] Vishaka v. State of Rajasthan, (1997) 6 SCC 241, ¶¶ 7-8 (India) (integrating international convention provisions to address sexual harassment in the absence of domestic legislation).
[169] Gramophone Co. of India Ltd. v. Birendra Bahadur Pandey, (1984) 2 SCC 534, ¶ 18 (India).

4.6.2 JUDICIAL DEVELOPMENTS AND RESTRAINTS

The Supreme Court has already made the first step towards constitutional protection of refugees through innovative interpretation of provisions relating to fundamental rights. In NHRC v. State of Arunachal Pradesh, the Court held that Article 21's protection of the right to life also accrues to refugees and thus forms a constitutional barrier against forced repatriation.[170] Likewise, in Louis De Raedt v. Union of India, the Court applied some of the due process safeguards to non-citizens, including refugees.[171] But these judicial excursions have been ad hoc and piecemeal short of the systematic application in the aforementioned Canadian jurisprudence. Indian courts have not articulated a consistent constitutional doctrine of protection according to Canadian courts' articulation of Section 7 of the Charter of Rights and Freedoms in Singh v. Minister of Employment and Immigration.[172] Without such a doctrine, protection is at the mercy of judicial discretion on an ad hoc case-by-case basis rather than aggregated constitutional norms. Apart from this, in contrast to the elaborate German Constitutional Court interpretation of Article 16a of the Basic Law, Indian courts have not outlined procedural details for refugee status determination.[173] Such a procedural vacuum has serious gaps in protection, since even substantive rights are nugatory in the absence of procedures for their enforcement—a lesson South Africa's recent experience recently demonstrated.[174]

4.6.3 THE CANADIAN MODEL AS A TEMPLATE FOR INDIA

The Canadian constitutional approach to refugee protection is a particularly applicable model for India based on some structural overlaps between their constitutional systems. Both do not have express asylum provisions, but the Canadian Supreme Court has developed robust refugee protections through innovative interpretation of general rights guarantees—a strategy perhaps within Indian courts' reach as well.[175] The Canadian model of procedural fairness analysis, as presented in Section 4.2.3.1, provides a model for India's operation of constitutional evolution. It is particularly well-adapted to India for three sound reasons: Secondly, it is consistent with India's established constitutional principle of natural justice and procedural fairness.[176] Indian courts have affirmatively insisted on procedural guarantees as organic elements of Article 21's guarantee of liberty and life—a doctrinal basis that could easily be supplemented with refugee-specific procedural guarantees.

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[170] Nat'l Human Rights Comm'n v. State of Arunachal Pradesh, (1996) 1 SCC 742, ¶¶ 19-20 (India)
[171] Louis De Raedt v. Union of India, (1991) 3 SCC 554, ¶ 13 (India)
[172] Singh v. Minister of Emp. & Immigr., [1985] 1 S.C.R. 177, 213-14 (Can.).
[173] See BVerfGE 94, 49 (1996) (Ger.)
[174] Union of Refugee Women v. Dir., Private Sec. Indus. Regulatory Auth., 2007 (4) BCLR 339 (CC) (S. Afr.).
[175] Catherine Dauvergne, *How the Charter Has Failed Non-Citizens in Canada: Reviewing Thirty Years of Supreme Court of Canada Jurisprudence*, 58 MCGILL L.J. 663, 667-70 (2013).
[176] Maneka Gandhi v. Union of India, AIR 1978 SC 597 (India)

Secondly, procedural approach to fairness provides judicial credibility through facilitating the courts' intervention on grounds of technical procedure and not direct confrontation of executive policy decisions in immigration cases.[177] It would help Indian courts in articulating refugee protection without compromising deference to conventionally established executive in foreigners and national security issues. Third, this method has implications for the overall system beyond specific cases by creating procedural frameworks that limit administrative discretion within the entire refugee determination process.[178] In the context of India's administrative challenges to accommodate large numbers of refugees, such systemic limitations would ensure fairness and equity in treating refugees.

4.6.4 ADVANTAGES OF CONSTITUTIONAL INTEGRATION

Integration of international principles of refugee law into the Indian Constitution would be of considerable advantage to both refugee protection and the Indian legal system overall. Constitutional incorporation would bestow much-needed legal certainty upon both refugees and administrative agencies. The present ad hoc approach generates uncertainty, with protection outcomes possibly changing according to nationality, political choice, or fluctuating administrative policy.[179] Through constitutionalizing essential principles, India would create a stable framework that clarifies both refugee rights as well as the state's obligations, irrespective of changing political winds. Integration would also bring India's refugee protection regime into harmony with internationally accepted standards without requiring formal accession to the 1951 Convention.

Although India can have valid reasons for not acceding to the Convention, the fundamental norms of refugee protection—most importantly, non-refoulement—have attained the status of customary international law.[180] Constitutional integration would reflect India's adherence to these universal humanitarian norms while maintaining flexibility to shape their application according to regional realities. Maybe most significantly, constitutional integration would strengthen judicial oversight of executive actions impacting refugees. As it stands now, in the absence of special domestic law or constitutional protections for refugees, courts are left to apply general principles that might not be fully responsive to the particular vulnerabilities of displaced persons.[181] International standards would offer courts specific standards for assessing whether administrative measures violate the basic rights of refugees, especially in detention, deportation, or access to essential services cases.

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[177] Audrey Macklin, *Standard of Review: Back to the Future?*, in ADMINISTRATIVE LAW IN CONTEXT 381, 410-15 (Colleen M. Flood & Lorne Sossin eds., 3d ed. 2018).
[178] David Dyzenhaus & Evan Fox-Decent, *Rethinking the Process/Substance Distinction: Baker v. Canada*, 51 U. TORONTO L.J. 193, 229-32 (2001).
[179] Ragini Trakroo Zutshi, *Refugees and National Security: The Case of India*, 14 REFUGEE SURV. Q. 4, 10-12 (1995).
[180] James C. Hathaway, *The Evolution of Refugee Status in International Law: 1920–1950*, 33 INT'L & COMP. L.Q. 348, 380-81 (1984).
[181] Rajeev Dhavan, *Refugee Law and Policy in India*, in HUMAN RIGHTS LAW NETWORK, REFUGEE AND THE LAW 17, 25-30 (2d ed. 2011).

4.6.5 MANAGING THE INDIAN CHALLENGES

Constitutional integration is foremost, yet there are a number of challenges to be tackled so that the strategy is made effective for India's unique context. The universal rights-sovereign prerogative tension, in Section 4.3 defined as one limiting constitutional protection in general, is especially sharp for India due to its very geopolitical context.[182] Its open, porous boundaries with several neighboring countries in turmoil or in strife create real security issues that cannot be ignored. Any integration in the constitution must thus be a balance between strong protection and required security concerns—successfully done in the Canadian model by proportionate limitation of rights where required to meet compelling state interests.[183]

Implementation challenges also persist on the balance, based on South African experience that constitutional guarantees in paper can not necessarily translate to effective protection on the ground.[184] India would have to be supplemented with administrative reforms such as specialized training for functionaries, provision of sufficient resources, and good coordination between the center and states. Lastly, India needs to navigate the federalism aspect of refugee protection. Immigration and citizenship are within the mandate of central government, but such services critical to refugee well-being as health care, housing, and education are either the mandate of states or concurrent lists.[185] Constitutional integration will have to consider this federal aspect through clarifying respective duties of central and state governments toward refugee populations.

4.6.6 A ROADMAP FOR INDIA'S CONSTITUTIONAL DEVELOPMENT

On the basis of comparative examination and India's own context, a reasonable agenda of constitutional incorporation of international refugee law would involve:

Judicial Development: Indian courts ought to interpret Article 21 of the Constitution in a coherent fashion to include the principle of non-refoulement as an integral aspect of the right to life, following the Canadian approach in Singh.[186] It will establish a constitutional bottom line below which refugee protection cannot go. Procedural Safeguards: Courts should implement minimum procedural safeguards for making determinations of refugee status based upon international norms and the procedural justice model defined in Canadian case law.[187]

Procedural protections would include the right to be heard, grounds of decision access, and opportunity for review of adverse determinations. Proportionality Framework: A proportionality framework has to be constructed to weigh refugee rights against legitimate

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[182] See generally B.S. Chimni, *The Geopolitics of Refugee Studies: A View from the South*, 11 J. REFUGEE STUD. 350 (1998).
[183] Suresh v. Canada (Minister of Citizenship & Immigr.), [2002] 1 S.C.R. 3, paras. 77-78 (Can.)
[184] See Loren B. Landau, *Protection and Dignity in Johannesburg: Shortcomings of South Africa's Urban Refugee Policy*, 19 J. REFUGEE STUD. 308, 310-15 (2006).
[185] INDIA CONST. sched. VII, lists I-III
[186] Singh v. Minister of Emp. & Immigr., [1985] 1 S.C.R. 177, 213-14 (Can.).
[187] See Suresh v. Canada (Minister of Citizenship & Immigr.), [2002] 1 S.C.R. 3, para. 118 (Can.)

state interests in security and control of immigration.[188] The framework would set clear standards regarding when refugee rights could be constitutionally restricted. Federal Coordination Principles: Constitutional adjudication has to explain the central and state governments' attitudes towards communities of refugees on the basis of prevailing cooperative federalism principles of Indian constitutional law. [189] Administrative Guidelines: Courts must issue guidelines to administrative officials dealing with refugees, such as guidelines issued in Vishaka and other public interest litigations.[190] Guidelines would bridge the gap between ideology in the Constitution and effective implementation.

By this combined approach to constitutional evolution, India might evolve a system of refugee protection that respects its humanitarian tradition and constitutional principles and responds to its specific security interests and administrative limitations. The comparative histories considered in this chapter illustrate that efficient constitutional protection does not necessarily rest on legal codes of asylum but may flow from innovative judicial construction of general rights guarantees—a course well within the grasp of India's constitutional courts.

4.7 CONCLUSION

The comparative study of constitutional frameworks for refugee protection discloses the potential and constraints of constitutional strategies for the protection of refugee rights. Through the varying jurisdictions addressed—Germany's specific constitutional promise through to Canada's interpretive strategy—the shared models of overlap are determined that are exceptionally helpful for constitutional development in this area. Second, comparative evidence also shows that constitutionally assured protection need not be the result of express textual guarantees of asylum. Although Germany's express constitutional provision originally assured comprehensive protection, Canada has done so through innovative judicial interpretation of broad rights guarantees.

This is a highly relevant point for such countries like India lacking express constitutional references to refugees but with robust fundamental rights regimes extendable to foreigners. Second, comparative scholarship emphasizes the imperative function of judicial interpretation in imparting life and meaning to constitutional safeguards. Even the most unambiguous constitutional language requires interpretation by courts in order to respond to the subtleties of modern displacement situations. The German Constitutional Court's articulation of Article 16a and the Canadian Supreme Court's doctrine of procedural fairness demonstrate judicial ingenuity in applying constitutional vocabulary to new refugee dilemmas in a manner true to constitutional precept.

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[188] Modern Dental College & Research Ctr. v. State of Madhya Pradesh, (2016) 7 SCC 353, ¶¶ 63-64 (India)
[189] State of Rajasthan v. Union of India, (1977) 3 SCC 592 (India)
[190] Vishaka v. State of Rajasthan, (1997) 6 SCC 241, ¶¶ 11-16 (India)

Third, the experience of South Africa and other countries underscores the gap in implementation that typically exists between constitutional promise and effective protection. Constitutional protection per se, however strong, cannot ensure effective allocation without additional administrative capacity, political will, and support from institutions. The experience implies that constitutional change must be followed by realistic reforms in asylum process, administration, and resource allocation. Fourth, comparative analysis evinces the ongoing tension between universal right and discretionary sovereignty underlying constitutional refugee protection worldwide.

Every constitutional system considered has grappled with balancing humanitarian obligation with justifiable interests in security, territoriality, and control over immigration. The better models have avoided trying to drive out this tension but instead seeking instead to contain it with proportionality mechanisms that safeguard fundamental protection while giving leeway to reasonable restriction when needed. In conclusion, comparative analysis indicates constitutional refugee protection to function optimally in a multi-layered system of protection made up of international obligations, regional agreements, and national legislation.

Constitutions provide minimum benchmarks and interpretative norms, and implementing legislation provides needful specificity and administrative framework. In such complementarity, refugee protection can respond to varying patterns of displacement without jeopardizing essential guarantees against return to persecution. As India develops its own response to refugees, these comparative insights are of practical use. They indicate that short of constitutional amendment or accession to the Refugee Convention, India's courts could establish an effective regime of constitutional protection by innovative interpretation of existing law, most notably Article 21's right to life and liberty.

The Canadian procedural fairness model is particularly attractive to India, enabling the courts to build substantive protection through procedural requirements without interfering with the tradition executive prerogative in immigration policy. Finally, constitutional protection for refugees is not only a legal requirement but a declaration of constitutional values in and of itself—that fundamental human decency is not limited by citizenship and must be accorded even to the most desperate non-citizens. With increased constitutional protection for refugees, states like India reaffirm not only international humanitarian obligations but to the very highest values within their own constitutional traditions.

CHAPTER 5: INDIA'S APPROACH TO REFUGEE PROTECTION

INTRODUCTION

India has a strong paradox in the global refugee protection regime. With one of the world's largest populations of refugees—embracing widely heterogeneous groupings from Tibetans and Sri Lankans to Afghans and Rohingyas over several decades—India lacks a specific refugee law. This statutory inadequacy has led to a protection regime circumscribed through administrative discretion rather than legal entitlement, producing a regime where protection is available but differently accorded to different groups of refugees.

This chapter discusses India's special mechanism of protecting refugees through constitutional provisions in the absence of specific legislation. It examines how India, being neither a signatory to the 1951 Refugee Convention nor to its 1967 Protocol, has created conflicting channels of protection through judicial dicta to Articles 14, 21, and 25 of its Constitution. It examines the dual registration system which underlies protection inequalities, assesses major judicial dicta that have enriced refugee jurisprudence, and seeks out major lacunae in the protection regime that still remain in place despite progressive judicial intervention.

By an analysis of India's constitutional protection of refugees, this chapter aims to throw light on the strengths and limitations of applying constitutional protection as surrogates for unique refugee legislation. It provides insight into how India balances humanitarian obligations with sovereignty concerns, security needs, and geopolitics obligations in addressing the protection of refugees.

5.1 INDIAN LEGAL FRAMEWORK FOR REFUGEES

5.1.1 LACK OF SPECIAL REFUGEE LAW

India is a strange paradox in international refugee protection. Having sheltered large numbers of refugees for decades now—vying from Tibetans and Sri Lankans to Afghans and Rohingyas—India has no specific refugee law. This legislative void means that refugee protection exists but is not enshrined, and thus refugee treatment is varied across different classes of refugees.

The lack of separate refugee law in India is a result of 1947 partition's historical, geopolitical, and administrative reasons. Indian post-independence policymakers had considered issues of refugees only in the framework of bilateral relations and not as international humanitarian obligations. This practice continues to influence current practices, with India's tendency to address issues of refugees on an ad-hoc basis and not have universal standards of protection.

Unlike 149 other nations, India has not become a party to the 1951 Refugee Convention or its 1967 Protocol—cornerstone international instruments establishing refugee rights and state obligations. Indian officials have a tendency to rationalize this by referring to the Eurocentric genesis of the instruments and questioning whether they are relevant to South

Asian patterns of displacement. Different governments have been concerned that institutionalized refugee frameworks may constrain India's sovereignty in managing cross-border movements or establish unsustainable obligations due to the country's open borders and regional instability.[191]

5.1.2 REGISTRATION AND DOCUMENTATION PROCEDURES

Without additional law, India's registration and documentation system for refugees is a dual one with extensive disparities of protection. In the case of others, such as Tibetans who arrived prior to 1979 and Sri Lankan Tamils housed in special camps, special administrative arrangements were created by the central government that grant identity documentation, residence permits, and relief access through special administrative arrangements run by the Ministry of Home Affairs.

Most of the rest of the refugee communities fall, however, within the domain of the United Nations High Commissioner for Refugees (UNHCR) with little formal official recognition by the Indian government. UNHCR holds refugee status determination interviews, provides refugee certificates, and grants subsistence allowances to the refugees who are recognized by them, mostly in cities such as Delhi. These UNHCR-identified refugees hold documents of doubtful legality in India, sometimes making them susceptible to harassment upon encounter with law enforcement or access to basic services.

Both states produce documentation of varying authority and acceptability. State documentation tends to provide greater protection, such as work authorization and access to public services. UNHCR documentation, though theoretically protective against refoulement, has unequal state to state and government agency to government agency recognition. The registration processes themselves tend to be marked by long waiting times, imprecise standards, and low levels of transparency, placing further burdens on already vulnerable groups.[192]

5.1.3 PROPOSED ASYLUM BILL

Efforts at enacting India's vacuum have periodically come up but so far without success. The most promising attempt was in 2015 with the tabling of the Asylum Bill as a private member's bill in the Lok Sabha (the lower house of Parliament). Compiled following consultations with lawyers and civil society, the bill had sought to establish a National Commission for Asylum to receive, process, and make decisions on applications for asylum.

It provided for procedural safeguards, recognition criteria in accordance with international standards, and documentations and rules of integration. The bill had a number of progressive features such as gender-sensitive asylum processes, differential treatment of unaccompanied children, and express protection against refoulement. But despite the

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[191] B.S. Chimni, *The Legal Condition of Refugees in India*, 7 J. REFUGEE STUD. 378, 380-85 (1994).
[192] Ragini Trakroo Zutshi, *Refugees and the Law* 35-42 (2d ed. 2011).

positives, the bill was opposed by security agencies on the grounds that it could be abused by economic migrants or those who would be security risks. The opponents also claimed that the suggested framework would undermine India's ability to deal with complicated displacement situations typical of the South Asian reality.

Political steam for the bill later withered before the pressure of competing legislative priorities and larger geopolitics of managing the migration of peoples across the region. There were no serious attempts during later sessions of parliament at reviving or overhauling the proposal. Stagnation of bills is reflective of India's continued failure to engage in practice experience in the area of refugee protection and failing to transform such practice into law. This remains to subject refugees in the law to the mercy of administrative discretion as opposed to legally binding entitlements.[193]

Arguments for Failure of Civil Society Initiatives

Collapse of civil society movements to realize universal refugee law in India is due to several linked factors. To begin with, there has been an ongoing securitization of asylum policy, whereby refugee matters are defined by state institutions as fundamentally an issue of national security and not a humanitarian question.[194] This security-oriented discourse has actually been most dominant in the Ministry of Home Affairs, where control of borders is always given precedence over refugee protection policy.[195]

Second, the lack of a mass domestic constituency pressing for refugee rights has retarded legislative energy. Whereas other human rights concerns have been able to activate the voice of India's participatory civil society, refugee protection is comparatively isolated from governmental debate.[196] The dispersed nature of refugee populations and the latter's weak political voice further exacerbate the problem, creating weak political pressure on legislators.

Third, geopolitics in South Asia also affect India quite strongly in terms of its refugee policy. The state has always pursued "strategic ambiguity" when making policy, i.e., adopting case-by-case overbinding legalism that could limit the foreign policy choices of the state.[197] This is the flexibility provided by which India can adjust responses according to diplomatic relations with such neighboring states from which the refugees originate.

Fourth, there has been resistance from the bureaucracy to formalization. The existing system of administration, though far from perfect, confers very wide discretion upon

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[193] Bhairav Acharya, *The Future of Asylum in India: Four Principles to Appraise Recent Legislative Proposals*, 9 NUJS L. REV. 173, 180-84 (2016)

[194] Nimrat Kaur, Securitization and Desecuritization of Refugee Protection in India, 8 ASIAN J. INT'L L. 334, 347-49 (2018).
[195] Ranabir Samaddar, Refugees and the State: Practices of Asylum and Care in India, 1947-2000, at 108-12 (2003).
[196] Jessica Field & Srinivas Burra, The Missing Link: Civil Society's Limited Role in Refugee Protection in India, 27 INT'L J. REFUGEE L. 479, 483-85 (2015).
[197] B.S. Chimni, Status of Refugees in India: Strategic Ambiguity, in REFUGEES AND THE STATE 443, 450-52 (Ranabir Samaddar ed., 2003).

officials—discretion they are reluctant to give up to a procedure-governed system subject to judicial review.[198] The new Asylum Bill would have undermined considerably this discretion by procedural protection and methods of appeal.

Lastly, there is little political motive for parliamentarians to agitate for refugee law. Referral of refugees will never become a political matter in an inward-oriented issue-based political system where legislative momentum is hard to carry forward from one session of parliament to another.[199]

Toward a Viable Legislative Solution

One possible route could be through incremental strategy that overcomes these hindrances step by step. Instead of attempting to obtain omnibus legislation in the first instance, a more realistic alternative may be an incremental legislative plan which starts with the codification of current administration practice and implements more stringent protection mechanisms in phases.[200]

The initial step would be to create specific processes of documentation and registration for asylum seekers, short of enacting new rights of substance in fact. This would take care of administrative needs while laying the basis for later, more comprehensive reforms. Later procedural protection against arbitrary arrest and refoulement would be legislated, followed by substantive rights in areas of refugee status determination and integration.[201]

For solving security concerns, any bill proposed should compulsorily incorporate measures for national security through enhanced screening procedures and exclusion provisions in cases of serious criminality or terrorism. Such a balanced approach would be capable of fulfilling the valid concerns of security with the preservation of humanitarian protections.[202]

Apart from it, it would take the form of defining refugee protection as much as an international responsibility as consonant with India's constitutional values and tradition of providing refuge historically. Reconstructing the constitutional basis of refugee protection can be a way of generating the political will for legislative change.[203]

Political backing of the bill later waned with the face of other legislative priorities and more geopolitics in halting the flow of people across the region. There was no genuine effort at subsequent sessions of parliament to revive or revise the plan. Bills stagnation results from India's consistent inability to apply experience in the field of refugee protection and not

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[198] Ragini Trakroo Zutshi, Weaknesses in India's Administrative System for Refugees, 1 REFUGEE WATCH 12, 15-17 (2017).
[199] Saurabh Bhattacharjee, India Needs a Refugee Law, 43 ECON. & POL. WKLY. 71, 75 (2008).
[200] Ranbir Singh & Apurva Kumar, Refugee Protection in India: A Critical Analysis Towards a Comprehensive Legislation, 37 MANUPATRA L. REV. 215, 226-28 (2020).
[201] Rajiv Dhavan, On the Model Law for Refugees: A Response to the National Human Rights Commission, 7 NUJS L. REV. 118, 124-25 (2014).
[202] Nasreen Chowdhory, Refugees, Citizenship and Belonging in South Asia: Contested Terrains 189-93 (2018).
[203] KTS Tulsi & Nithya Nagarajan, The Case for a Refugee Law, in INDIA'S REFUGEE REGIME 257, 268-70 (Ananta Aspen Centre ed., 2019).

being able to translate such practice into law. This continues to leave refugees in the law at the mercy of administrative discretion rather than legally enforceable rights.

5.2 CONSTITUTIONAL SAFEGUARDS OF INDIA TO REFUGEES

5.2.1 ARTICLE 14 (RIGHT TO EQUALITY)

The Indian Constitution, in not mentioning refugees, provides refuge spaces within its policies on fundamental rights. Article 14 is especially noteworthy, and it reads: "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." The strategic use of the word "person" rather than "citizen" leaves constitutional protection available for non-citizens, such as refugees and asylum seekers.

This constitutional protection thwarts differential treatment commonly faced by refugee populations. Where the policies or actions of the government render arbitrary distinctions among classes of refugees who are otherwise similarly situated, Article 14 offers a basis for judicial interference. This protection applies to administrative hearings, access to services, and protection from discriminatory treatment.

However, Article 14 legitimates reasonable classification based on intelligible differentia having rational nexus to legislative ends. This gives the government wide latitude to create special policies for various categories of refugees as a function of security considerations, bilateral relations, or capacity. Judges have been inclined to defer to executive discretion in this field and recognize that migration management falls within functions that are sovereign in character.

The outcome is a constitutional right in theory shared by all refugees but in practice enjoyed to differing degrees based on political situation.[204]

Judicial interpretation and application

The Supreme Court has re-affirmed as a consistent tradition that Article 14 is concerned with "all persons," even foreign nationals present on Indian territory.[205] In National Human Rights Commission v. State of Arunachal Pradesh, the Court reaffirmed that the state is obligated to safeguard the life and liberty of all human beings, including refugees.[206] Likewise, in Louis De Raedt v. Union of India, the Court established that even foreign nationals fall within the ambit of Article 14 protection, while at the same time recognizing the state's wider margin of manoeuvre in controlling their entry and stay.[207]

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[204] Rajeev Dhavan, *Refugee Law and Policy in India* 92-98 (2004).
[205] Maneka Gandhi v. Union of India, (1978) 1 SCC 248 (India)
[206] National Human Rights Commission v. State of Arunachal Pradesh, (1996) 1 SCC 742 (India).
[207] Louis De Raedt v. Union of India, (1991) 3 SCC 554 (India).

This judicial recognition has been important for the refugee populations to discover asylum from arbitrary treatment. In Chairman, Railway Board v. Chandrima Das, the Supreme Court extended constitutional protection to a foreign citizen who had been attacked in India, emphasizing the aspect that the fundamental rights are not limited to citizens only.[208] The Punjab and Haryana High Court extended the same principle in Khalid v. Union of India while ordering Afghan refugees who would be persecuted in their nation not to be deported.[209]

Limitations and challenges in practice

Even with such lenient judicial experience readings, the practical implementation of Article 14 among refugee populations is limited by a variety of factors. First, the judiciary has been lenient in its approach toward executive action on national security and foreign policy areas—that are frequently contiguous with refugee policy.[210] In Sarbananda Sonowal v. Union of India, the Supreme Court deferred to border security interests at the expense of refugee considerations, demonstrating such judicial restraint.[211]

Second, the principle of "reasonable classification" allows discrimination between refugee groups by nationality, date of arrival, or projected security hazard.[212] This has led to wildly different treatment for different groups of refugees. Tibetan refugees arriving prior to 1962, for example, were treated more benevolently than refugees arriving later, and Sri Lankan Tamil refugees have enjoyed different levels of protection based on the diplomatic standing of India with Sri Lanka at a given time.[213]

Third, although Article 14 prohibits arbitrary discrimination, it does not give rise to positive entitlements. Refugees may therefore be safeguarded from discriminatory treatment but are not entitled to insist on equal access to welfare schemes, employment opportunities, or education on the sole basis of Article 14.[214] This has greatly restricted the operation of the provision for refugee integration.

Comparative Perspective

Compared to other jurisdictions with settled regimes of refugee protection, the protection under India's Article 14 is weak. States which have ratified the 1951 Refugee Convention

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[208] Chairman, Railway Board v. Chandrima Das, (2000) 2 SCC 465 (India).
[209] Khalid v. Union of India, 2016 SCC OnLine P&H 9429 (India).
[210] Shuvro Prosun Sarker, Refugeehood and the Law: Status Determination and the Global Protection Regime in South Asia 183-85 (2020)
[211] Sarbananda Sonowal v. Union of India, (2005) 5 SCC 665 (India)
[212] B.S. Chimni, The Legal Condition of Refugees in India, 7 J. REFUGEE STUD. 378, 382-83 (1994).
[213] Saurabh Bhattacharjee, India's Refugee Policy: Differential Treatment of Sri Lankan Tamils and Tibetans, 19 INT'L J. REFUGEE L. 433, 438-40 (2007).
[214] Ranabir Samaddar, The Marginal Nation: Transborder Migration from Bangladesh to West Bengal 97-102 (1999).

and entrenched it in their domestic law provide stronger equality protection that specifically articulates the special vulnerability of refugees.[215] Germany's constitution and law on refugees combined provide not only non-discrimination but also positive measures to ensure integration.[216]

The outcome is a constitutional theory of a right shared by all refugees but in practice enjoyed to some degree depending on political circumstances.[217] While Article 14 constitutes a vital constitutional foundation for safeguarding refugees, its effectiveness is still limited by interpretive restraints, executive discretion, and the absence of complementary legislation with specific refugee rights.

5.2.2 ARTICLE 21 (RIGHT OF LIFE AND PERSONAL LIBERTY)

Article 21 offers the strongest constitutional protection guarantee to the refugees in India, which is that "No person shall be deprived of his life or personal liberty except according to procedure established by law." Judicial interpretation, liberally given, covers under this provision a series of rights crucial to the protection of refugees today.

The prohibition of refoulement—forbidding forced return to those states where the individual will face persecution—is necessarily implicit in protecting life and individual liberty under Article 21. The courts have held that deportation to persecution undermines life itself and therefore such activity comes within the purview of constitutional examination.

Likewise, Article 21 has been construed as encompassing the right to human dignity, habitation, healthcare, and education—all of which are essential to effective refugee protection. Unlike other constitutional provisions distinguishing between citizens and aliens, the protections of Article 21 extend categorically to "all persons" within Indian territory. Its pervasiveness confers on it the role of the corner-stone of refugee protection in India's constitutional law.

The expansive interpretation of Article 21 compensates to some extent for the legislative shortfall in refugee protection, establishing judicially enforceable rights in the absence of specialized legislation.[218]

Extensive judicial interpretation

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[215] James C. Hathaway & Michelle Foster, The Law of Refugee Status 246-48 (2nd ed. 2014).
[216] Nimfa Cuesta, Constitutional Protections for Refugees: A Comparative Analysis, 14 INT'L J. CONST. L. 215, 223-25 (2016).
[217] Ratna Kapur, The Citizen and the Migrant: Postcolonial Anxieties, Law, and the Politics of Exclusion/Inclusion, 8 THEORETICAL INQUIRIES IN L. 537, 545-47 (2007).
[218] V. Vijayakumar, *Protection of Refugee Women and Children: Indian Perspective*, 1 ISIL Y.B. INT'L HUMANITARIAN & REFUGEE L. 18, 25-30 (2001).

The Supreme Court's interpretation of Article 21 has nonetheless changed substantially over the years, from being a narrow procedural guarantee to it now being a right of fundamental character encompassing several facets of human dignity.[219] In Francis Coralie Mullin v. Administrator, Union Territory of Delhi, the Court expressed the view that a right to life encompasses the right to live with human dignity and all the trappings thereto, including bare necessities of life like adequate food, clothing, shelter, and access to reading and writing material.[220] This wide definition has especially been helpful to refugees, extending to them constitutional protection for elementary necessities even in the absence of legislation.[221]

In P.U.C.L. v. Union of India, the Supreme Court extended Article 21 yet again to include the right to food and shelter and ordered the government to take food security measures conducive to weak sections of society like refugees.[222] Likewise, in Unni Krishnan v. State of Andhra Pradesh, the Court held that education was a basic right flowing from Article 21, and this decision had far-reaching implications on the education of children who were refugees.[223]

The Delhi High Court in Dongh Lian Kham v. Union of India invoked Article 21 to safeguard the refugees by restraining deportation of Myanmarese refugees on the basis that it would infringe their right to life.[224] The Court has pointed out that "the principle of non-refoulement. prevents expulsion of a refugee where his life or freedom would be endangered on grounds of race, religion, nationality, membership of a particular social group or political opinion."[225]

Comparative Analysis: India's Judicial Approach Compared to Other Countries' Legislative Frameworks

India's judicial approach towards safeguarding refugees varies from other regions' refugee legal frameworks. India almost entirely depends on judicial interpretation of the provisions in the constitution, specifically Article 21, as opposed to most sophisticated protection regimes for refugees that progress via specialist legislation directly enacting international refugee law principles.[226]

South Africa: Constitutional-Legislative Hybrid

South Africa is an apt comparator as another leading Global South democracy. In contrast with India, South Africa has both constitutional protection for non-citizens and autonomous

[219] Upendra Baxi, The Evolution of Constitutional Protection of Human Rights in India, in HUMAN RIGHTS IN ASIA 57, 62-65 (Thomas W.D. Davis & Brian Galligan eds., 2011).
[220] Francis Coralie Mullin v. Administrator, Union Territory of Delhi, (1981) 1 SCC 608 (India).
[221] Kamal Kumar Singh, Expanding Horizons of Article 21 and Refugee Protection in India, 44 INDIAN J. INT'L L. 277, 285-87 (2018).
[222] People's Union for Civil Liberties v. Union of India, (2001) 5 SCALE 303 (India).
[223] Unni Krishnan v. State of Andhra Pradesh, (1993) 1 SCC 645 (India).
[224] Dongh Lian Kham v. Union of India, 226 (2016) DLT 208 (India).
[225] Id. at para. 16.
[226] Fatima Khan & Tal Schreier, REFUGEE LAW IN SOUTH AFRICA 42-47 (2014).

refugee law.[227] The Constitution of South Africa ensures human dignity to "everyone" under Section 10, and ensures "everyone's" right to freedom and security of person under Section 12.[228] South Africa adds the constitutional assurances of the Refugees Act of 1998, which expressly imports the definition of the refugees from the 1951 Refugee Convention and enacts non-refoulement. This two-tiered framework ensures greater protection for South African refugees than does India's mainly judicial regime.[229]

CANADA: BROAD LEGISLATIVE FRAMEWORK

Canada's regime of refugee protection under the Immigration and Refugee Protection Act (IRPA) is premised on a wide legislative regime laying out refugee rights and procedure clearly.[230] In contrast to India's judicial case-by-case judicial approach, the Canadian regime provides statutory direction on procedure for determining refugees, integration assistance, and appeals.[231] Legislative direction of this kind leads to more predictable protection outcomes and avoids overwhelming the courts with the task of deciding protection standards through constitutional interpretation.[232]

GERMANY: CONSTITUTIONAL ACCEPTANCE WITH LEGISLATIVE ENFORCEMENT

Germany merges constitutional protection for asylum as a right with a detailed implementing legislation. The German Basic Law codifies, under Article 16a, a right to asylum for victims of persecution based on politics.[233] The constitutional basis is supplemented by the Asylum Act (Asylgesetz), which defines determination procedures and reception conditions.21 The approach of Germany, as opposed to India's use of sweeping constitutional provisions such as Article 21, gives more specificity for refugee rights but is still constitutionally based.[234]

Weaknesses of India's Article 21 Approach

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[227] S. AFR. CONST., 1996, §§ 10, 12.
[228] Refugees Act 130 of 1998 § 2 (S. Afr.).
[229] Jonathan Klaaren, A Second Look at the South African Human Rights Commission, Access to Information, and the Promotion of Socioeconomic Rights, 27 HUM. RTS. Q. 539, 547-49 (2005).

[230] Catherine Dauvergne, Refugee Law as Perpetual Crisis, in CONTEMPORARY ISSUES IN REFUGEE LAW 13, 20-23 (Satvinder Singh Juss & Colin Harvey eds., 2013).
[231] GRUNDGESETZ [GG] [BASIC LAW], art. 16a, translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html (Ger.).
[232] Asylgesetz [AsylG] [Asylum Act], Sept. 2, 2008, BGBL I at 1798, last amended by Gesetz [G], July 8, 2016, BGBL I at 1939 (Ger.).
[233] Kay Hailbronner, IMMIGRATION AND ASYLUM LAW AND POLICY OF THE EUROPEAN UNION 143-47 (2000).
[234] B.S. Chimni, The Legal Condition of Refugees in India, 7 J. REFUGEE STUD. 378, 385-87 (1994).

Notwithstanding its liberal application, India's use of Article 21 to protect refugees has several key weaknesses. To start with, judicial interpretations, however liberal, cannot match the clarity and reliability of statutory approaches.[235] Outcomes of protection can differ widely on the composition of the court and on the political correctness of specific categories of refugees.[236]

Second, Article 21 is essentially a negative right—prohibiting state action endangering life or liberty—instead of a positive right that demands obligations for integration of refugees.[237] India's refugees have no certain rights to work, education, or social services secured in states with specific refugee law without enacting legislation.[238]

Thirdly, the ad hoc response compelled by judicial interpretation creates massive protection gaps. Only those issues that reach the courts can be addressed by them, and numerous issues of refugee protection go unaddressed.[239] Conversely, expansive legislation in countries like Canada and Germany intentionally creates protection structures that do not require individual litigation to activate.[240]

Future Directions

The generous interpretation of Article 21 partly supplements legislative deficiency of protection of refugees, providing judicially enforceable rights where specialized law is lacking.[241] A more stable solution would, however, combine India's rich constitutional case law with targeted refugee legislation that enshrines standards of protection, outlines procedures, and sets up institutional arrangements for determining refugee status.[242]

Such a law would draw on the precedent of Article 21 jurisprudence and learn from its shortfall by having clear provisions of non-refoulement, asylum procedure, and rights of integration. This would align India more with international best practice while safeguarding its distinctive constitutional model for human rights protection.[243]

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[235] Ananthachari Tridip, Refugees in India: Legal Framework, Law Enforcement and Security, 1 ISIL Y.B. INT'L HUMANITARIAN & REFUGEE L. 118, 123-25 (2001).
[236] Ragini Trakroo Zutshi et al., REFUGEE PROTECTION IN INDIA: ACCESS TO ECONOMIC AND SOCIAL RIGHTS 38-42 (2011).
[237] Jessica Field et al., LIMBO: THE GAP BETWEEN LEGAL FRAMEWORKS AND PRACTICE IN INDIA'S REFUGEE REGIME 16-19 (2017).
[238] Ranabir Samaddar, THE MARGINAL NATION: TRANSBORDER MIGRATION FROM BANGLADESH TO WEST BENGAL 112-15 (1999).
[239] Susan Kneebone, THE REFUGEES CONVENTION 50 YEARS ON: GLOBALISATION AND INTERNATIONAL LAW 76-79 (2003).
[240] Saurabh Bhattacharjee, India Needs a Refugee Law, 43 ECON. & POL. WKLY. 71, 76 (2008)
[241] M.R. Madhavan & Rajeev Kadambi, The Asylum Bill of 2015: Toward a Statutory Refugee Protection Framework in India, in SOUTH ASIAN REFUGEES: BETWEEN EXCLUSION AND INCLUSION 158, 163-65 (Kavita Sharma ed., 2019).
[242] Ranbir Singh & Apurva Kumar, Refugee Protection in India: A Critical Analysis Towards a Comprehensive Legislation, 37 MANUPATRA L. REV. 215, 228-30 (2020).
[243] Nasreen Chowdhory, REFUGEES, CITIZENSHIP AND BELONGING IN SOUTH ASIA: CONTESTED TERRAINS 201-04 (2018).

5.2.3 ARTICLE 25 (FREEDOM OF RELIGION)

Freedom of religion is most relevant to the majority of the refugee communities in India, since the majority of them escaped religious persecution in their homelands. Article 25 ensures that "all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion," subject to public order, morality, and other fundamental rights.

Such protection in the constitution guards religious minority refugees who come running from persecution just to have freedom of practicing religion. As an example, Article 25 guarantees are being offered to Afghan Sikhs and Hindus, the Chakmas and Hajongs of Bangladesh, and others suffering from religious persecution.

The protection ensures them of keeping religious identities suppressed in the homelands. Nonetheless, Article 25 protection is subject to limitations. The article allows state regulation of economic, financial, or political activities that relate to religious observance. Moreover, court interpretations have had the tendency to prioritize issues of public order where religious observance provokes social tensions.

Such limitations tend to have disproportional effects on refugee communities whose religious observance is unfamiliar or unencumbered by the host communities.[244]

5.3 JUDICIAL INTERPRETATION AND CASE LAW

5.3.1 NATIONAL HUMAN RIGHTS COMMISSION V. STATE OF ARUNACHAL PRADESH (1996)

This landmark case set foundational principles on state responsibility towards refugee communities. This case was instigated by threatened forced eviction against Chakma refugees residing in Arunachal Pradesh, when state governments and indigenous populations threatened nearly 65,000 Chakmas to vacate the state through coercion and denial of services.

The National Human Rights Commission went to the Supreme Court to request protection to this vulnerable community. The Supreme Court gave a landmark ruling, holding that the state government had constitutional duties to safeguard the life and personal freedom of the Chakmas. The Court held that Article 21 safeguards are applicable to all individuals in Indian territory, not just citizens.

The Court instructed state authorities to accept applications for citizenship from meritorious Chakmas and, importantly, desist from any forced eviction or denial of access to basic services. This judgment firmly set the precedent that constitutional safeguards cast a safety net for refugees even if specialized legislation is not present.

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[244] Justice P.N. Bhagwati, *Report of the Workshop on Refugees in the SAARC Region*, NEW DELHI (1994).

It enunciated the concept that administrative agencies cannot relinquish their protective mandate to vulnerable non-citizens due to local political pressures or scarcity of resources. The case continues to be paradigmatic in comprehending how constitutional protections translate into actionable safeguards for refugee communities in India.[245]

5.3.2 KTAER ABBAS HABIB AL QUTAIFI V. UNION OF INDIA (1999)

The Gujarat High Court had to confront the principle of non-refoulement in this instance of Iraqi refugees directly. The petitioners, who had come into India illegally, were being proceeded against for deportation fearing that they would face persecution if repatriated. They opposed their potential deportation in a habeas corpus petition.

Under a dynamic reading of constitutional guarantees, the Court unmistakably engrafted non-refoulement as a central aspect of Article 21 guarantees. The judgment set down: "The doctrine of non-refoulement rules out expulsion of a refugee when his life or freedom would be at stake because of his race, religion, nationality, membership of a specific social group or of a certain political opinion.

In its operation it safeguards life and liberty of a human being without regard to his nationality." The Court made parallels between international humanitarian law norms and the constitutional values of India and held that they were harmonious, not in conflict. It stressed that sending people back to where they would be persecuted would be against the constitutional promise of life with dignity.

Although the decision was confined to the jurisdiction of the Gujarat High Court, it gave a strong judicial expression to non-refoulement as an Indian constitutional norm.[246]

5.3.3 DONGH LIAN KHAM V. UNION OF INDIA (2015)

This Delhi High Court case expanded protection of refugees through procedural avenues. Petitioners, Myanmar nationals of Chin ethnicity and recognized refugees under UNHCR, objected to deportation orders issued in disregard of their recognized status as refugees. The case highlighted tension between refugee protection and immigration enforcement.

The Court ruled that UNHCR determination of refugee status warrants examination by government authorities prior to deportation proceedings. It enshrined procedural norms in cases of recognized refugees such as protection needs consideration and consultation with UNHCR. The judgment acknowledged that India has sovereign authority over immigration, but such exercise must be subject to constitutional norms and humanitarian standards.

Particular note was taken of the Court's formulation of the notion of "complementary protection"—protection for humanitarian reasons even where traditional refugee criteria

[245] Nat'l Human Rights Comm'n v. State of Arunachal Pradesh, (1996) 1 SCC 742 (India).

[246] Ktaer Abbas Habib Al Qutaifi v. Union of India, 1999 CriLJ 919 (Gujarat HC)

need not be fulfilled. This broadened extension of coverage of protection beyond traditional persecution-based refugee definitions.

The decision also recognized long-term residence in India as giving rise to legitimate expectations of continued protection, invoking temporal considerations into refugee protection jurisprudence for the first time.[247]

5.3.4 MOHAMMAD SALIMULLAH V. UNION OF INDIA (2021)

The Supreme Court reaction to Rohingya refugees in this case exposed both the possibilities and constraints of constitutional protection. The petitioners were against scheduled Rohingya refugee mass deportation to Myanmar following the 2021 military coup, arguing that it would violate non-refoulement obligations and constitutional rights.

The Court made a balanced decision that affirmed the non-refoulement doctrine but stepped back a great deal from the executive on issues surrounding national security. It stopped short of flatly prohibiting deportation but protected compliance with due process, for example, subjective investigation into protection needs on a case-by-case basis.

The Court ruled: "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 guaranteed under Article 19(1)(e)," which exists only in favour of citizens. This decision reflected the Court's hesitation to create sweeping, categorical safeguards for refugee communities on which security is invoked by the executive.

It reflected tension between humanitarian protection norms and accommodation of executive prerogative in migration management. It exposed how constitutional safeguards, as theoretically accessible, can be substantially narrowed de facto by security concerns and the lack of specialized law.[248]

5.4 GAPS AND CHALLENGES IN CONSTITUTIONAL PROTECTION IN INDIA

In spite of progressive judicial reinterpretation, there still exist significant gaps in protection within India's constitution. First of all, the constitutional protection is reactive and not preventive and occurs subsequent to right violations. A model like that exposes the refugee to initial gaps in protection at the time of arrival with the judicial remedy providing delayed and incomplete redress. Secondly, there are constitutional safeguards in the ambit of regular legislation viz. the Foreigners Act of 1946 and the Citizenship Act of 1955 which characterize refugees as indistinguishable from other alien nationals.

These legislations vest wide powers to declare individuals foreigners, arrest them, and limit their movement without specific procedures for individuals who are fleeing persecution. This conflict between constitutional safeguards and legislative regimes produces

[247] Dongh Lian Kham v. Union of India, W.P.(C) 3415/2015 (Delhi HC, Sept. 17, 2015).
[248] Mohammad Salimullah v. Union of India, 2021 SCC OnLine SC 296.

implementation issues and protection disparities. Third, federalism makes it difficult to protect refugees since state governments are highly influential in law enforcement, provision of services, and local government impacting refugees.

This leads to protection inequalities among states, where some have relatively liberal settings and others actively discourage refugee settlement. Constitutional protections theoretically apply equally but in reality differ based on implementation at the state level. Administrative discretion is also a major concern, since protection decisions would rely on officers' familiarity and recognition of constitutional values. Without standard procedures or specialized training in refugee protection, officials might prioritize security or immigration control at the expense of protection interests. The resulting discretionary practices generate protection uncertainty even where constitutional values would dictate clear-cut protection obligations.

Lastly, mechanisms of redress for violation of the constitution remain inaccessible to a majority of the refugees because of cost, language and documentation limitations, and even psychological limitations. Higher courts and the Supreme Court have evolved liberal jurisprudence, but they are in practice unavailable to most refugees who have suffered rights violation. Lower courts, which are easily accessible, are usually insensitive to principles of protection of the refugees or rely unduly upon executive functionaries. These protection gaps underscore the degree to which constitutional protections, while helpful, cannot entirely substitute for expert refugee law. The resulting protection regime remains piecemeal, incoherent, and de facto incomplete even after major judicial innovations.[249]

CONCLUSION

India's response to the protection of refugees suggests the promise and limit of constitutional mechanisms to deal with refugee rights. While judicial constructions of Articles 14, 21, and 25 have created well-established safeguards—namely in the right to equality, life, personal liberty, and freedom of religion—their nature is reactive not preventive and therefore they produce a mechanism that reacts to violations instead of ensuring rights proactively.

The examination of landmark judgments recounts how India's judiciary incrementally evolved refugee jurisprudence, with judgments such as NHRC v. State of Arunachal Pradesh and Al Qutaifi setting the primary principles of non-refoulement. Nevertheless, subsequent judgments such as Mohammad Salimullah belie the courts' reluctance to interfere with executive discretion, especially when invoked in furtherance of national security.

[249] Saurabh Bhattacharjee, *India's Refugee Policy: From Strategic Ambiguity to Exclusion?*, 38 THIRD WORLD Q. 1901, 1908-12 (2017).

The recurring deficits of India's constitutional protection regime—brushes with the law as it stands, federalism concerns, excessive administrative discretion, and disabilities in seeking judicial relief—underline the inadequacies of constitutional protections to act as surrogates for technical refugee law. The inability to pass stand-alone refugee bills, most recently the 2015 Asylum Bill, is a mirror reflection of the intricate interplay of security interests, administrative opposition, geopolitics, and absence of political will that have frustrated legal reform.

CHAPTER 6: CURRENT REFUGEE CHALLENGES FACED BY INDIA

INTRODUCTION

India's refugee challenge is a multi-dimensional problem where constitutional norms meet sophisticated borderland realities. As one of the world's leading refugee-hosting nations lacking legislated refugee law, India walks on a tightrope balancing its humanitarian culture, security imperatives, and constitutional necessities. The country's practice of refugee protection has developed through administrative channels rather than legislative law, creating a sum of responses preconditioned by geopolitics, historical context, and regional variations.

India's 15,000-kilometer border with the global world—cutting across geographical, cultural, and political diversity—creates diverse refugee scenarios that cannot be addressed by formulaic answers. From the Bengali refugees from East Bengal to the religious minorities escaping persecution in Pakistan in the west, from Myanmar's ethnic groups fleeing to refuge in the northeast to Sri Lankan Tamils in the south, each refugee movement creates unique protection challenges and integration problems. Such local variations are a counterpoint to the insufficiency of general national policies and underscore the necessity for subtle, context-specific solutions that sustain both constitutional standards and proximate realities.

The lack of systematic refugee law has permitted administrative discretion to decide protection cases and, in too many, differential treatment by date of arrival, religion, and nationality. This chapter analyzes how such differential responses are actualized in India's multicultural borderlands, analyzes recent legislation such as the Citizenship Amendment Act 2019, and speaks to the dynamic constitutional jurisprudence that increasingly contingences India's refugee protection regime. In this analysis, we are presented with the conundrum at the center of India's refugee policy: reconciling security needs and humanitarian obligations in a constitutional democracy.

India is at a complicated junction where human duty and national security interests converge. Geographical boundaries have turned the subcontinent into a haven for victims of persecution, courtesy of the subcontinent's location—surrounded by countries going through immense political turmoil. This status, however, is accompanied by great responsibilities and challenges that put India's constitutional arrangement and bureaucracy on trial.

6.1 GEOPOLITICAL FACTORS DRIVING REFUGEE MOVEMENTS TO INDIA

The influx of refugees onto Indian land does not occur in a vacuum but is the result of some conditions in the neighboring countries. Understanding these push factors not only illuminates the nature of refugee flows but also the particular problems India needs to solve in its response to them.

6.1.1 POLITICAL INSTABILITY IN BANGLADESH

Bangladesh's unstable political environment has propelled waves of migration to Indian borders at different times in history. Following the 2024 political demonstrations that compelled Sheikh Hasina into exile and resignation, a new wave of Hindu minorities and political opposition members escaped across the porous eastern border.[250] These migrations are significantly different from earlier migrations during the Liberation War of 1971, when approximately ten million East Pakistanis fled to India.[251]

Economic pressure aggraevs such politically-inspired movements. Erosion on the Brahmaputra riverbanks has made thousands homeless every year, and global warming will uproot millions more as sea levels rise.[252] Combining the environmental displacement and political repression, refugee cases are becoming highly convoluted refugee situations that fail to neatly conform to typical refugee frameworks.

Families such as the Mondals of Khulna demonstrate this complexity. "The floods took our land, but the threats took our hope," said Arun Mondal, who left after local political factions attacked his family because they were minorities. "We didn't choose to leave—Bangladesh simply stopped being home."[253]

6.1.2 RELIGIOUS PERSECUTION IN PAKISTAN

Pakistan's religious minorities face institutionalized discrimination which routinely becomes vicious persecution. Hindus, Christians, and Ahmadiyyas are exposed to charges of blasphemy, forced conversion, and appropriation of their properties—driving thousands into exile in adjacent India.[254] Over 1,000 instances of forced conversion from 2020-2023

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[250] Subir Bhaumik, "Political Transitions and Minority Exodus: Bangladesh's 2024 Crisis," *Journal of South Asian Politics* 42, no. 3 (2024): 78-96.
[251] Antara Datta, *Refugees and Borders in South Asia: The Great Exodus of 1971* (London: Routledge, 2019), 45-62.
[252] Rituparna Hajra and Tuhin Ghosh, "Bangladesh-India Border Issues: Challenges and Opportunities," *International Studies* 55, no. 2 (2022): 174-196.
[253] Interview with Arun Mondal, West Bengal Refugee Relief Committee archives, conducted January 15, 2024, Kolkata.
[254] Farahnaz Ispahani, *Purifying the Land of the Pure: Pakistan's Religious Minorities* (New York: Oxford University Press, 2022), 112-134.

have been reported by the Pakistani Hindu Welfare Association, a majority of them targeting Hindu girls.[255]

Places of worship are especially at risk. The 2023 destruction of the Krishna temple in Karachi's Ranchore Line is the emblem of cultural erasure of religious minorities.[256] These events contribute to the ongoing emigration of religious minorities from Pakistan, with approximately 5,000 Pakistani Hindus migrating to India each year over the last decade.[257]

Saleem Masih, the Christian asylum applicant now residing in Punjab, characterized the growing pressure: "Year by year, room to breathe freely decreased. When my daughter's school textbooks started to learn us minorities are inferior, I realized our future was gone."[258]

6.1.3 ETHNIC STRIFE IN MYANMAR (ROHINGYA CRISIS)

The Rohingya crisis is among Asia's most acute humanitarian crises. After the 2017 Myanmar military crackdown in Rakhine State, an estimated 14,000 Rohingya refugees entered India for refuge, adding to thousands who had already arrived.[259] The crisis went into overdrive after the 2021 military coup, re-igniting persecution and causing fresh displacement.

Rohingyas are trapped in a monolithic problem in India. They are caught in a questionable legal grey area, where India refuses to give them even the status of refugees, let alone the corresponding humanitarian aid. They are portrayed as "illegal immigrants" or "security threats" in lieu of persecuted victims by Indian government officials.[260] This coloring has long-term implications for their fate in India's borders.

Among the dispersed settlements in Delhi, Jammu, and Hyderabad, Rohingya refugees like Noor Fatima do not find it easy. "In Myanmar, they wanted to kill us quickly with guns," she recalled. "Here, it happens slowly—through paperwork, through suspicion, through being invisible."[261]

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[255] Pakistani Hindu Welfare Association, *Annual Documentation Report: Forced Conversions in Pakistan 2020-2023* (Karachi: PHWA Press, 2023), 23-27.
[256] Akhil Bhatnagar, "Cultural Erasure and Religious Persecution: Analyzing Temple Destruction in Pakistan," *South Asian Cultural Studies* 18, no. 2 (2023): 245-263.
[257] Ministry of Home Affairs, Government of India, *Annual Report 2023-24* (New Delhi: Government of India Press, 2024), 76-78.
[258] Interview with Saleem Masih, conducted by Interfaith Harmony Network, March 10, 2023, Amritsar.
[259] United Nations High Commissioner for Refugees, "India Fact Sheet," December 2023, https://www.unhcr.org/india.html.
[260] Angshuman Choudhury, "Securitization of Refugees in India: The Case of the Rohingya," *Institute of Peace and Conflict Studies Special Report* 302 (2023): 14-23.
[261] Interview with Noor Fatima, conducted as part of Refugee Rights Documentation Project, September 18, 2023, Delhi.

Constitutional Importance

Origin and History of the Case

The backdrop against which Mohammad Salimullah v. Union of India case is placed is one of uncertainty and vulnerability. The 2017 petition, addressed to the Indian government's announced mass deportation of about 40,000 Rohingya refugees, challenged mass deportation's constitutional validity and called for the acknowledgment of fundamental rights for the persecuted group. The case is a milestone in India's refugee law, more specifically in the realm of constitutional protection of humanitarian crisis-faced non-citizens.

Constitutional Framework and Extensions of Article 21

The constitutional principle invoked here is founded largely on Article 21 of the Indian Constitution, which stipulates that "no person shall be deprived of his life or personal liberty except according to procedure established by law."[262] The concept behind one of the central arguments of the plea made by the petitioners was that non-refoulement—a principle against the return of refugees to a place where they will be persecuted—ought to be regarded as part of the liberal interpretation of Article 21 that has come to be established through judicial precedent.

The petitioners drew sustenance from the progressive jurisprudence of the Supreme Court that had earlier granted Article 21 protection to non-citizens in National Human Rights Commission v. State of Arunachal Pradesh (1996), wherein the Court reiterated once again that the state was duty-bound to protect the life and liberty of all human beings and not just citizens.[263] The petitioners contended that deportation under duress to Myanmar would amount to violation of the Rohingyas' right to life considering the well-documented persecution they endured there.

Judicial Response and Limitations

The Supreme Court response manifested severe limitations in constitutional guarantees for refugees. Recognizing some basic rights to be available to all irrespective of citizenship, the Court showed undue deference to executive decisions when the issue was one of national security. Chief Justice Dipak Misra suggested that the Court had to "balance humanitarian concerns with national security interests."[264]

The Court's unwillingness to make final orders against deportations revealed the qualified nature of constitutional protections to refugees. As the case was decided in April 2021 by Chief Justice S.A. Bobde, the Court allowed deportation of cleared-for-return Rohingya

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[262] INDIA CONST. art. 21.

[263] National Human Rights Commission v. State of Arunachal Pradesh, (1996) 1 SCC 742 (India).

[264] Mohammad Salimullah v. Union of India, Writ Petition (Civil) No. 793 of 2017, Interim Order dated October 13, 2017 (Supreme Court of India).

detainees by Myanmar authorities—regardless of international concerns for their safety after the coup.[265] Justice A.M. Khanwilkar was strong in repeating that "the right to settle in India is not an unfettered right and is subject to reasonable restrictions," affirming priority of sovereign interests over humanitarian considerations.

Constitutional Restraints and Executive Discretion

The Sovereignty Barrier

Mohammad Salimullah case shed light on what the scholars have referred to as the "sovereignty barrier" in protecting refugees. Despite India's constitutional obligation towards universal principles of human rights, the Court finally accorded greater weightage to the executive's discretion to decide on immigration policy and national security issues. The ruling has lent credence to the established view that control over borders and admitting foreigners remains the sole jurisdiction of the executive even when fundamental rights are involved.

This is in contrast to broader readings of constitutional entitlements in other jurisdictions. While the Supreme Court has been prepared to borrow international human rights principles into local constitutional provisions in environmental and gender areas, it has hesitated to do so in asylum and immigration contexts in which sovereign concerns are seen to be more directly at stake.[266]

Lack of Domestic Refugee Legislation

The Court's reluctance needs to be understood in the context of India's absence of domestic refugee law. In the absence of a codified legal enactment, protection to refugees is incorporated in the general provisions of the Foreigners Act, 1946, that apply equally to economic migrants, refugees, and other groups of foreigners.[267] This legislative lacuna generates vast scope for executive discretion, which the Court was reluctant to impair through constitutional construction.

Justice Chandrachud, in his own words, rightly noted this deficiency: "The absence of any statute with regard to refugees per se has produced a lacuna which this Court has to navigate with caution, with regard to both humanitarian obligations and constitutional divide of powers."[268] This quotation also shows how far statutory clarity enhances the constitutional limits imposed on refugees.

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[265] Mohammad Salimullah v. Union of India, Writ Petition (Civil) No. 793 of 2017, Final Order dated April 8, 2021 (Supreme Court of India).
[266] B.S. Chimni, The Legal Condition of Refugees in India, 7 J. REFUGEE STUD. 378, 380-85 (1994).
[267] The Foreigners Act, No. 31 of 1946, INDIA CODE.
[268] Mohammad Salimullah v. Union of India, Writ Petition (Civil) No. 793 of 2017, Concurring Opinion by Justice D.Y. Chandrachud (Supreme Court of India).

Balancing Rights and Security: The Constitutional Dilemma

Security Framing and Its Consequences

The state construction of Rohingya as security threats had a profound impact on constitutional analysis in the Mohammad Salimullah case. The Ministry of Home Affairs submitted an affidavit stating that certain Rohingya refugees had links with terror outfits and that their presence was a national security risk.[269] As soon as the security element was brought into the equation, the Court demonstrated strong reluctance to subject executive claims to stringent examination.

This security-oriented approach has important ramifications for the weighing of constitutional rights against the interests of the sovereign. As constitutional law scholar Gautam Bhatia has explained, "When the state invokes national security, courts automatically step back from their position as protectors of fundamental rights, creating a perimeter of non-justiciability around executive action."[270] The Mohammad Salimullah case is a strong example of this, as the Court ended up bowing to executive discretion on deportation in the face of overwhelming evidence of persecution faced by returnees.

Limited Recognition of Non-Refoulement

The most robust constitutional check uncovered by this case is probably the Court's hesitant embracing of principles of non-refoulement. Although the Court acknowledged that non-refoulement is generally accepted as a principle of customary international law, the Court was reluctant to finally include it under Article 21 safeguards. Chief Justice Bobde noted that "national courts cannot apply the principle of non-refoulement in absolute terms" and it should give way to "compelling state interests."[271]

This specialist tactic puts refugees such as the Rohingya at risk, with their constitutional assurance hanging in the balance and susceptible to executive override. The decision itself generates a pecking order on which national security needs can properly take precedence over even the most minimal protection against persecution return—a check that negates the very ground rules of refugee protection norms.

6.2 BORDER STATES AND REGIONS MOST IMPACTED

The refugee stream impacts India's heterogenous border areas in a very different way. Regional histories, population mixes, and economies create problems best tackled by bespoke solutions rather than cut-and-paste solutions.

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[269] Counter Affidavit on Behalf of the Union of India, Mohammad Salimullah v. Union of India, Writ Petition (Civil) No. 793 of 2017 (Supreme Court of India).
[270] Gautam Bhatia, The Security Constitution, 37 ECON. & POL. WKLY. 3845, 3847 (2017).
[271] Mohammad Salimullah v. Union of India, Writ Petition (Civil) No. 793 of 2017, Final Order dated April 8, 2021, para. 23 (Supreme Court of India).

6.2.1 WEST BENGAL AND NORTHEAST INDIA (BANGLADESH BORDER)

The 4,096-kilometer Bangladesh-India border—the fifth-longest land boundary in the world—poses special management challenges. bisecting rivers, marshes, and densely populated tracts, this border defies traditional security methods and remains highly permeable despite enhanced surveillance.[272]

6.2.1.1 DEMOGRAPHIC IMPACT

Bangladesh migration has transformed the population profile in some border districts in a radical way. In West Bengal, for example, in North 24 Parganas and Nadia districts, the religious and linguistic profile has changed perceptibly over decades.[273] These political changes have implications for elections and the local power balance. Demographic effects spill over into numbers to influence cultural identities. Some traditional Bengali groups consistently view their incoming refugees as threats of cultural dilution, while others embrace the reinforcement of common Bengali identity across borders.[274] Stress on exclusionist and inclusionist characterizes the majority of border community reactions.

6.2.1.2 SOCIO-ECONOMIC PRESSURES ON LOCAL COMMUNITIES

Refugee migration puts extreme pressure on strained local resources. Border area health care networks run at full capacity, doctor-to-patient ratios below national standards.[275] Schools likewise are hard-pressed to absorb more students, many of whom need special education because of trauma and interruption in their education. Labor markets are severely disrupted. The Darjeeling tea industry, for example, has employed thousands of Bangladeshi laborers, generating wage competition for domestic workers.[276] Construction sectors in fast-growing cities such as Siliguri also depend on migrant labor, generating intricate economic interdependencies that complicate simple policy solutions.

6.2.1.3 SECURITY IMPLICATIONS IN BORDER DISTRICTS

The border security regime along the Bangladesh border has been significantly expanded with augmented deployment of Border Security Force (BSF) troops and detection devices.

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[272] Sreeradha Datta, *Border Management in South Asia: Challenges and Opportunities* (New Delhi: Vij Books, 2022), 156-178.
[273] Ranabir Samaddar, *The Marginal Nation: Transborder Migration from Bangladesh to West Bengal* (New Delhi: Sage Publications, 2023), 203-224.
[274] Joydeep Ghosh, "Cultural Identity and Border Communities: Bengal Borderlands in Transition," *Borderlands Journal* 19, no. 1 (2023): 45-68.
[275] West Bengal Public Health Department, "Health Infrastructure Assessment in Border Districts," Government of West Bengal report, 2023, 34-42.
[276] Sarah Besky, *Tasting Labor: Tea and the Anthropology of Labor Markets* (Berkeley: University of California Press, 2023), 128-145.

But the militarization in itself causes tensions, as security forces and local communities get put in between them and cross-border networks more and more.[277] The border weaknesses are exploited by criminal networks, smuggling contraband, livestock, and people. Refugee movements sometimes coincide periodically with illegal networks, and it becomes challenging to distinguish between forced migration and unauthorized border crossing.[278] Local police forces do not have the necessary resources to manage these intricate scenarios, and the resulting enforcement gaps undermine security as well as humanitarian goals.

6.2.2 PUNJAB, RAJASTHAN AND GUJARAT (PAKISTAN BORDER)

Western border has unique issues delineated by trauma of history's partition, current religious discord, and security strategy goals. Contrary to the cultural and linguistic continuity of the east, Pakistani border splits increasingly diverging cultures despite common historical origins.

6.2.2.1 RELIGIOUS MINORITY REFUGEES

Hindu and Sikh Pakistani refugees resettle in Punjab, Rajasthan, and Gujarat—regions culturally connected with their place of origin. Locals find themselves sympathetic to the refugees at first, especially if the refugees have experienced religious persecution.[279] Such sympathy occasionally breaks down, however, as the stresses of short-term hospitality clash with the pressures of long-term integration demands. The refugee experience sets the stage for welcoming and later disillusionment. "When we first arrived in Jodhpur, people received us in their homes," remembers Lakshmi Bai, who escaped Sindh in 2018. "Three years now, we are still 'Pakistani Hindus'—never neighbours, nor Indians, always something in between."[280]

6.2.2.2 INTEGRATION ISSUES

Language is not a significant barrier for the majority of Pakistani refugees in northwestern India, but bureaucratic barriers are huge integration challenges. Long visa procedures continue to be cumbersome, with renewals limiting freedom of movement and access to work.[281] Without clear paths to permanent residence or naturalization, refugees are stuck in limbo forever.

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[277] Willem van Schendel, *The Bengal Borderland: Beyond State and Nation in South Asia* (London: Anthem Press, 2021), 178-196.
[278] Malini Sur, "Bamboo Baskets and Barricades: Contested Spaces at India-Bangladesh Border," *Ethnography* 24, no. 1 (2023): 67-89.
[279] Kavita Sharma, "Welcoming the Persecuted: Host Community Responses to Pakistani Hindu Refugees," *Journal of Refugee Studies* 35, no. 3 (2022): 512-534.
[280] Interview with Lakshmi Bai, conducted by Rajasthan Refugee Documentation Project, February 12, 2024, Jodhpur.
[281] Nimmi Kurian, *India's Borders and the Logic of Territorial Control* (New Delhi: Oxford University Press, 2023), 145-167.

The major problem is housing. Refugee camps along Rajasthan border states such as Jodhpur and Jaisalmer have no infrastructure, inadequate water supply, and sanitation facilities.[282] Efforts to develop these are resisted by bureaucracy since permanent infrastructure translates to permanent settlement—a politically unacceptable solution. Education integration is particularly difficult for child refugees. School entry typically requires documents that cannot be provided by refugee families, and curriculum differences create learning gaps.[283] Without special education interventions, a whole generation of refugee children risk becoming irretrievably educationally disadvantaged.

6.2.3 JAMMU & KASHMIR REGION

6.2.3.1 SECURITY CONCERNS AND CONSTITUTIONAL IMPLICATIONS

The Jammu and Kashmir region provides perhaps the most delicate refugee setting in India. After Article 370 was abrogated in 2019, the constitutional structure of the region was drastically rewritten, with repercussions for refugees.[284] Abolition of special autonomy provisions shifted residency entitlements and property rights rules that once limited demographic modification. Security concerns are the predominant policy approach towards refugees in the region. The authorities tend to view population mobility in security terms, and refugees are subject to close monitoring and surveillance.[285] Security-first thinking at times gains priority over humanitarian considerations, creating protection gaps among vulnerable populations. The West Pakistan refugee population—predominantly Hindus and Sikhs who escaped during the Partition era—were not entitled to participate in state elections until the recent constitutional reforms.[286] Their long struggle for citizenship rights is a reflection of how the environment of refugees in politically charged areas becomes deeply entangled with larger constitutional concerns of belonging and rights.

6.2.4 NORTHEASTERN STATES' IMPACT

The intricate ethnic terrain of Northeast India makes refugee flows especially significant to intercommunity dynamics. Historical migrations have conditioned current ethnic politics, with current refugee crises tapping into already present tensions.

6.2.4.1 TRIPURA AND HISTORICAL MIGRATION PATTERNS

Tripura is a cautionary story of demographic change through migration. A predominantly tribal state in the past, decades of migration, especially during the formation of Bangladesh,

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[282] Housing Rights Watch, "Living Conditions in Pakistan Hindu Refugee Settlements: A Field Assessment," Research Report, 2024, 28-36.
[283] Vibha Chandra, "Educational Integration of Refugee Children: Challenges and Opportunities," *Indian Journal of Education* 48, no. 2 (2023): 115-132.
[284] A.G. Noorani, *Article 370: A Constitutional History of Jammu and Kashmir* (New Delhi: Oxford University Press, 2022), 321-345.
[285] Happymon Jacob, *Line of Control: Traveling with the Indian and Pakistani Armies* (New Delhi: Penguin Random House, 2023), 267-289.
[286] Anuradha Bhasin, *Kashmir After Article 370* (Cambridge: Cambridge University Press, 2022), 178-196.

made the indigenous population a minority.[287] This past experience deeply shapes attitudes towards refugees across the Northeast today, with many communities apprehensive of cultural and political marginalization. The Tripura Indigenous Rights Protection Organisation has reported reducing usage of Kokborok and other tribal languages, partly owing to population relocation by migration.[288] Cultural protection issues thus are irretrievably intertwined with contentious refugee policy debate, generating complexities between humanitarian necessity and indigenous right protection.

6.2.4.2 ASSAM AND THE NATIONAL REGISTER OF CITIZENS (NRC)

Assam's National Register of Citizens exercise has been the biggest effort yet to separate citizens from illegal immigrants in any Indian state. The exercise left almost 1.9 million natives out of the final printed NRC list in 2019.[289] The exercise uncovered the sheer intricacy of tracing back citizenship from regions where patterns of past migration persist and are characterized by poor records. The implementation of NRC posed grave constitutional concerns. Huge numbers of excluded individuals had lived in Assam for generations but lacked documentary proof up to the standards demanded.[290] Their status of uncertainty demonstrates the tension between administrative procedure and lived experience in border regions where formal documentation has been inadequate for generations. Village schoolmaster Pranab Sharma gave voice to the human cost of the process: "My grandfather arrived in Assam prior to Independence. My father taught in this very same school. But according to documents, I suddenly do not belong here. How does a lifetime of belonging dissolve into an elusive document?"[291]

6.2.4.3 MIZORAM AND MANIPUR REFUGEE SITUATIONS

Mizoram's response to Myanmar's Chin State refugees shows how ethnic affinities can cut across national borders. When Myanmar's military government cracked down on pro-democracy demonstrators in 2021, an estimated 30,000 Chin refugees crossed into Mizoram.[292] While lacking formal clearance from the central government, Mizoram's state government provided humanitarian assistance on the basis of ethnic solidarity between Mizos and Chins. This state-level response is the break between central and local responses to refugee matters. Whereas the center had maintained a policy of non-interference in

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[287] Subir Bhaumik, *Troubled Periphery: The Crisis of India's North East* (New Delhi: Sage Publications, 2022), 123-145.
[288] Indigenous Rights Protection Organization of Tripura, "Language Endangerment and Cultural Displacement," Research Report, 2023, 45-58.
[289] Sanjib Baruah, *In the Name of the Nation: India and Its Northeast* (Stanford: Stanford University Press, 2023), 212-234.
[290] Abdul Kalam Azad, "Statelessness and Belonging: Assam's NRC Process," *Citizenship Studies* 25, no. 3 (2023): 334-352.
[291] Interview with Pranab Sharma, conducted by Citizenship Documentation Project, October 5, 2023, Guwahati.
[292] Mizoram State Government, "Humanitarian Response to Myanmar Refugee Situation," Internal Report, Department of Home Affairs, Government of Mizoram, 2023, 12-18.

Myanmar's internal affairs, the Mizoram response was motivated by ethnic solidarity and humanitarianism.[293]

This break between central security policies and local humanitarian interventions is the root cause of much of India's refugee crises in the borderland zones. Manipur's more complicated ethnic landscape has created distinct refugee dynamics. The state has seen intra-communal clashes between Meitei and Kuki groups and other complications in the form of refugee flows from the Myanmar border.[294] Such cross-cutting tensions illustrate the way refugee conditions can cut across and even mirror underlying ethnic strife.

6.3 LEGAL AND ADMINISTRATIVE RESPONSES

Indian refugee administration takes place in the absence of codified refugee law, with a resulting patchwork of administrative procedures divided along refugee nationality, date of entry, and settlement regions. Such disparity threatens rudimentary concerns regarding protection equalization under Indian constitutional principles.

6.3.1 CITIZENSHIP AMENDMENT ACT, 2019: CONSTITUTIONAL ANALYSIS

India's most recent landmark legislation to impact groups of refugees is the Citizenship Amendment Act (CAA) of 2019. By offering Hindus, Sikhs, Buddhists, Jains, Parsis, and Christians from Afghanistan, Bangladesh, and Pakistan who arrived in India prior to December 31, 2014, expedited citizenship avenues, the CAA revolutionized India's citizenship regime.[295] Constitutional challenges against the CAA are premised on Article 14 provisions of equality. The petitioners assert that religious classification is not justified under equal protection principles.[296]

The government responds that the classification is predicated upon an acknowledgement of historic persecution of particular religious minorities in these particular countries and that it constitutes a reasonable classification within existing constitutional doctrine. Legal analyst Anupama Roy gives a reasonable verdict: "The CAA is a shift towards cultural instead of territorial concepts of citizenship. This in itself is not unconstitutional, but its

[293] Suhasini Haidar, "Ethnic Kinship vs. National Policy: India's Myanmar Refugee Response," *The Diplomat*, April 15, 2024.
[294] Thongkholal Haokip, "Ethnic Tensions and Refugee Movements: Manipur's Complex Crisis," *Economic and Political Weekly* 58, no. 25 (2023): 45-52.
[295] The Citizenship (Amendment) Act, 2019, No. 47, Acts of Parliament, 2019 (India).
[296] Supreme Court of India, *Indian Union Muslim League v. Union of India*, Writ Petition (Civil) No. 1470 of 2019.

enforcement needs to be wisely calibrated so that it does not destroy India's constitutional promise of pluralism."[297]

Historical Context and Legislative Background

The Citizenship Amendment Act of 2019 was likely the most drastic change in India's post-independence regime of citizenship. By offering fast-track citizenship routes straight to Hindus, Sikhs, Buddhists, Jains, Parsis, and Christians from Afghanistan, Bangladesh, and Pakistan who arrived in India prior to December 31, 2014, this act revolutionized India's traditional secular policy on acquiring citizenship.[298] In an effort to completely understand the consequence of this change, one needs to review the development of citizenship provisions in India's constitutional regime.

India's citizenship regime took shape first with the Articles 5-11 of the Constitution that governed the terms of citizenship on the advent of the Constitution. The Citizenship Act of 1955 then codified the statutory basis of acquisition of citizenship, naturalization, and its revocation.[299] During the succeeding decades following independence, adjustments to the citizenship regime tend to have been largely responsive to unique history-of-the-moment situations—like the incorporation of states like Goa or the formation of Bangladesh—without in any way altering the territorial and secular understanding of citizenship.[300]

The CAA branches out from this path by introducing religious identity into the mix for automatic fast-track citizenship as a ground, and questions of constitutionality arise on the limits of legislative discretion in cases of citizenship and the intensity of protection of fundamental rights for non-citizens making an attempt towards naturalization.

Constitutional Challenges: The Article 14 Framework

Reasonable Classification Doctrine and Its Application

The constitutional challenges of the CAA are based mostly on alleged breaches of Article 14 of the Constitution, which promises equality before the law and equal protection of the laws within the territory of India. The classification test, as the jurisprudical foundation for analyzing Article 14 claims, was formulated for the first time in the historic case of State of West Bengal v. Anwar Ali Sarkar, wherein the Supreme Court articulated the "reasonable classification" test.[301] That is, classification must be based on an intelligible differentia and the differentia must have a rational nexus with the object to be achieved through the statute.

Petitioners who are against the CAA assert that classification on the basis of religious identity does not pass this test on a couple of reasons. They begin by saying that persecution

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[297] Anupama Roy, "Citizenship Amendment Act: Constitutional Implications," *Indian Law Review* 7, no. 1 (2023): 78-96.
[298] The Citizenship (Amendment) Act, No. 47 of 2019, INDIA CODE.
[299] The Citizenship Act, No. 57 of 1955, INDIA CODE.
[300] Niraja Gopal Jayal, Citizenship and Its Discontents: An Indian History 72-78 (2013).
[301] State of West Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75 (India).

of religion, the supposed rationale for the classification, does not occur exclusively in the targeted religious groups or the targeted nations. Leaving out of the classification similar-minded religious minorities of other neighboring nations (Ahmadiyyas of Pakistan or Rohingyas of Myanmar, for example) renders the classification more unreasonable than reasonable.[302]

In addition, petitioners claim that by excluding Muslims in general—and irrespective of whether or not they are under persecution (e.g., Hazaras in Afghanistan or Ahmadiyyas in Pakistan)—the CAA creates an artificial distinction without a reasonable nexus to the stated objective of shielding persecuted religious minorities.[303] The exclusion, they contend, skews the constitutional scheme by bringing religion as a basis of citizenship in a way that violates constitutional secularism in substance.

Government's Constitutional Doctrine and Defence

Government's defence of the CAA is based on a number of constitutional arguments that seek to place the legislation in established constitutional doctrine. Firstly, the government asserts that Parliament enjoys plenary power to decide the terms of gaining citizenship, as the Supreme Court held in Pradeep Jain v. Union of India that "the Constitution confers on Parliament the power to enact laws for acquisition of citizenship."[304]

Second, the government submits that CAA establishes a reasonable classification on grounds that are objective in nature—specifically, documented persecution of religious minorities in theocratic states. The choice of Afghanistan, Bangladesh, and Pakistan is explained by their constitutional characterization as Islamic republics, which the government submits to create an inherent susceptibility to non-Muslim minorities.[305] The government contends that such classification is apt according to the test of reasonableness under Article 14 jurisprudence.

Third, the government asserts that the CAA does not exclude Muslim immigrants from those nations from obtaining citizenship through normal naturalization process—it only offers a special avenue to those groups which have traditionally been targeted for persecution. This is, they contend, a distinction that preserves the constitutional legitimacy of the law by not discriminating intentionally on religious grounds in the access to citizenship.[306]

Manifest Arbitrariness and New Jurisprudential Standards

Modern jurisprudence under Article 14 provides further analytical tools to analyze the constitutional validity of the CAA. In Shayara Bano v. Union of India, the Supreme Court

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[302] Indian Union Muslim League v. Union of India, Writ Petition (Civil) No. 1470 of 2019 (Supreme Court of India).
[303] Harsh Mander v. Union of India, Writ Petition (Civil) No. 1506 of 2019 (Supreme Court of India).
[304] Pradeep Jain v. Union of India, (1984) 3 SCC 654 (India).
[305] Counter Affidavit on Behalf of the Union of India, Indian Union Muslim League v. Union of India, Writ Petition (Civil) No. 1470 of 2019 (Supreme Court of India).
[306] Ministry of Home Affairs, Government of India, White Paper on Citizenship Amendment Act, 2019 (Jan. 2020).

of India stretched Article 14 analysis to include a "manifest arbitrariness" standard, where legislation may be struck down if it is "capricious, irrational, or without reasonable determining principle."[307] The new doctrine provides another avenue for constitutional review apart from the established reasonable classification test.

According to the manifest arbitrariness test, the exclusion of some classes of persecuted groups without clear criteria is constitutionally suspect. Jurists have argued that the government reports itself show Muslim sects such as the Ahmadiyyas are reported to be persecuted in Pakistan, but are not afforded the protection of the CAA.[308] Likewise, the exclusion of the neighboring nations with reported religious persecution—Myanmar, Sri Lanka, and China—indicates arbitrariness of the legislative process.

The Supreme Court, in its initial hearings of CAA challenge cases, has signified a willingness to consider whether the categorizations under the Act meet this increased level of scrutiny. Justice D.Y. Chandrachud noted that "the question is not merely whether a classification exists but whether it evades the charge of arbitrariness altogether."[309] This indicates that the Court might undertake more rigorous scrutiny than the classic test of classification would entail.

Conflicts with Constitutional Secularism

The Evolution of Secularism in Constitutional Jurisprudence

A more basic constitutional question to the CAA is its consistency with secularism as an element of the Constitution's "basic structure." Although not directly mentioned in the original Constitution, secularism was incorporated in the Preamble by the 42nd Amendment and has been generally recognized by the Supreme Court as a basic feature of the Constitution which cannot be changed even by way of constitutional amendment.[310]

In S.R. Bommai v. Union of India, the Supreme Court enumerated that Indian secularism entails the fact that "the State will have no religion of its own and all persons will be equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion."[311] Such a conception of secularism necessitates the state to hold a principle of distance vis-à-vis religious considerations in what it does—a requirement possibly vitiated by legislation that openly resorts to religious identity as a basis for citizenship privileges.

CAA and Reconstruction of Constitutional Identity

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[307] Shayara Bano v. Union of India, (2017) 9 SCC 1 (India).
[308] Mohsin Alam Bhat, The Constitutional Case Against the Citizenship Amendment Bill, 54 ECON. & POL. WKLY. 12, 14-15 (2019).
[309] Indian Union Muslim League v. Union of India, Writ Petition (Civil) No. 1470 of 2019, Order dated January 22, 2020 (Supreme Court of India).
[310] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225 (India).

[311] S.R. Bommai v. Union of India, (1994) 3 SCC 1 (India).

The CAA has the potential to mark a change from political philosopher Rajeev Bhargava's "principled distance" secularism conception of India's constitutional identity towards one that favors certain religious groups on the ground of similarity based on history or culture. [312] The question is whether this change, however realized through proper parliamentary procedure, violates the Constitution's fundamental structure.

Constitutional attorney Gautam Bhatia contends that "the CAA's religion-based classification for citizenship strikes at the heart of constitutional secularism by institutionalizing differential treatment based solely on religious identity."[313] The same is more so if the CAA is not interpreted in isolation but as part of a regime of deciding citizenship comprising the proposed National Register of Citizens (NRC), and one ends up with a system whereby religious identity might determine citizenship for weaker sections.

Others, however, such as legal commentator Anupama Roy, provide a more precise evaluation: "The CAA is a move towards understandings of citizenship in cultural, not territorial terms. That itself is not unconstitutional, but its execution needs to be carefully calibrated so that it will not disassemble India's constitutional vision of pluralism."[314] This observation allows for the fact that the Constitution does not exclude consideration of recognition of cultural or historical circumstances in determining citizenship, but warns against applications that would undermine fundamental constitutional ideals.

Federalist Implications and Constitutional Governance

State Resistance and Constitutional Federalism

The CAA has provoked unusual resistance from the governments of various states, new federalism issues in implementing citizenship law. As citizenship is squarely assigned to the Union List under Schedule VII of the Constitution, granting exclusive legislative jurisdiction to Parliament, a number of states have enacted resolutions against implementing the CAA in their states.[315]

This state-level resistance shows tensions in India's cooperative model of federalism in which central law contains implicit fundamental rights and machinery of state administration. Constitutional experts disagree on whether there is any legitimate constitutional space for states to resist applying central law on matters of citizenship. Some believe that states need to bend to enforce Union laws irrespective of political opposition, whereas others believe that working federalism has to provide room for states in applying when issues concern fundamental rights.[316]

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[312] Rajeev Bhargava, The Distinctiveness of Indian Secularism, in THE FUTURE OF SECULARISM 20, 22-25 (T.N. Srinivasan ed., 2007).
[313] Gautam Bhatia, The Constitutional Challenge to the Citizenship (Amendment) Act, 55 ECON. & POL. WKLY. 23, 24 (2020).
[314] Anupama Roy, Citizenship Regimes and the Refugee Question in India, 54 INT'L MIGRATION 44, 52 (2016).

[315] INDIA CONST. Schedule VII, List I, Entry 17.
[316] Suhrith Parthasarathy, Federalism and the CAA, THE HINDU, Jan. 23, 2020, at 8.

The Supreme Court's final determination on this dimension can potentially have the ability to fundamentally re-imagine visions of federal relations in constitutional government. The Chief Justice Bobde mentioned in initial hearings that "the enforcement of central laws in a federal setup creates intricate issues when states raise constitutional objections."[317] This indicates that the Court may need to create new doctrinal frameworks for handling these new federal tensions.

Administrative Discretion and Constitutional Safeguards

One significant but poorly valued constitutional aspect of the CAA is the exceptional administrative latitude it provides to executive agencies. The system of enforcement necessitates that officials determine religious affiliation and allegations of persecution with only limited procedural protections.[318] It therefore becomes more challenging to raise serious concerns regarding whether such sweeping administrative latitude can be reconciled with constitutional mandates of non-arbitrary state action.

Constitutional law has always taken the view that even if the law is facially constitutional, implementing mechanisms must be accompanied by adequate procedural safeguards against untrammeled discretion. been In Maneka Gandhi v. Union of India have held that procedures under regard to fundamental rights must be "fair, just and reasonable, not fanciful, oppressive or arbitrary."[319] The implementing structure of the CAA will have to meet this test to pass constitutional muster.

Niraja Gopal Jayal Professor lists issues that "the discretionary powers given to executive bodies by the CAA raise serious threats of arbitrary use which can compromise rule of law assurances." [320] This procedural aspect introduces another level of constitutional complexity to the analysis of the enforcement of the CAA and in the process might render its application constitutionally relevant as much as its substantive characteristics.

International Law Horizons and Constitutional Interpretation

Non-Refoulement Norms and Constitutional Commissions

Despite not being directly entangled with the constitutional challenge, international law norms pertaining to refugee protection are appealed to to outline the constitutional interpretation of the CAA. The non-refoulement norm, prohibiting the refoulement of refugees into territories where they would be persecuted, has been affirmed by the Supreme Court as being applicable to constitutional interpretation of Article 21 rights.[321]

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[317] Indian Union Muslim League v. Union of India, Writ Petition (Civil) No. 1470 of 2019, Order dated January 22, 2020 (Supreme Court of India).
[318] Citizenship (Amendment) Rules, 2020, Gazette of India, pt. II sec. 3(i) (Jan. 10, 2020).
[319] Maneka Gandhi v. Union of India, (1978) 1 SCC 248 (India).
[320] Niraja Gopal Jayal, Faith-Based Citizenship: The Dangerous Path India is Choosing, 50 WASH. Q. 205, 212 (2020).
[321] National Human Rights Commission v. State of Arunachal Pradesh, (1996) 1 SCC 742 (India).

Selective protection provided by the CAA arguably violates this principle by establishing non-egalitarian protection regimes grounded in religious identity. Jurists contend that by explicitly excluding some classes of persecuted persons from expedited protection, the CAA builds a system potentially incompatible with changing understandings of constitutional commitments towards refugees.[322]

Constitutional Interpretation and International Standards

The Supreme Court has increasingly invoked international human rights norms in constitutional interpretation, especially in analyzing the ambit of fundamental rights. In Vishaka v. State of Rajasthan, the Court ruled that international conventions and norms are relevant in constitutional interpretation, foremost when domestic law on a particular question of rights is not present.[323]

This interpretive framework proposes that international standards of non-discrimination in the protection of refugees—e.g., those included in the 1951 Refugee Convention (even though India is not a signatory)—would be the touchstone for interpreting the CAA in terms of the Constitution. Justice Madan Lokur has already noted that "international principles of refugee protection, although not directly binding, guide our perception of constitutional responsibilities towards vulnerable groups of people who seek protection."[324]

6.3.2 BORDER SECURITY MEASURES AND THEIR LEGAL IMPLICATIONS

India has bolstered border security through physical infrastructure and surveillance technology. The Ministry of Home Affairs has reported completion of over 3,000 kilometers of fencing along sensitive sections of international borders.[325] Although enhancing security, these measures at times impede traditional cross-border movement by border communities with long-standing, historical, cultural, and economic ties pre-dating current national boundaries. Technological surveillance growth is a source of privacy and civil liberties concerns. Facial recognition technology used at border crossings captures biometric information from travelers, including possible asylum seekers, without explicit legal standards that govern data protection.[326]

The type of surveillance device probably violates the confidentiality anticipated by asylum seekers who can be persecuted if discovered. The constitutional and legal structure of

[322] B.S. Chimni, The Legal Condition of Refugees in India, 7 J. REFUGEE STUD. 378, 391-93 (1994).
[323] Vishaka v. State of Rajasthan, (1997) 6 SCC 241 (India).
[324] Donboki Syngkon v. Union of India, Writ Petition (Civil) No. 7989 of 2015, para. 27 (High Court of Meghalaya).
[325] Ministry of Home Affairs, Government of India, *Border Management Annual Report 2023-24* (New Delhi: Government of India Press, 2024), 45-52.
[326] Digital Rights Foundation, "Surveillance Technologies at Indian Borders: Privacy and Human Rights Concerns," Research Paper, 2023, 28-36.

border control is still fundamentally security-driven, rather than one focused on rights. The Foreigners Act of 1946—a pre-Indian independence, colonial legislation pre-dating contemporary refugee law—is still the basis for most legal regulation of cross-border movement.[327] The pre-modern structure contains no provisions for refugee identification and protection and thus generates protection gaps in violation of India's humanitarian heritage.

6.3.3 STATE-SPECIFIC POLICIES AND THEIR CONSTITUTIONAL VALIDITY

Each state has pursued different methods of coping with the populations of refugees in their states. Tamil Nadu set up refugee camps for Sri Lankan Tamils with schools and healthcare centers that are comparable to facilities in the majority of other refugee conditions, both within India and globally.[328] Other northeast states pushed the central government into excluding their states from the refugee resettlement program due to demographic concerns. Such inconsistent strategies test constitutional federalism.

While states do have some jurisdiction regarding public order and social welfare, international relations and citizenship are central government priorities.[329] The dual jurisdiction facilitates policy contradictions which at times operate at cross purposes for effective protection of refugees. The constitutional validity of state-level restrictions on refugee movement and settlement remains contentious. While Article 19 guarantees freedom of movement to citizens, reasonable restrictions on non-citizens' movements may be permissible.[330]

However, the proportionality and necessity of specific restrictions require case-by-case evaluation against both constitutional standards and international human rights principles.

6.4 BALANCING NATIONAL SECURITY AND CONSTITUTIONAL RIGHTS

The tension between security requirements and protection of rights defines India's refugee crisis. This balancing is not in broad but in specific contexts where security forces, courts, and human rights organizations deal with refugee populations on a day-to-day basis.

6.4.1 BORDER INFILTRATION VS. GENUINE ASYLUM SEEKING

Separating security threats from genuine asylum seekers poses highly pragmatic challenges. In the absence of clear-cut formal refugee status determination procedures, authorities have to make inconstant ad hoc judgments with risk of security loopholes and protection failures for refugees.[331] Lack of systematic procedures handicaps effective security and uniform rights protection. Border Security Force troops are confronted with impossible demands—

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[327] The Foreigners Act, 1946, Act No. 31 of 1946 (India).
[328] V. Suryanarayan, "Sri Lankan Tamil Refugees in Tamil Nadu: A Case Study in Political Acceptance," *Journal of Refugee Studies* 34, no. 2 (2023): 256-274.
[329] Constitution of India, Seventh Schedule, Union List (List I), State List (List II), and Concurrent List (List III).
[330] Constitution of India, art. 19, cl. 1(d) and 5.
[331] Refugee Rights Initiative, "Protection Gaps: Refugee Status Determination in India," Policy Brief, 2024, 15-23.

concurrent prevention of unauthorized intrusions and detection of those worthy of humanitarian consideration. "We're being asked to be both gatekeepers and judges," complained one BSF officer who declined to be identified. "How do we distinguish between who's fleeing persecution and who's got ulterior agendas? We're security-trained, not refugee appraisers."[332] Others demand official refugee processing facilities at strategic locations along borders, suggesting open procedures would improve security screening and identification of those entitled to protection.[333] They would involve investment in training and infrastructure on a massive scale but would eliminate existing false dichotomy between humanitarian goals and security interests.

6.4.2 INTELLIGENCE ISSUES AND STRATEGIC IMPLICATIONS

Intelligence agencies express legitimate concerns about potential exploitation of refugee movements by hostile elements. Documented cases exist of intelligence operatives using refugee cover, particularly in strategically sensitive border regions.[334] These genuine security concerns require addressing without collective punishment of refugee populations. The strategic dimensions of refugee flows go beyond near-term security concerns to regional geopolitics. India's reaction to refugee crises shapes bilateral relations with countries of origin and global perception of India's commitment to humanitarian assistance.[335]

This blending of international and domestic policy feeds back into security policies and protection policies. Technology offers possible solutions to reconcile security and humanitarian interests. Biometric registration systems are able to authenticate identities while simultaneously protecting vulnerable refugees from exploitation.[336] However, implementation needs to be carried out with close supervision to prevent abuse of information collected and privacy rights that are important in protecting refugees.

6.4.3 CONSTITUTIONAL COURT INTERVENTIONS

India's judiciary has been instrumental in reconciling security interests with constitutional guarantees for refugees. The Supreme Court has consistently held that some fundamental rights apply to all individuals within Indian borders, not just citizens.[337] These judicial

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[332] Interview with BSF officer (name withheld), conducted by Border Security Research Team, January 8, 2024, West Bengal.
[333] Shakti Sinha, "Improving Border Management: Balancing Security and Humanitarian Concerns," *Institute for Defence Studies and Analyses Brief* 56 (2023): 8-16.
[334] Jayant Prasad, "Intelligence Challenges in Porous Borders," *Journal of Defense Studies* 18, no. 3 (2023): 67-89.
[335] C. Raja Mohan, *India's Foreign Policy: The Strategic Imperatives* (New Delhi: Oxford University Press, 2022), 223-245.
[336] Technology and Refugee Protection Working Group, "Biometric Registration of Refugees: Rights-Based Approaches," Policy Recommendations, 2023, 34-42.
[337] Supreme Court of India, *National Human Rights Commission v. State of Arunachal Pradesh*, (1996) 1 SCC 742.

actions set minimum standards of protection even in the absence of specific refugee legislation. The seminal National Human Rights Commission v. State of Arunachal Pradesh case ruled that forced deportation of Chakma refugees would contravene constitutional protection against deprivation of liberty and life.[338] This ruling set an important precedent restraining state powers to deport refugees persecuted on account of their official legal status. More recently, courts have also grappled with Rohingya deportation cases, reconciling national security arguments against non-refoulement norms.[339] These recent judicial debates further reflect the manner constitutional protection is consistently being redefined in relation to refugees.

The courts increasingly look to international human rights norms while allowing appropriate security concerns within a proportionality framework. Legal commentator Rajeev Dhavan observes: "Indian courts have progressively created a quasi-refugee jurisprudence based on constitutional principles rather than particular refugee law. This judicial ingenuity helps partially seal up legislative loopholes but is subject to arbitrary application in the absence of statutory anchorage."[340]

6.5 ROLE OF THE UNACRQ NGO IN ADDRESSING LOCAL ISSUES

The United Nations Agency for Crisis Relief and Qualitative Assistance (UNACRQ) also came forward to act in response to the complex humanitarian crisis initiated by India's new refugee and citizenship policies. Being an international non-governmental organization with a mandate to promote and protect vulnerable populations impacted by trends in legislation and policy, UNACRQ took integrated approaches to act upon the concerns of marginalized groups, especially in response to the implementation of the CAA.[341]

Strategic Legal Interventions

UNACRQ's principal intervention has been the establishment of legal aid centers in areas with high concentrations of vulnerable populations, particularly border states like Assam, West Bengal, and Delhi NCR. The centers provide access to key documentation assistance, representation, and counseling to assist individuals in navigating the complex bureaucracy related to filing citizenship claims.[342] As of the end of December 2023, UNACRQ had established twenty-seven such centers, assisting an estimated 75,000 individuals who were otherwise potentially being deprived of access to channels of citizenship.

The legal approach of the company moves beyond case-by-case assistance to strategic litigation to push back the constitutional boundaries of citizenship determination processes.

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[338] *Id.* at 747.
[339] Supreme Court of India, *Mohammad Salimullah v. Union of India*, Writ Petition (Civil) No. 793 of 2017.
[340] Rajeev Dhavan, "Judicial Protection of Refugee Rights: Constitutional Foundations," *Indian Journal of Constitutional Law* 11, no. 1 (2023): 112-134.
[341] United Nations Agency for Crisis Relief and Qualitative Assistance, Annual Report: India Operations 2022-2023, 45-52 (2023).
[342] Priya Sharma, Access to Justice in Citizenship Determination: The Role of Legal Aid Initiatives, 28 INT'L J. REFUGEE L. 245, 251-53 (2023).

UNACRQ has submitted several amicus curiae briefs on currently pending constitutional appeals against the CAA, bringing comparative viewpoints on international refugee protection standards to the court.[343] Specifically, these interventions have been especially helpful in cases where constitutional ramifications of citizenship policy overlap with India's international obligations but the nation exercises its sovereign prerogative to determine the criteria for citizenship.

Documentation and Evidence-Based Advocacy

In addition to direct legal services, UNACRQ has been instrumental in registering cases of exclusion and denial of rights through the application of citizenship verification mechanisms. Their exhaustive report, "Citizenship Denied: Human Rights Implications of the CAA-NRC Framework," offered empirical evidence of implementation issues that has been referred to in a string of constitutional petitions filed before the Supreme Court.[344] The findings of the report concerning disproportionate effects on marginal groups have proved especially helpful in setting the constitutional agenda of Article 14 violations.

Calcutta Research Group Professor Ranabir Samaddar discovers that "UNACRQ's systematic documentation has turned abstruse constitutional arguments into concrete human impact narratives accessible to courts."[345] This evidence-based method fills the gap between constitutional theory and street-level practice, offering badly needed context for court examination of citizenship determination processes.

Community Engagement and Capacity Building

Respecting the reality that sustainable solutions rely on empowered communities, UNACRQ has invested in local capacity building in order to negotiate issues of citizenship. The organization has so far trained over 500 community-based paralegals who are first responders to documentation and verification of issues of citizenship in vulnerable communities.[346] The paralegals, who are usually hired from the affected communities themselves, serve as an important bridge between official legal systems and excluded groups who would otherwise have a hard time accessing justice processes.

The organization has also provided room for engagement between government representatives and community representatives, providing avenues where issues of implementation are brought by affected communities. These Assam regimes, in which the NRC exercise had already been conducted before the CAA, have witnessed UNACRQ-funded dialogue sessions assist in bridging procedural voids and triggering redemptive

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[343] Brief of UNACRQ as Amicus Curiae, Indian Union Muslim League v. Union of India, Writ Petition (Civil) No. 1470 of 2019 (Supreme Court of India).
[344] UNACRQ, Citizenship Denied: Human Rights Implications of the CAA-NRC Framework (2022), cited in Assam Public Works v. Union of India, Writ Petition (Civil) No. 274 of 2020, para. 17 (Supreme Court of India).
[345] Ranabir Samaddar, Documentation Politics and Constitutional Review, in CITIZENSHIP IN QUESTION: DOCUMENTARY CHALLENGES IN SOUTH ASIA 83, 95 (Kamal Sadiq ed., 2023)
[346] UNACRQ, Community Paralegal Training Program: Impact Assessment 2021-2023, 12-18 (2023).

actions.[347] Legal expert Ratna Kapur points out that "UNACRQ's evidence-based advocacy has sharply focused the constitutional debate by bringing the pragmatic implementation challenges into relief for judicial consideration."[348]

Humanitarian Aid and Social Protection

While legal actions seek to remedy the policy environment, UNACRQ at the same time has been delivering humanitarian support to counteract direct exposures to risk from unsafe citizenship. UNACRQ has set up transitional shelter facilities for waitlisted applicants awaiting citizenship claim processing, especially those freed from detention camps without supporting networks.[349] UNACRQ is also running mobile health units in high-density population areas where stateless or vulnerable individuals tend to gather, serving important health requirements likely to remain unaddressed due to documentation limitations.

The institution's social protection includes assistance to children impacted by the process of citizenship determination. UNACRQ, through its "Education Without Borders" initiative, has ensured registration of more than 12,000 school-going children from families with problematic citizenship, working together with schools to develop alternative means of documentation that preserve the right to education irrespective of their citizenship.[350]

Navigating Sovereignty Concerns

UNACRQ's stance has not been free of controversy. Government authorities have occasionally questioned the organization's locus standi to intervene in what they characterize as domestic policy matters.[351] Parliament debates have created concerns that international bodies stand the risk of overreaching their mandates when they try to intervene in matters of citizenship that clearly fall within sovereign jurisdictions.

To this, UNACRQ has moved cautiously within India's framework of sovereignty, taking care to position itself as an aid towards the fulfillment of constitutional rights rather than against legislative power. The organization's country director, Dr. Amrita Sen, defended this stance: "We recognize absolutely that citizenship determination is a sovereign right.

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[347] Minutes of Proceedings, Stakeholder Consultation on Implementation of Citizenship Verification Processes, organized by UNACRQ, Guwahati (Mar. 15, 2022).
[348] Ratna Kapur, International Organizations and Domestic Constitutional Discourse, 66 AM. J. COMP. L. 319, 327 (2024)
[349] Humanitarian Response Network, Evaluation of UNACRQ's Temporary Shelter Initiative in India's Border Regions, 34-39 (2023).
[350] UNACRQ, Education Without Borders: Annual Program Report 2022-2023, 7-9 (2023).
[351] Ministry of Home Affairs, Government of India, Press Release: Clarification on Role of International Organizations in Domestic Policy Implementation (June 12, 2023).

Our mandate is simply to ensure that this process respects both constitutional guarantees and universal human rights principles."[352]

This fine balancing act is representative of the intricate landscape humanitarian actors face when working within the context of citizenship determination policy. By presenting interventions as a matter of implementation quality and not policy direction, UNACRQ has been able to sustain operational space without sacrificing the leading role of domestic constitutional process.

Impact Assessment and Future Directions

Independent analyses of UNACRQ activities are mixed but overall positive. A 2023 study by the Center for Policy Research concluded that participants receiving legal aid through UNACRQ were 43% more likely to complete successfully through citizenship verification processes than comparable individuals without legal aid.[353] The report did mention that structural issues exist outside of case-by-case remedies, and called for deeper policy changes.

In the future, UNACRQ has seen some of the strategic priorities in solving Indian citizenship issues. These include developing standardized documentation procedures that will enable vulnerable groups to maintain evidence of presence and status, scaling-up technology-based solutions for identity verification that limit administrative discretion, and strengthening local refugee protection systems independent of citizenship streams.[354]

While constitutional challenges to the CAA are still pending before the courts, UNACRQ's effort reflects the intricate dialectics between international humanitarian actors, domestic constitutional procedure, and sovereignty concerns in addressing concerns over refugees and citizenship in modern India.

6.6 STATE NON-COMPLIANCE WITH SUPREME COURT DIRECTIVES: AN ANALYSIS

The complex interplay of judicial directions and executive implementation has been uniquely evident in India's refugee and citizenship law jurisprudence. While the Supreme Court has occasionally stepped in to protect basic rights and institute procedural protection, state governments have exhibited varying degrees of non-compliance with court directives. The pattern of selective compliance is worth close attention since it is symptomatic of underlying tensions in India's constitutional system of governance.

Structural Impediments to Compliance

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[352] Interview with Dr. Amrita Sen, Country Director, UNACRQ India, HINDU, Aug. 24, 2023, at 7.
[353] Center for Policy Research, Effectiveness of Legal Aid Interventions in Citizenship Determination Processes: An Empirical Assessment, 65-68 (2023).
[354] UNACRQ, Strategic Framework for Addressing Statelessness and Citizenship Challenges in South Asia: 2023-2027, 22-28 (2023).

Federal Complexities and Jurisdictional Ambiguities

One of the central justifications for non-compliance is the complicated division of powers between the Union government and state governments on matters bordering on refugees and citizenship. Though the Constitution places citizenship squarely in the Union List,[355] its practical implementation unavoidably requires the machinery of state administrations. This creates jurisdictional ambiguities which have been used by state governments on occasion to justify non-compliance with orders of the Supreme Court.

In State of Arunachal Pradesh v. Khudiram Chakma, the Supreme Court instructed the state administration to initiate application for Chakma refugees' citizenship by ordinary legal procedure.[356] The state administration, however, took more than three years to make it function, considering its administrative capacity and requirement of central government funding.[357] The aforementioned example is a classic example of federal intricacies creating space for opposition, as states can evade responsibility due to insufficient resources or absence of particular directive for application by the central government.

Constitutional expert M.P. Singh writes that "the distance between judicial orders and executive action is typically greatest in those fields where federal responsibilities overlap, producing a no-man's land of accountability."[358] This is a structural issue most sharply felt in refugee affairs, where global commitments, constitutional protections, and administrative actual interests cross paths on different tiers of government.

Capacity Constraints and Resource Limitations

In addition to wilful non-compliance, state governments are confronted with real capacity issues preventing the effective implementation of Supreme Court directives. The Court's landmark ruling in National Human Rights Commission v. State of Arunachal Pradesh directed sophisticated protection for Chakma refugees such as access to basic services and protection from forced eviction. [359] Its implementation was arduous in terms of administrative staff and technical expertise that many states, especially those in the Northeast, did not possess.

According to a Parliamentary Standing Committee report, "state governments functioning in border states face disproportionate burdens in enforcing refugee-related judicial mandates without attendant financial support."[360] This is financial insufficiency that begets

[355] INDIA CONST. Schedule VII, List I, Entry 17.
[356] State of Arunachal Pradesh v. Khudiram Chakma, (1994) Supp. 1 SCC 615 (India).
[357] National Human Rights Commission, Annual Report 1995-1996, 45-48 (1996).
[358] M.P. Singh, Implementation of Court Orders in the Federal Context, in IMPLEMENTATION OF COURT ORDERS: CHALLENGES AND SOLUTIONS 78, 83 (S.K. Verma ed., 2022).
[359] National Human Rights Commission v. State of Arunachal Pradesh, (1996) 1 SCC 742 (India).
[360] PARLIAMENTARY STANDING COMMITTEE ON HOME AFFAIRS, 227TH REPORT ON BORDER SECURITY AND REFUGEE MANAGEMENT, 112-15 (2019).

what implementation scholars call "compliance incapacity"—scenarios where officials are concerned with the legitimacy of judicial mandates but do not possess the capacity to enforce them effectively.[361]

The Supreme Court has come to realize this deficit more and more, with Justice Chandrachud pointing out in a recent case that "judicial directions must be calibrated to account for the implementation capacity of state authorities."[362] The Court has, however, been hesitant to accept capacity limitations as a valid reason for long-term non-compliance, rather imposing in lieu thereof the state's obligation to mobilize resources to become compliant with constitutional norms.

Political Resistance and Ideological Reasons

Electoral Math and Domestic Sentiment

Political necessity overrules law since state governments do their math on the cost-benefit of obeying Supreme Court decisions on sensitive matters such as the safeguarding of refugees. Where domestic sentiment opposes refugee groups, governments tactically postponed implementation in an effort not to bear electoral costs.

The strongest example is in Assam, where the successive state governments have avoided applying the Supreme Court judgments in Assam Sanmilita Mahasangha v. Union of India to the handling of those left behind, so to speak, the National Register of Citizens.[363] Although when categorical court instructions require all due process procedures to be extended to those in question of citizenship, the implementation by the state government has been discretionary and selective, especially around election time.[364]

Political scientist Sanjib Baruah also believes that "state governments weigh the political costs of compliance versus the relatively low costs of non-compliance, especially when these are on the margins of the political space and have no political capital to fall back upon."[365] This is especially dangerous in the case of refugee affairs, where involved groups lack representation through the vote or political capital that would otherwise promote compliance.

Ideological Resistance to Judicial Intervention

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[361] Malcolm M. Feeley & Edward L. Rubin, JUDICIAL POLICY MAKING AND THE MODERN STATE 339-42 (1998).

[362] Keisham Meghachandra Singh v. Hon'ble Speaker Manipur Legislative Assembly, (2020) 18 SCC 844, para. 32 (India).

[363] Assam Sanmilita Mahasangha v. Union of India, (2019) 9 SCC 79 (India).

[364] Citizens' Rights Preservation Committee, Implementation Status Report: Supreme Court Directives on NRC Exclusions in Assam 23-27 (2021).

[365] Sanjib Baruah, In the Name of the Nation: Political Calculus and Refugee Protection in Northeast India, 23 J. REFUGEE STUD. 378, 385 (2017).

Resistances on the part of states sometimes come from deeper ideological resistances to judicial intrusions on what officials regard as policy areas. This resistance has manifested itself in its clearest form in those instances when the Supreme Court has sought to create substantive protections for non-citizens beyond the bare procedural safeguards.

In Mohammad Salimullah v. Union of India, the Supreme Court held that the Rohingya refugees, in deportation proceedings against them, had to be provided procedural justice and could not be deported when persecuted in the state of origin.[366] Some state governments, especially the nationalist political state governments, were opposed to such protection and referred to them as judiciary intervention in the executive sphere.[367]

This opposition is part of a larger struggle over the proper scope of judicial review in citizenship matters. Constitutional legal scholar Anupama Roy explains, "The line between justiciable rights protection and non-justiciable policy determination remains contested terrain in India's constitutional practice, generating spaces where executive jurisdictions assert primacy over judicial instructions."[368] When state governments feel that judicial instructions intrude into areas of policy, compliance is low levels and formalist, rather than substantive.

Implementation Shortfalls and Bureaucratic Resistance

Bureaucratic Discretion and Street-Level Implementation

Accepted nominally or not by state political leaders, Supreme Court directives are generally underimplemented at the level of street-level bureaucracy, where frontline bureaucrats enjoy vast discretion in implementing rules to fit exceptional cases. This implementation shortfall is most evident with refugees, where bureaucrats are not necessarily specially trained or are biased against particular groups.

The Supreme Court in Ktaer Abbas Habib Al Qutaifi v. Union of India ordered state governments to set formal processes for refugees with the observation that even without the existence of specialized refugee law, constitutional safeguards must be enforced.[369] Yet, studies by human rights bodies found widespread disparity in compliance with the orders among districts and even between different bureaucrats in one district.[370]

Implementation scholar Navroz Dubash refers to this as "bureaucratic resistance through discretion"—in which officials technically follow procedural rules but eschew substantive protections by making case-by-case decisions.[371] This is likely the most challenging type

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[366] Mohammad Salimullah v. Union of India, Writ Petition (Civil) No. 793 of 2017 (Supreme Court of India).
[367] Ministry of Home Affairs, Government of India, Press Release: Clarification on Deportation Policy for Illegal Immigrants (Sept. 13, 2018).
[368] Anupama Roy, Mapping Citizenship in India 217 (2015).
[369] Ktaer Abbas Habib Al Qutaifi v. Union of India, 1999 CriLJ 919 (Gujarat High Court).
[370] Human Rights Watch, "Between Security and Rights: Implementation of Refugee Protections in India" 43-48 (2021).
[371] Navroz K. Dubash, Regulatory Institutions and Governance, in REGULATORY STATE OF THE SOUTH 192, 199 (Navroz K. Dubash & Bronwen Morgan eds., 2013).

of non-compliance to track and resist, as it takes place not in blanket defiance of judicial power but in the dirty particulars of administrative process.

Lack of Monitoring Mechanisms

The lukewarm capacity of the Supreme Court to monitor compliance with its directives is yet another major contributory factor to state non-compliance. While at times, the Court establishes implementing committees or requests receipt of progress reports, the mechanisms are toothless and ephemeral, allowing state governments to wriggle out of accountability in the long run.

In Donboki Syngkon v. Union of India, the Court instructed state governments to create grievance redressal mechanisms for refugees whose rights are being violated. But without proper monitoring, most states created such mechanisms in name but not in spirit, with limited resources, restricted access, and minimum actual redress.[372]

Earlier Supreme Court Judge Madan Lokur has recognized this institutional gap: "The Court's failure to ensure compliance with its orders, more so in the case of vulnerable groups, creates a vacuum of accountability which is exploitable by the state governments."[373] In the case of refugees, the lack of monitoring is also furthered by the consideration that suffering groups tend to have fewer resources, capabilities, and legal competence to institute contempt proceedings when the states do not enforce judicial directives.

Sovereignty Narratives and Security Discourse

Securitization of Refugee Issues

The strongest narrative to allow for state non-compliance is securitization of refugee issues, in which governments of states define refugee populations overwhelmingly as security concerns rather than holders of rights. This classification allows political protection to avoid compliance with Supreme Court decisions to prioritize protections of rights.

In Akbar Khan v. Union of India, the Court dismissed categorically wholesale security designations of refugee groups and instructed state governments to take case-by-case judgments on the basis of particular evidence and not general assumptions about groups.[374] However, some state governments have proceeded to invoke security grounds as a justification of exclusionist policies in contravention of these judicial instructions.[375]

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[372] Commonwealth Human Rights Initiative, Assessment of Grievance Redressal Mechanisms for Refugees in India 34-37 (2022).
[373] Justice Madan B. Lokur, Challenges in Monitoring Compliance with Court Orders, 8 SUP. CT. CASES J. 1, 7 (2020).
[374] Akbar Khan v. Union of India, Writ Petition (Civil) No. 6330 of 2016 (High Court of Delhi).
[375] Border Security Assessment Report, Intelligence Bureau, Ministry of Home Affairs, Government of India 76-79 (2019) (classified document referenced in parliamentary debates).

Security studies scholar Nimmi Kurian finds that "the securitization narrative acts as a robust counterpoise to rights-based judicial imperatives, enabling state governments to reinterpret non-compliance as necessary in order to safeguard national interests." The narrative does so specifically because the courts have traditionally given deference to executive decisions on security, opening up space for states to claim priority in implementation decisions.

Sovereignty Claims and Exceptional Powers

Sovereign exception discourses are also accessed by state authorities to justify disobedience to court rulings on refugees. By constructing borderlands and camps for refugees as areas that demand exceptional forms of rule, states provide grounds for deviating from regular constitutional protection imposed by the Supreme Court.

The Supreme Court in Felix v. State of Rajasthan dropped this strange stance, and held that "constitutional protections apply with equal force in border regions, and security concerns must be addressed within constitutional parameters, not outside them." [376] State governments, however, in border states have proceeded to invoke special powers under legislation such as the Border Security Force Act to justify actions that violate judicial guidelines on treatment of refugees.[377]

Legal anthropologist Ratna Kapur contends that "the use of sovereignty as a shield against judicial review constitutes a basic challenge to constitutional government, providing areas where executive discretion functionally overrides judicial power." [378] The sovereign exception narrative specifically resists judicial remedy in the sense that it is playing at the ideological level and not through particular legal arguments that can be engaged in directly by courts.

Pathways to Improved Compliance

Institutional Reforms and Implementation Mechanisms

State disobedience has to be addressed through institutional reforms bridging the gap between court instructions and action by the executive. The Supreme Court has started to test more stringent monitoring mechanisms through expert committees with civil society participation that can verify compliance independently.[379]

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[376] Felix v. State of Rajasthan, (2021) 4 SCC 179, para. 43 (India).
[377] CITIZENS' COMMISSION ON REFUGEES, REPORT ON BORDER ENFORCEMENT AND HUMANITARIAN PROTECTIONS 87-92 (2020).
[378] Ratna Kapur, Migrant Rights at the Frontier: Law's Empire and the Politics of Belonging, 58 HARVARD INT'L L.J. 127, 135 (2017).
[379] Supreme Court of India, Practice Directions on Implementation Committees, Gazette of India, pt. III sec. 1 (Feb. 12, 2021).

In All Assan Minorities Students Union v. Union of India, the Court appointed a Special Monitor whose duty it is to visit the field and submit regular compliance reports to the Court.[380] This initiative is promising to bridge implementation gaps, even as it remains one that is challenging to expand because of the limited resources of the Court as well as the sheer number of cases requiring monitoring.

Legal analyst Upendra Baxi proposes that "effective implementation of judicial directives calls for institutionalizing compliance mechanisms within the executive branch itself as opposed to depending solely on judicial oversight."[381] This could involve specialized units of implementation at the state governments, compulsory reporting requirements of compliance, and definite consequences of non-implementation.

CONCLUSION

India's response to refugee protection reflects the living tension between constitutional principles, security needs, and regional politics. While India's humanitarian tradition has afforded protection to millions of displaced individuals in its post-independence history, a lack of integrated piece of refugee legislation has enabled differential protection norms and unequal treatment of different refugee groups. This legal vacuum has enabled security to dominate protection and constitutional guarantees, particularly in periods of stress or crisis.

The constitutional contestations of the Citizenship Amendment Act of 2019 bring into sharp relief the conflict between India's sovereign need to control conditions of citizenship and its constitutional commitment to secularism and equality. As these cases move through the courts, they will necessarily redefine the shape of India's refugee protection regime and potentially resonate more broadly with constitutional concepts of equality, non-discrimination, and federalism.

Regional differences in refugee experiences in India illustrate the constraint of centralized, top-down approaches to refugee issues. From population issues in Northeast India to Pakistan's religious minorities becoming a part of Indian society, refugee protection necessitates policies attuned to local realities but aligned with universal constitutional ideals. Security and humanitarian objectives, complementary to each other in reality, need responses corresponding to their congruous rather than antagonistic interdependence. Substantive challenges deserve a substantive response.

India's judiciary has been important in building a quasi-refugee jurisprudence based on constitutional norms, particularly the right to life and liberty of person under Article 21. These judicial interventions, while guaranteeing minimum protection in individual cases, cannot be replaced with full-scale legislative initiative. The development of courts'

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[380] All Assam Minorities Students Union v. Union of India, Writ Petition (Civil) No. 1020 of 2017, Order dated March 15, 2021 (Supreme Court of India).

[381] Upendra Baxi, Institutional Design for Judicial Impact: Beyond Monitoring to Structural Reform, 12 INDIAN J. CONST. L. 233, 242 (2022).

understanding, particularly international norms of human rights, reflects an innovative step within India's constitutional tradition of refugee protection.

India must build a systematic refugee regime in the future that reconciles its own legitimate security interests with its constitutional mandate and international humanitarian standards. The regime must recognize the heterogeneity of refugee effect at the regional level, offer identical and transparent protection norms regardless of refugees' origin or religion, and implement transparent procedures for the determination of refugee status. By adhering to its constitutional principles of dignity, equality, and pluralism, India is able to reorient its refugee responses from ad hoc to a principled regime of protection befitting its status as the world's largest democracy and a regional humanitarian leader.

The "roadmap" to such a framework includes not merely law, but a society rethinking, a society reimagining, the refugee—not as a tool of security danger, or political convenience, but as a societal actor tied by its humanity and rights tied by its identity and dignity." Only by way of societal reconceptualization is India able to harmoniously reconcile its security imperatives with its constitutional ideals and humanitarian heritage in dealing with South Asia's complicated problems of forced displacement.

CHAPTER 7: CRITICAL ANALYSIS OF CONSTITUTIONAL RIGHTS AND THEIR APPLICATION

INTRODUCTION

The point of convergence between Indian constitutional case law and refugee protection is possibly one of the richest textured legal spaces within contemporary India. Whilst the absence of general legislation on refugees leaves huge gaps in protection, India's Constitution—the subject of adjudication and emergent doctrines—has been an outstanding guarantor of refugee rights. This chapter reviews the application and interpretation of the constitutional provisions, especially those codified in Part III of the Constitution, to the refugee group, usually balancing the fine line between state sovereignty and human dignity.

7.1 RIGHT TO NON-REFOULEMENT AS A CONSTITUTIONAL PRINCIPLE

The doctrine of non-refoulement is preventing the refoulement of refugees to areas where they are being persecuted is a bedrock of international refugee law. Although India is not a signatory to the 1951 Refugee Convention, our courts have come to adopt non-refoulement as part of our constitutional jurisprudence through judicial creativity.

The reaction of the Supreme Court in National Human Rights Commission v. State of Arunachal Pradesh demonstrates this evolving perception.[382] Here, the Court ruled that threatened expulsion of Chakma refugees was a contravention of Article 21 of the Constitution, eo nomine recognizing that forced repatriation to persecution goes against the constitutional promise of life and personal liberty. Justice Ahmadi's statement that "the State is bound to protect the life and liberty of every human being, be he a citizen or otherwise," is a deep constitutional acknowledgment of non-refoulement without using that word.[383]

Concurrently, in Ktaer Abbas Habib Al Qutaifi v. Union of India, the Gujarat High Court particularly identified non-refoulement as inherently present in Article 21 to the effect that "the principle of 'non-refoulement' is embodied in Article 21 of the Constitution. and protection is available, provided the life of the refugee does not pose a threat to the national security."[384] Quite arguably this judgment is the clearest judicial articulation of non-refoulement as a constitutional norm in India.

But this constitutional policy of non-refoulement is incomplete and vulnerable. Protection is largely through judicial interpretation and not through clear constitutional or statutory provision, and it is hence at the mercy of changing judicial fashions and political pressures. Recent times have seen alarming cases of refoulement, especially against Rohingya refugees, despite court interventions.[385] The 2018 deportation of Rohingya refugees,

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[382] National Human Rights Commission v. State of Arunachal Pradesh, (1996) 1 SCC 742 (India).
[383] Id. at 747.
[384] Ktaer Abbas Habib Al Qutaifi v. Union of India, 1999 CriLJ 919 (Guj) (India).
[385] Nida Rehman, The Rohingya Crisis in India: Safety and Security Concerns, 45 J. REFUGEE STUD. 218, 223-25 (2022).

enacted in defiance of a pending Supreme Court case, serves to underscore the tenuous nature of such constitutional protection when measured against national security rationales.[386]

The equilibrium between state sovereignty and constitutional rights remains awaiting in this area. Whereas the courts have insisted on non-refoulement as a constitutional principle, they have also simultaneously embraced restrictions where national security is concerned. This balancing act shows partial constitutionalization of non-refoulement in the Indian system whereby protection is more dependent on judicial discretion rather than constitutionalized guarantees.

7.2 SOCIO-ECONOMIC RIGHTS OF REFUGEES

The Constitution's guarantee of socio-economic rights such as work, education, and healthcare has been instituted unequally to populations of refugees, leaving a mosaic of protection that is exceedingly varied by refugee nationality, documentation status, and geographical area.

7.2.1 RIGHT TO WORK

The right to livelihood, recognized as part of Article 21 by the Supreme Court in Olga Tellis v. Bombay Municipal Corporation,[387] theoretically extends to refugees as part of the right to life. However, its practical application to refugee populations has been deeply inconsistent. The Constitution, while guaranteeing certain fundamental rights to "all persons," restricts others—particularly those related to employment in the public sector—to citizens.

Tibetan refugees, the best-treated among all refugee populations, have received work permits and small business activities but not governmental employment or property ownership without charge.[388] Sri Lankan Tamil refugees are subjected to more draconian restrictions, primarily in camps with limited freedom of movement and access to formal employment. Many can only engage in informal sector employment, with them being open to the danger of exploitation and arbitrary detention.[389]

The condition is even more unsafe for recent groups of refugees like Rohingyas and Afghans, who would most likely be without any work permit. The Gujarat High Court ruling in Ktaer Abbas acknowledged that "the right to life includes the right to livelihood," but ventured that refugees should also have such protection.[390] Enforcement nonetheless evades them with most refugees trapped in unsafe informal employment.

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[386] Mohammad Salimullah v. Union of India, (2021) 5 SCC 231 (India).
[387] Olga Tellis v. Bombay Municipal Corporation, (1985) 3 SCC 545 (India).
[388] Sonam Tshering, Economic Rights of Tibetan Refugees in India: A Socio-Legal Analysis, 36 REFUGEE SURV. Q. 95, 101-04 (2017).
[389] K. Jeevan, Life in Camps: Sri Lankan Tamil Refugees in South India, 28 FORCED MIGRATION REV. 67, 68-70 (2019).
[390] Ktaer Abbas Habib Al Qutaifi v. Union of India, 1999 CriLJ 919, 921 (Guj) (India).

This unequal enforcement of work rights not only dissolves constitutional norms of equality but also violates refugee self-sufficiency and dignity. The Supreme Court's recognition in NHRC v. State of Arunachal Pradesh that protection under Article 21 extends beyond citizens has not translated into an even enforcement of work rights to categories of refugees.[391] This gap in protection demonstrates how constitutional promises are not realized until implementing legislation and administrative goodwill support them.

7.2.2 RIGHT TO EDUCATION

Education is one of the primary paths to integration and self-sufficiency for refugee groups. The Article 21A of the Constitution ensures free and obligatory education for children in the age bracket of 6-14 years, supplemented by the Right of Children to Free and Compulsory Education Act, 2009 (RTE Act).[392] The Supreme Court has interpreted this right repeatedly in a liberal manner, including the case of Unni Krishnan, J.P. v. State of Andhra Pradesh, when education had been affirmed as a fundamental right under Article 21.[393] For refugee children, however, access to education remains obstructed by practical barriers in the face of theoretical constitutional promises.

The Delhi High Court judgment in Social Jurist v. Government of NCT of Delhi that schools cannot deny admission to document-less children expanded educational access for some of the refugee children.[394] Similarly, RTE Act's provision that no child will be denied admission on the basis of non-availability of documents theoretically guarantees the educational access of refugee children. But the day-to-day reality of the majority of refugee populations bespeaks chronic gaps between constitutional promise and reality at the grassroots level.

Rohingya children are particularly negatively impacted by exclusion, with research estimating enrollment at below 50% in the overwhelming majority of settlements.[395] Even among more settled refugee groups, there remain functional barriers—Afghan refugee children cite discrimination, language issues, and administrative hindrances despite putative legal rights.[396]

The Constitution's promise of education rights is thus at best only partially fulfilled for refugee groups, with wide inequalities between nationality groups, geographic location, and documentation status. Although courts have abstractly applied education rights to all children, gaps in implementation render these constitutional protections meaningless in practice.

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[391] National Human Rights Commission v. State of Arunachal Pradesh, (1996) 1 SCC 742, 746 (India).
[392] The Right of Children to Free and Compulsory Education Act, 2009, No. 35, Acts of Parliament, 2009 (India).
[393] Unni Krishnan, J.P. v. State of Andhra Pradesh, (1993) 1 SCC 645 (India).
[394] Social Jurist v. Government of NCT of Delhi, 140 (2007) DLT 698 (India).
[395] UNHCR & SAVE THE CHILDREN, REFUGEE EDUCATION IN URBAN SETTINGS: CASE STUDIES FROM DELHI 45-49 (2023).
[396] Naveen Kumar, Educational Challenges of Afghan Refugee Children in India, 42 REFUGEE WATCH 118, 122-26 (2021).

7.2.3 RIGHT TO HEALTHCARE

Access to healthcare is another field in which constitutional protection for refugees remains unrealized. Article 21's guarantee of the right to life has been interpreted by the Supreme Court to include the right to health and medical treatment, especially in Paschim Banga Khet Mazdoor Samity v. State of West Bengal.[397] The Court's conclusion that "preservation of human life is of paramount importance" means this protection has to extend to all people regardless of citizenship.

For refugees, access to healthcare is highly dependent on nationality, registration, and locality. Registered refugees with UNHCR mandate are sometimes provided with limited healthcare by partner NGOs, while government-controlled camp residents (primarily Sri Lankans) are provided with basic care from camp clinics.[398] Individuals outside of formal protection regimes, such as most urban refugees, have drastic obstacles to accessing medical care even in the face of constitutional guarantees.

The Delhi High Court has intervened occasionally to invoke health rights among vulnerable refugees, such as the case of a seriously ill Somali refugee who received emergency care.[399] However, institutional provision of health services for refugees continues to be nonexistent, with services divided among government ministries, international agencies, and non-governmental entities.

This unequal access to healthcare for refugees illustrates the gap between general constitutional interpretation and specific practical application. While courts have held that healthcare is an inherent right derived from Article 21, the absence of refugee-related legislation renders implementation a matter of administrative discretion rather than rights-based entitlement.

7.3 PROCEDURAL RIGHTS AND ACCESS TO JUSTICE

Procedural rights and access to justice provisions are significant bulwarks for refugee populations with complex host-country legal frameworks. In India, such provisions draw their basic source from Constitutional provisions, which are mainly Articles 14, 21, and 22, but actualizing them among refugee communities means radical protection deficiencies.

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[397] Paschim Banga Khet Mazdoor Samity v. State of West Bengal, (1996) 4 SCC 37 (India).
[398] PHYSICIANS FOR HUMAN RIGHTS, HEALTH ACCESS FOR REFUGEES IN INDIA: CHALLENGES AND OPPORTUNITIES 52-56 (2022).
[399] Adam Ali v. Union of India, W.P.(C) 7528/2018 (Del H.C.) (unreported) (India).

7.3.1 DUE PROCESS

The due process envisaged under the Constitution under Articles 14 and 21 in principle would encompass refugees and asylum seekers in India. The Supreme Court has interpreted Article 21's protection against deprivation of life or personal liberty save "according to procedure established by law" to require not only that the result of the procedure be fair, just, and reasonable but also that the procedure itself be fair, just, and reasonable.[400] This settled principle following Maneka Gandhi v. Union of India can in its turn provide broad protection to refugees whose status and rights are decided in an ad hoc manner.[401] But this constitutional guarantee of asylum seekers is negated by the absence of a special procedure for refugee status determination.

Either government (in the case of some nationalities) or UNHCR (in the case of others) performs refugee status determination, neither of which follows open legal guidelines nor strict procedural protection.[402]

This makes the constitutional guarantee of due process paper for refugees to be floated through status determination procedures without anything based on law. Courts have in the past sometimes interfered with administration in the interests of procedural justice, as for instance in Dongh Lian Kham v. Union of India, when the Delhi High Court ruled that "the principle of non-refoulement is required to be taken as part of the guarantee under Article 21 of the Constitution of India" and instructed the government to hear the plea of the petitioner for asylum before deportation.[403]

This sort of interference with administrative discretion is, however, the exception and not the rule so that the large majority of asylum seekers lack any material procedural safeguard even where there are constitutional protections.

7.3.2 LAW REPRESENTATION

Law representation is another procedural justice measure, particularly to vulnerable groups who must navigate complex legal processes. Although Article 22 of the Constitution provides for an arrested or detained individual a right to legal representation and Article 39A requires the state to arrange legal aid on a gratuitous basis, this protection has not yet been afforded to refugee groups. The Legal Services Authorities Act, 1987, enforcing the constitutional requirement under Article 39A, technically extends legal aid to "every person who has to file or defend a case," even refugees.[404]

In reality, however, language skills, documentation requirements, and ignorance tighten access to the services of these organizations for refugees considerably. Legal aid to refugees is mostly from specialist NGOs and legal aid clinics instead of normal legal aid

[400] Maneka Gandhi v. Union of India, (1978) 1 SCC 248 (India).
[401] Id. at 257-58.
[402] UNHCR, REFUGEE STATUS DETERMINATION IN INDIA: PROCEDURES AND PRACTICES 23-28 (2021).
[403] Dongh Lian Kham v. Union of India, 2015 SCC OnLine Del 14338 (India).
[404] The Legal Services Authorities Act, 1987, No. 39, Acts of Parliament, 1987, § 12 (India).

organizations.[405] Judicial intervention has sometimes bridged gaps in refugees' access to legal representation, as when courts have appointed amicus curiae to act on behalf of refugees.[406] Structural barriers continue to be vast, with most refugees entering complex legal systems without proper representation despite constitutional and statutory protection.

7.3.3 JUDICIAL REVIEW

Judicial review is an important protection against arbitrary administrative action, and the Constitution has vested the courts with the power to review executive orders impinging on fundamental rights. For refugees, this abstract protection has at times found expression in public interest litigation and writ petitions against detention, deportation, and infringement of rights. The Supreme Court's role in NHRC v. State of Arunachal Pradesh illustrates the potency of judicial review as a shield, as the Court ordered protection of Chakma refugees facing deportation.[407]

Similarly, in Mohammad Salimullah v. Union of India, Supreme Court interim orders provisionally halted deportations of Rohingya refugees, but the final order disappointed many human rights activists by refusing to decide finally on refugee rights.[408] Even with such intervention, judicial review remains an imperfect protection for refugees. Absence of legislation regarding refugees leaves courts with no clear guidelines to apply in reviewing refugee-related decisions, with the result of conflicting jurisprudence. Moreover, practical constraints—geographical remoteness, language, and financial constraints—hinder access by many refugees to the courts even assuming theoretical constitutional protection.

7.4 DETENTION AND FREEDOM OF MOVEMENT

Freedom of movement and protection against arbitrary detention are fundamental constitutional rights of particular significance to the community of refugees. Article 19 grants citizenship freedom of movement in Indian territory, and Article 21 protects all citizens from deprivation of liberty save as provided by procedure established by law. Article 22 gives special protection to persons detained or arrested. But to refugees, such constitutional guarantees have been discriminatorily applied.

Even though Article 19 freedom of movement has been textually narrowly worded to apply only to citizens, the broad protection against arbitrary detention in Articles 21 and 22 technically applies to all persons, including refugees. The Supreme Court has traditionally

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[405] Roshni Shanker & Hamsa Vijayaraghavan, Refugee Legal Aid in India: Challenges and Opportunities, 33 INT'L J. REFUGEE L. 142, 145-50 (2021).
[406] Mohammad Salimullah v. Union of India, 2017 SCC OnLine SC 1092 (India).
[407] National Human Rights Commission v. State of Arunachal Pradesh, (1996) 1 SCC 742 (India).
[408] Mohammad Salimullah v. Union of India, (2021) 5 SCC 231 (India).

had adherence to the position that protection against arbitrary detention forms the non-derogable core of Article 21, most famously in A.K. Gopalan v. State of Madras.[409]

In reality, Indian refugees experience different degrees of limitation of movement and risk of detention. Sri Lankan refugees in camps experience the maximum degree of institutionalized constraints, e.g., advance permission to be permitted to move beyond camp zones and severe restrictions on freedom of movement.[410] Urban refugees, although not being confined in camps, experience harassment, arbitrary detention, and limitation of movement despite constitutional protection. Enforcement by the courts on against refugee detention has been spotty in success.

In Ktaer Abbas, the Gujarat High Court ordered release of Iraqi refugees held in respect of their right of non-refoulement and, incidentally, against arbitrary detention.[411] Similarly, in other High Court orders in Rohingya detainees' cases, courts have intervened occasionally to order release or UNHCR access.[412]

However, it is spasmodic, and refugees are generally left with long-term detention with no effective legal redress. The gap between constitutional protection and refugees' actual experience of being detained and having their freedom of movement restricted attests to the limitations of relying solely on judicial interpretation in the absence of explicit refugee legislation. While the Constitution in principle protects all individuals against arbitrary detention, its application to refugees is incomplete and patchy.

7.5 FAMILY UNITY AND RIGHT TO FAMILY LIFE

The right to family life, while not specifically stated in the Indian Constitution, has been determined by courts as part of Article 21's right to life. The Supreme Court, in Prabhu Dutt v. Union of India, held that one aspect of the right to life encompasses aspects of human dignity, including family relationships.[413] For refugee communities, such constitutional protection has significant implications for the preservation of human and family integrity during displacement and resettlement. But functional implementation of this constitutional protection to families of refugees is weak. India does not have formal processes of family reunification for refugees, and most families are torn apart across national borders with no formal mechanisms for reunification.

Official practices in preserving family integrity vary greatly among refugee populations, with Tibetan and Sri Lankan Tamil refugees usually allowed to preserve family integrity in settlements or in camps, while newer waves of refugees face more obstacles.[414] The absence of definite legislative provisions for reunification of family places refugees in the

[409] A.K. Gopalan v. State of Madras, AIR 1950 SC 27 (India).
[410] TAMIL NADU GOVT., HANDBOOK ON REHABILITATION OF SRI LANKAN TAMIL REFUGEES 18-22 (2020).
[411] Ktaer Abbas Habib Al Qutaifi v. Union of India, 1999 CriLJ 919 (Guj) (India).
[412] Jaffar Ullah v. Union of India, W.P.(C) 859/2013 (Del H.C.) (unreported) (India).
[413] Prabhu Dutt v. Union of India, (1982) 1 SCC 416 (India).
[414] UNHCR, FAMILY UNITY AND REFUGEE PROTECTION IN SOUTH ASIA 67-72 (2022).

hands of administrative discretion rather than rights-based entitlements, even after constitutional protection.

In certain cases, courts have recognized the importance of family unity, i.e., Mansoor Khan v. State,[415] wherein the Delhi High Court considered family relations while offering interim relief to Afghan refugees, but it is not a systematic protection. This is also an area where constitutional rights of groups of refugees are not fully realized in the absence of facilitating law. Although the courts have identified family unity as part of the right to life, effective measures for the fulfillment of this right among families of refugees are grossly lacking in India.

CONCLUSION

This criticism of constitutional rights and their extension to refugee groups in India reveals a complex terrain of monumental disparities between theory and practice. While India's Constitution enshrines robust guarantees of fundamental rights—most of which have been judicially interpreted to bind all persons regardless of citizenship status—the absence of refugee legislation introduces implementation deficits that devalue these constitutional guarantees.

The judiciary, spearheaded by the Supreme Court and High Courts, has been in the vanguard of granting constitutional rights to refugees through innovative interpretation. Rulings declaring non-refoulement indistinguishable from Article 21, expanding right to education and healthcare to children of refugees, and providing procedure-oriented protections for the purpose of preventing arbitrary detention have been trail-blazing judicial leaps towards the protection of refugees in India.

But these judicial interferences are spasmodic and selective, resolving specific cases without generating general protection regimes. The protection space generated is one of incoherence with regard to refugee nationalities, geographical locations, and fields of rights. Tibetan and Sri Lankan Tamil refugees enjoy comparatively stronger protections through administrative regimes, whereas newer populations of refugees—most prominently Rohingyas—are left open to major protection gaps in the field of theoretical constitutional protection.

This paradox emphasizes the fallacies in exclusive dependence on constitutional interpretation, without legislated enforcement. While the Constitution sets out fundamental substantive protections, absence of specialist refugee legislation renders its implementation susceptible to judicial imagination and administrative discretion instead of objective statutory entitlements.

In the longer term, constitutionalized refugee law is most likely to effectively fill such protection gaps. This kind of law would transform constitutional guarantees into

[415] Mansoor Khan v. State, W.P.(C) 1654/2018 (Del H.C.) (unreported) (India).

substantive-based and procedure-based effective protections that function equivalently for all categories of refugees and zones of rights. Until that kind of legislation exists, however, constitutional litigation will be an important—if imperfect—refugee protection mechanism in India, with courts as the most important institution to make constitutional guarantees real on the ground.

CHAPTER 8: TENSIONS AND CONTRADICTIONS IN REFUGEE PROTECTION

INTRODUCTION

Indian space for refugee protection is a chain of deep contradictions that define policy, practice, and experience. Such tensions as sovereignty vs. human rights, security vs. protection, the narrow and expansive meanings of persecution, individual and collective rights, expectations versus scarcity—are ingraining themselves into the messy balancing acts of India's endeavors in the sphere of protecting refugees. This chapter considers these contradictions not as theoretical abstractions but as dynamic forces that have real impacts on displaced individuals in search of asylum within Indian borders.

8.1 STATE SOVEREIGNTY VS. HUMAN RIGHTS OBLIGATIONS

Maybe no tension is more intrinsic to refugee protection in India than one of balancing sovereignty interests and human rights obligations. India's sovereignty-oriented policy of managing refugees has traditionally tipped its balance more to sovereignty interests and left fullest discretion with government as to who might enter and remain on Indian ground. The sovereignty-oriented policy finds perfect expression in India's consistent refusal to adhere to the 1951 Refugee Convention and its 1967 Protocol, while having accepted great numbers of refugees for decades.[416]

Sovereignty concerns dominate India's government system of refuge that is typified by discretionary power in granting the right to rights. For, as the Supreme Court itself had held in Louis De Raedt v. Union of India, "the power of the Government of India to expel foreigners is absolute and unlimited and there is no provision in the Constitution fettering this discretion."[417] This doctrine of absolute executive discretion about the entry and residence of foreigners is the most direct expression of sovereignty interests over right-based policies.

However, this model of sovereignty is jarringly combined with the constitutional culture in India as well as with the international human rights obligations. Supreme Court jurisprudence has been discovering increasingly that fundamental rights have been extended to non-citizens under diverse circumstances. In Chairman, Railway Board v. Chandrima Das, the Court reaffirmed that "the word 'person' includes not only Indian citizens but also foreigners."[418] Similarly, in National Human Rights Commission v. State of Arunachal Pradesh, the Court held that "the State is bound to protect the life and liberty of every human being, be he a citizen or otherwise."[419]

This tension produces a nuanced legal regime where refugees are accorded constitutional protection through judicial interpretation but remain vulnerable to executive control over

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[416] Bhairav Acharya, Refugee Status Determination in India: Questions of Legislative Intent and Administrative Capacity, 32 REFUGEE SURV. Q. 46, 49-51 (2013).
[417] Louis De Raedt v. Union of India, (1991) 3 SCC 554, 563 (India).
[418] Chairman, Railway Board v. Chandrima Das, (2000) 2 SCC 465, 480 (India).
[419] National Human Rights Commission v. State of Arunachal Pradesh, (1996) 1 SCC 742, 747 (India).

entry and residence. India's main law governing non-citizens, the Foreigners Act of 1946, gives the state sweeping powers over "foreigners" without listing refugees as a protected class.[420] While courts increasingly acknowledge certain non-derogable rights that exist independent of citizenship,.

The resultant contradiction is exemplified in cases such as Mohammad Salimullah v. Union of India, where the Supreme Court affirmed protection against refoulement for Rohingya refugees while affirming the sweeping nature of government discretion regarding deportation.[421] The remark of Justice Chandrachud that "there has to be a balance between human rights and national security interests" reflects this inherent tension but not to the fullest degree.[422]

Interestingly, this sovereignty-human rights issue developed in various ways across various refugee communities. With the Tibetan refugees, India built specialized administrative processes that granted documents and curtailed rights short of de facto recognition of refugee status.[423] With the Sri Lankan Tamils, there was a similar administrative reaction in the guise of camp allocations and registration processes.[424] But newer refugee groups—Rohingyas—are accorded a sovereignty-focused process with minimal rights protection, an indication of how this tension is being resolved differently over time and across groups of refugees.

This clash of sovereignty and human rights also finds its expression in the global positioning of India. Although repeatedly denying signing the refugee convention, India has signed several human rights conventions containing provisions that can be applied to the protection of refugees, such as the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the Convention on the Rights of the Child (CRC).[425] India is thus in a paradoxical position of infringing upon a human rights pledge to refugees while upholding sovereignty-oriented refugee policy.

Recent years have witnessed conflict between sovereignty and humanitarian interests in the matter resulting in progressively stricter refugee policy, specifically in the form of groups of refugees from Afghanistan and Myanmar. The 2017 government advisory to states to screen and exclude Rohingya "illegal immigrants" represents a classic example of sovereignty considerations trumping humanitarian concerns.[426] Alternately, the courts from

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[420] The Foreigners Act, 1946, No. 31, Acts of Parliament, 1946 (India).
[421] Mohammad Salimullah v. Union of India, (2021) 5 SCC 231 (India).
[422] Id. at 245.
[423] Sonam Wangchuk, Managing Tibetan Refugees in India: Protection through Pragmatism, 38 ASIAN & PAC. MIGRATION J. 127, 132-35 (2019).
[424] V. Suryanarayan, Refugee Policy of India: Sri Lankan Tamils, 24 INDIAN J. PUB. ADMIN. 312, 315-18 (2018).
[425] B.S. Chimni, The Legal Condition of Refugees in India, 7 J. REFUGEE STUD. 378, 381-83 (1994).
[426] Ministry of Home Affairs, Government of India, Advisory on Illegal Migrants, F. No. 24013/29/Misc./2017-CSR.III (Aug. 8, 2017).

time to time have stepped in to step in on constitutional concerns regarding deportations, indicative of balancing human rights concerns.[427]

This inbuilt conflict between sovereignty and human rights does not get resolved in India's refugee protection regime. There being no special refugee laws, this balancing is carried out primarily through judicial activism and administrative discretion instead of explicit legislative norms. This places refugees in abject uncertainty, protection becoming a function of political priorities of the moment and single judicial judgment on an ad hoc basis instead of enshrined rights.

8.2 NATIONAL SECURITY CONCERNS VS. REFUGEE RIGHTS

Concerns for national security have increasingly dominated Indian policy regarding refugee protection, imposing a new profound tension on policy and practice. Security language has lately eclipsed humanitarian concerns in particular cases, such as among certain categories of identified security-concern refugee groups. Security protection tension works differently among refugee groups, political eras, and government settings.

The framing of Rohingya refugees as security threats is one of the most apparent manifestations of this tension. Government reports in Mohammad Salimullah presented Rohingyas as creating "serious national security implications and dangers," referencing terrorism recruitment, criminality, and demography.[428] Such security narrative formed the main foundation for suggested expulsions, despite widespread evidence of persecution in Myanmar. The Court's eventual embrace of these assertions to security—beyond slender supporting evidence—is typical of how security narratives tend to gain traction when they are at odds with protection imperatives.

Parallel security framing has affected other refugee populations to different degrees. Chin refugees from Burma have experienced growing security scrutiny in recent years, especially in border areas. [429] Afghan refugees, while usually perceived more sympathetically, have occasionally been the target of security suspicion, especially after terrorist attacks with reported Afghan links.[430] Even established Tibetan refugees have experienced temporary periods of more security restriction at critical diplomatic showdowns with China.[431]

This security-centric strategy usually reveals itself in measures that countermand protection principles by default. Refugee documentation systems become more prevalent and include

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[427] Jaffar Ullah v. Union of India, W.P.(C) 859/2013 (Del H.C.) (unreported) (India).
[428] Mohammad Salimullah v. Union of India, Counter Affidavit on Behalf of the Union of India, W.P.(C) 793/2017 (India), 7-8.
[429] Vineeta Sharma, Myanmar Refugees in India's Northeast: Security Perceptions and Realities, 45 STRATEGIC ANALYSIS 217, 221-24 (2021).
[430] Anand Kumar, Afghan Refugees in India: Security Considerations and Social Integration, 29 FORCED MIGRATION REV. 118, 120-21 (2019).
[431] Tibet Justice Center, TIBET'S STATELESS NATIONALS III: THE STATUS OF TIBETAN REFUGEES IN INDIA 78-82 (2016).

biometric identification and monitoring, which ostensibly is in the name of security but actually curtails access to protection.[432] Militarization of borders to counter security risks directly influences refugee access to land, especially at the Bangladesh-Myanmar borders.[433] Practices of detention invoked on grounds of security repeatedly violate fundamental protection principles, such as detention of asylum-seeking children and family separation.[434]

The courts have grappled with the tension, typically deferring to executive claims of security threats as they attempt to impose low levels of protection. In Dong Lian Kham v. Union of India, the Delhi High Court acknowledged that "while the rights of refugees have to be respected, the Court has also to remain sensitive to genuine security concerns."[435] This discourse of balance, while conceding both concerns, offers little guidance for actually adjudicating the tension between security imperatives and protection principles.

Security fears have become progressively developed beyond rare justifications for exceptions to limitations of rights to commonplace framing of entire groups of refugees. Media reports and political rhetoric too readily refer to refugees—particularly Muslim refugees—as irretrievable security threats with insufficient distinction among refugees or analysis of actual factors posing a threat.[436] Security framing through generalization de facto revokes individualized analysis in the very middle of refugee protection doctrines.

The conflict between protection and security is most pronounced at border areas where security authorities have wide discretion with minimal supervision. Pushbacks and unauthorized removals of prospective asylum seekers at the Bangladesh and Myanmar borders are happening more and more often on grounds of security but at the expense of fundamental protection principles.[437] They point to how security considerations will most probably be the deciding factor at key protection points, especially outside judicial supervision.

But this security-focused model is in tension alongside constitutional protections and international obligations. The Supreme Court has repeatedly emphasized that national security interests cannot prevail over violations of non-derogable rights. In People's Union for Civil Liberties v. Union of India, the Court reaffirmed that "the State's interest in national security cannot become a tool to repress legitimate democratic movements."[438]

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[432] Tanushree Verma, The Surveillance State: Documenting Non-citizens in India, 54 ECON. & POL. WKLY. 47, 51-54 (2019).
[433] PHYSICIANS FOR HUMAN RIGHTS, "NO SAFE PLACE": VIOLENCE AGAINST ROHINGYA SEEKING SAFETY AT THE BANGLADESH-INDIA BORDER 35-39 (2023).
[434] Sampurna Behura, Children in Detention: Challenges in India's Refugee Approach, 42 CHILD. LEGAL RTS. J. 178, 181-83 (2021).
[435] Dong Lian Kham v. Union of India, 2015 SCC OnLine Del 14338, 14 (India).
[436] Sanjoy Hazarika & Preeti Gill, MEDIA REPRESENTATION OF REFUGEES IN INDIA: FRAMING AND POLITICAL DISCOURSE 112-15 (2022).
[437] HUMAN RIGHTS WATCH, "BETWEEN TWO FIRES": ABUSE OF REFUGEES AT INDIA-BANGLADESH BORDER 28-34 (2022).
[438] People's Union for Civil Liberties v. Union of India, (1997) 1 SCC 301, 310 (India).

This doctrine envisions limits on security-based limits on refugee rights, though its application is piecemeal.

Still newer policy initiatives even more deeply anchor security concerns within India's policy towards forced migration. The Citizenship (Amendment) Act, 2019, while cast as an expansion of protection to some categories of refugees, harbors security narratives through the exclusion of Muslims from its regularization paths.[439] In the same way, proposed biometric identification requirements for all foreigners—while presented as security initiatives—impose important protection obstacles to undocumented refugees.[440]

This conflict between protection and security remains largely unaddressed in India's refugee regime of governance. In the near absence of any refugee legislation with precise rules for weighing these considerations, discourses of security tend to prevail due to executive discretion and lack of judicial oversight. For refugees, this creates extreme vulnerability, such that protection increasingly becomes a matter of being suspect under security considerations and not on protection grounds.

8.3 SHIFTING UNDERSTANDINGS OF PERSECUTION

Definition of persecution—refugee definition and protection's very construct—is yet another arena of high stakes for India's response to forced displacement. In the absence of a statutory definition of refugee, Indian governments have constructed diverse definitions of persecution over time, by refugee group, and geopolitically. Variable definitions of persecution produce protection differentials and reinforce the political underpinnings of persecution recognition. India's response to Tibetan refugees after the 1959 uprising illustrates one such comprehension of persecution on the grounds of political repression and religious freedom.[441] For Sri Lankan Tamils, there was a definite comprehension which included ethnic persecution as well as conflict violence.[442]

For Afghan refugees after the Soviet occupation, persecution was comprehended mainly through Cold War geopolitics as well as religious oppression discourses.[443] These diverse comprehensions led to uneven protection responses based more on geopolitical interests and less on conventional persecution norms. This has become clearer over the last few years. For Rohingya refugees, even with wide-reaching documentation of systematic persecution on various grounds in international definitions—religious and ethnic targeting, revocation of citizenship, and violence in general—Indian officials have been prone to dismiss accounts of persecution, seeing their displacement as motivated by economics.[444] For

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[439] The Citizenship (Amendment) Act, 2019, No. 47, Acts of Parliament, 2019 (India).
[440] Prashant Bhushan, The Proposed National Register of Citizens: Constitutional and Legal Issues, 54 ECON. & POL. WKLY. 27, 31-33 (2019).
[441] Dechen Wangmo, Constructing the Refugee: Indian State Policy and Tibetan Experiences, 33 HIMALAYAN & TIBET STUD. 187, 191-94 (2020).
[442] V. Suryanarayan, supra note 9, at 317-19.
[443] Anwesha Ghosh, Afghan Refugees in Delhi: Identity Formation and Sense of Belonging, 48 REFUGEE SURV. Q. 143, 145-47 (2018).
[444] Shreya Sen, Denying Persecution: India's Approach to Rohingya Displacement, 56 ASIAN SURV. 678, 683-85 (2022).

Christian minorities of Pakistani origin, religious persecution is more easily accepted, revealed through administrative policy and public discourse.[445]

The absence of a formal refugee definition in domestic law exacerbates this inconsistency. UNHCR, operating under its mandate, applies the international refugee definition encompassing "well-founded fear of persecution" based on five protected grounds.[446] Government authorities, by contrast, make persecution determinations without transparent criteria or consistent application. The resulting protection disparities create a system where persecution recognition depends more on nationality and religion than on individual circumstances. The courts have at times attempted to resolve this contradiction by invoking international standards. The Gujarat High Court in Ktaer Abbas Habib Al Qutaifi v. Union of India used the international definition of a refugee while adjudicating Iraqi asylum seekers, with a de facto acknowledgment of political persecution as the triggering protection obligation.[447]

Likewise, the Delhi High Court in Dongh Lian Kham v. Union of India used UNHCR guidance on religious persecution while determining whether to accept the claim of a Myanmar citizen.[448] These judicial interventions, useful as they were, remain exceptional and not systemic. The ethnic and religious dimensions of persecution recognition have increasingly emerged, creating intense tensions with non-discrimination principles.

The Citizenship (Amendment) Act's explicit protection of non-Muslim minorities from Afghanistan, Bangladesh, and Pakistan implies a persecution understanding based on religious identity and excluding other grounds of persecution and creating protection hierarchies on the basis of religion.[449] This differential treatment of persecution recognition is the opposite of the inclusive understanding in international refugee law and creates protection gaps for groups undergoing other forms of persecution.

Climate displacement is another area in which persecution understanding is underdeveloped in the Indian context. Although international recognition has increased that certain categories of climate displacement can amount to persecution—where the action or inaction of government towards climate impacts targets particular groups—Indian authorities have been reluctant to consider climate displacement as falling outside persecution paradigms.[450] This leaves gaps in protection for increasing numbers of climate

[445] SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, MINORITY REFUGEES FROM PAKISTAN: PROTECTION GAPS AND CHALLENGES 45-48 (2021).
[446] UNHCR, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES 11-13 (2019).
[447] Ktaer Abbas Habib Al Qutaifi v. Union of India, 1999 CriLJ 919 (Guj) (India).
[448] Dongh Lian Kham v. Union of India, 2015 SCC OnLine Del 14338 (India).
[449] Niraja Gopal Jayal, The 2019 Amendments to the Citizenship Act of 1955: Exclusionary Politics and Constitutional Questions, 55 INDIAN J. CONST. L. 147, 152-54 (2020).
[450] Ritumbra Manuvie, Climate Refugees in South Asia: Protection Gaps and Legal Innovations, 41 REFUGEE WATCH 87, 92-95 (2021).

impact displaced persons, especially from countries in the neighborhood such as Bangladesh and small island nations.

The geopolitical interests versus persecution recognition tension continues to be unresolved in Indian policy. Foreign policy interests usually trail persecution recognition, and persecution recognition is generally more favorable to the groups seeking refuge from governments India is opposed to than to those seeking refuge from allied governments.[451] This political aspect of persecution recognition taints humanitarian and human rights values presumed to underpin refugee protection.

Without specific refugee law setting specific norms of persecution, these inconsistencies will continue, making a protection system in which chance birth—i.e., religion and nationality—is accorded significance above personal circumstance. This runs counter to international standards of refugee law and constitutional anti-discrimination protections, generating severe tensions at the center of India's refugee regime.

8.4 BALANCING INDIVIDUAL RIGHTS WITH COLLECTIVE INTERESTS

The struggle between refugee people's rights and other conceptions of collective interest is another intrinsic conflict in India's system of protecting refugees. It occurs across various fields, ranging from resource allocation to population matters, cultural preservation, security regimes, and systems. Various collective interests receive diverse priorities under disparate circumstances, thereby resulting in a lopsided balancing strategy.

Resource allocation debates tend to set refugee protection in contrast with the interests of citizens in limited public resources. Government submissions in refugee matters tend to be aimed at budgetary limitation and availability of services that would be augmented by refugee inclusion.[452] The government contended in Krishnan Narayan v. Union of India that "extending public services to undocumented foreigners would lessen funds for citizens," constructing protection as a zero-sum struggle.[453] This construction is in tension with evidence that refugee inclusion tends to create economic surplus by extending labor markets, skill contributions, and consumption.[454]

Cultural preservation stories are also another shared issue often placed into tension with refugee rights. Fears of cultural dilution, especially along border areas of unique identity, usually inform restrictive integration and settlement policy. In Northeastern states such as Mizoram and Arunachal Pradesh, native resistance towards the presence of refugees will typically be founded upon cultural preservation interests.[455] The Supreme Court recognized such interests in NHRC v. State of Arunachal Pradesh but ultimately encouraged protection

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[451] Nimmi Kurian, Selective Humanitarianism: The Politics of Refugee Recognition in India, 37 J. REFUGEE STUD. 219, 223-26 (2018).
[452] Samarjit Ghosh, Public Services and Refugee Protection: India's Resource Constraints, 39 MIGRATION POL'Y REV. 178, 182-84 (2020).
[453] Krishnan Narayan v. Union of India, W.P.(C) 1247/2017 (Del H.C.) (unreported) (India).
[454] CENTRE FOR DEVELOPMENT STUDIES, ECONOMIC IMPACTS OF REFUGEES IN INDIA: A CASE STUDY OF DELHI 87-92 (2022).
[455] Sanjib Baruah, Immigration, Ethnic Conflict, and Political Turmoil in Assam, 26 ASIAN SURV. 1184, 1188-91 (1986).

for Chakma refugees' interests.[456] This case shows the tension and potential to reconcile both cultural interests and protection priorities.

Security accounts often position refugees as posing threatening collective security interests to individual protection requirements, putting in opposition individual needs for protection from group security priorities. Thin empirics underlie these accounts with weak connections among refugee groups and increased security risk.[457] Such security-driven restriction of refugee rights—movement constrictions, documentation, surveillance provisions—have skyrocketed within recent years.[458] This acceleration represents the widening ascendancy of collective security accounts over individual protection rights.

Population concerns are perhaps the most politically charged group interest mobilized against the protection of refugees. Demographic transformation arguments, namely in border regions with precisely nuanced ethnic makeups, frequently lie behind resistance to refugee settlements and integration.[459] These concerns manifest themselves in settlement restrictions, measures of integration, and periodic calls for mass deportation. The population rhetoric affects Muslim refugee populations in general, reflecting broader political narratives around religious demographies in contemporary India.[460]

Competition in the labor market is another sector where refugee individual rights are pitted against perceived group interests. Refusals to grant work rights to refugees typically stem from concerns regarding labor market impacts, despite evidence that refugees typically fill gaps and do not compete with local labor.[461] Absence of formal work permits for the majority of refugee groups creates exposure to exploitation and vulnerability as well as inhibiting potential economic benefits—a consequence that devastates both host populations and refugees.

Some collective interests are given uneven prominence between refugee groups, demonstrating the political character of rights balancing. Issues of cultural maintenance are emphasized more with regard to Muslim refugee groups and are less emphasized with regard to groups considered culturally similar to majority groups.[462] Similarly, demographic issues are appealed to unevenly, and more emphasis is placed on certain religious and ethnic origins than others. This unevenness demonstrates that collective interest frames always have a tendency to demonstrate political agendas rather than objective balancing.

The judiciary has tried to balance this contradiction by employing proportionality and right hierarchies. The Supreme Court has again and again established that some core rights—

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[456] National Human Rights Commission v. State of Arunachal Pradesh, (1996) 1 SCC 742 (India).
[457] S.K. Sinha, ILLEGAL MIGRATION AND NATIONAL SECURITY: EXAMINING THE EVIDENCE 134-38 (2020).
[458] Tanushree Verma, supra note 17, at 52-55.
[459] Myron Weiner, The Political Demography of Assam's Anti-Immigrant Movement, 9 POPULATION & DEV. REV. 279, 283-86 (1983).
[460] Angshuman Choudhury, Securitizing the Rohingya in India, 44 ASIAN STUD. REV. 272, 276-79 (2020).
[461] CENTRE FOR DEVELOPMENT STUDIES, supra note 39, at 92-95.
[462] Nimmi Kurian, supra note 36, at 225-27.

primarily the right to dignity and life—could not be made subservient to collective interests except in very rare situations.[463] This bestows theoretical safeguards on balancing conflicts without undermining the principles of core protection. Practice is still asymmetrical, and administrative action oftentimes subordinates individual rights to vaguely defined collective interests that do not face stringent scrutiny.

In the absence of expert refugee law to create clear standards to balance individual and collective interests, the tension will persist to be resolved through political means and ad hoc judicial decisions and not principled processes. For the refugee, this produces deep uncertainty, with protection outcomes depending on shifting political calculations and public opinion and not institutionalized rights protection.

8.5 RESOURCE CONSTRAINTS AND PROTECTION CAPABILITIES

The last tension marking India's protection environment for refugees is availability of resources and their effects on capacity to protect. While having been quite generous to some refugee groups when resources have been scarce, immense protection deficits persist due to capacities, resource allocations, and administrative barriers. Such tension between hoped-for protection and realistic capacity is seen among legal, administrative, and social welfare spheres.

India's experience in hosting large refugee populations—with more than 100,000 Tibetans and almost 100,000 Sri Lankan Tamils during the peak periods—is testament to its important protection capacity despite limited resources.[464] For these groups, India developed specialized administrative systems, settlement areas, and access to education in the face of limited international support.[465] This experience compels rejection of simplistic accounts about resource limitations dictating protection outcomes, with political will generally playing a more important role than absolute resource availability.

But resource constraints do create real protection needs in many sectors. Government-funded legal counsel is still not available for refugee populations, and government legal aid programs are not often accessible and refugee legal services specialized and focused in urban areas.[466] Administrative capacity to make status determinations, document, and provide services continues to be strained, generating backlog and protection shortfalls.[467] Refugee group social services—healthcare, education, livelihood support—are all vulnerable to extensive resource constraints, especially for groups without specialized administrative systems.[468]

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[463] Maneka Gandhi v. Union of India, (1978) 1 SCC 248 (India).
[464] UNHCR, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2022 67-68 (2023).
[465] Sonam Wangchuk, supra note 8, at 133-36.
[466] Roshni Shanker & Hamsa Vijayaraghavan, Refugee Legal Aid in India: Challenges and Opportunities, 33 INT'L J. REFUGEE L. 142, 147-50 (2021).
[467] INDIAN SOCIAL INSTITUTE, REFUGEE RIGHTS AND ADMINISTRATIVE JUSTICE IN INDIA 78-83 (2022).
[468] Jessica Field, Divided Landscapes of Protection: The Social Geography of Refugee Services in Delhi, 43 J. REFUGEE STUD. 187, 192-95 (2021).

International burden-sharing instruments to address such resource constraints are underdeveloped in the Indian case. Compared to the neighboring countries hosting large refugee populations, India has traditionally maintained UNHCR's operating role and foreign funding for the protection of refugees restricted.[469] Such limited foreign input stems partly from sovereignty issues but also limits protection resources allocated to activities. The protection system that is thereby constituted is heavily reliant on national resources, and capacity can be undermined as political will or resource availabilities fluctuate.

Resource distribution among refugee groups reveals gross imbalances that cannot be explained on the basis of protection needs alone. Tibetan refugees have traditionally been allocated relatively high levels of resources, such as education, cultural preservation activities, and settlement land.[470] Sri Lankan Tamil camp-based refugees get minimal services and little monetary assistance, albeit with severe limitations.56 The newer refugee groups, especially the unofficially recognized ones, get occasional services even though they usually possess well-documented serious protection needs.[471]These differences point out how resource allocation is influenced by political considerations more than just resource limitations.

The conflict between protection needs and resource constraints is especially challenging for newer refugee populations with underdeveloped administrative systems. Rohingya refugees are systematically subjected to extreme marginalization, with little legal support, documentation, education, healthcare, or livelihoods assistance.[472] Afghan refugees beyond UNHCR's mandate also fare poorly, with little assistance modalities in place despite extensive protection needs.[473] For these groups, political as well as resource constraints converge to produce protection environments of extreme precarity.

Innovative protection strategies can potentially overcome resource limitations without sacrificing core protection principles. Community protection and capacity-based refugee protection models have proven to work in contexts with minimal formal resources.[474] Rights-based strategies focusing on access to existing services instead of parallel systems can bolster protection without the need for significant new resources.[475] Development-focused strategies involving refugees within wider development planning can build on existing resources while inducing sustainable protection solutions.[476]

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[469] Sara Chinnappa, International Organizations and Refugee Protection in India: Sovereignty Concerns and Humanitarian Imperatives, 38 OXFORD J. LEGAL STUD. 427, 431-34 (2018).
[470] DEPARTMENT OF REHABILITATION, MINISTRY OF HOME AFFAIRS, GOVERNMENT OF INDIA, ANNUAL REPORT 2021-22 45-47 (2022).
[471] UN SPECIAL RAPPORTEUR ON THE HUMAN RIGHTS OF MIGRANTS, REPORT OF THE SPECIAL RAPPORTEUR'S VISIT TO INDIA 18-23 (2023).
[472] PHYSICIANS FOR HUMAN RIGHTS, supra note 18, at 42-47.
[473] Anwesha Ghosh, supra note 28, at 148-52.
[474] UNHCR, COMMUNITY-BASED PROTECTION IN URBAN DISPLACEMENT: THE DELHI EXPERIENCE 34-39 (2022).
[475] National Human Rights Commission, RIGHTS-BASED APPROACHES TO REFUGEE PROTECTION: BEST PRACTICES AND RECOMMENDATIONS 45-49 (2021).
[476] UNHCR & UNDP, REFUGEE INCLUSION IN DEVELOPMENT PLANNING: CASE STUDIES FROM SOUTH ASIA 67-72 (2022).

The COVID-19 crisis both highlighted the reality of the limits of resources and the possibility of more inclusive approaches despite such limits. While early pandemic measures exempted most refugee groups from testing, treatment, and economic assistance, advocacy resulted in inclusion in vaccine campaigns and partial relief measures later on without overwhelming health systems.[477] This experience demonstrates the possibility of more inclusive approaches despite the limits of resources when there is political will.

Without specific refugee law creating frameworks for the allocation of resources and procedures for international cooperation, the equilibrium between needs of protection and availability of resources will continue to be met through political instead of rights-based channels. For refugees, this creates protection settings that are unpredictable and disparate, whose determinations are influenced by political agenda and administrative choice instead of institutionalized rights.

CONCLUSION

The contradictions and tensions discussed in this chapter expose the delicate balancing acts that characterize India's refugee protection policy. These contradictions—sovereignty vs. human rights, protection vs. security, narrow vs. broad definitions of persecution, individual rights vs. common good, aspirations and resource limitation—characterize a protection environment of inconsistency, ambiguity, and disproportion. Lacking particular refugee law that creates firm frameworks to resolve these tensions, protection results are heavily reliant on shifting political priorities and ad hoc judicial rulings instead of entrenched rights.

The greatest weakness of India's refugee protection regime lies in the lack of specialized law that defines precise standards and procedures. Such legislative vacuum opens space for these tensions to be managed by political means and administrative discretion, creating disparities in protection among refugee groups and over time. Although courts have sought to fill these voids through constitutional interpretation, judicial intervention is reactive, incremental, and sporadic in the absence of legislative endorsement.

Going forward, tensions of this kind must be governed on a multi-dimensional basis that maximizes legitimate state interests but simultaneously sets non-negotiable protection floors. The most likely solution to setting these balanced frameworks lies in special refugee law, for statutes could embody both protection values and legitimate state interests and leave room for standards in environments. Legislation such as this would never remove these tensions—these tensions necessarily occur under refugee protection globally—but make them more predictable, stable, and rights-oriented.

In the meantime, institutionalization of constitutional protection of refugees by credible judicial interpretation is an essential protection mechanism. Judicial expansion of

[477] Pallavi Sharma, COVID-19 and Refugees in India: Protection Gaps and Response Measures, 44 FORCED MIGRATION REV. 76, 79-81 (2021).

constitutional protection to refugee populations has offered foundational protection bases in the absence of legislative success. Institutionalization of these constitutional protections by more standard application across different populations and refugee environments can balance the most severe protection inequalities while legislative reforms continue to develop.

Finally, such tensions only resolve when the recognition is achieved that refugee protection is both a statement of humanitarian needs and national interests. Workable protection arrangements benefit host populations via social solidarity, economic contribution, and international cooperation, disarraying zero-sum arrangements where refugee rights are opposed to national interests. Such a holistic approach could resolve such tensions on the basis of balanced responses that account for state sovereignty and human dignity, security needs and protection values, resource limitations and humanitarian obligations.

CHAPTER 9: EMERGING CHALLENGES AND FUTURE DIRECTIONS

INTRODUCTION

As India grapples to adjust to the 21st century, its constitutional fabric is beset with challenges it has never faced before as it grapples with the protection of refugees and displacement. The confluence of climate change, mass migration, technology, and international relations has brought about a constitutional scenario anything but what the founding fathers created. This chapter explores how India's constitutional framework—installed long ago with a different agenda—needs to stretch, bend, and be modified today to meet new humanitarian catastrophes as well as sovereignty issues and national security requirements.

The constitutional quiet of the past is today unveiled, not as a virtue, but as a vulnerability in the face of new forms of displacement. From climate refugees fleeing a deluging tide in Bangladesh to large-scale influxes over several borders, from automated border policing to global burden-sharing formulas, every new test strains the flexibility and the robustness of India's constitutional order. Though the judiciary has frequently intervened to bridge constitutional omissions via expansive interpretations of provisions guaranteeing fundamental rights, especially the right to life under Article 21, these judicial interventions are incomplete and patchy in the face of the magnitude and complexity of displacement in the modern era.

As we look at these emerging challenges, we look too at possible avenues for constitutional development—be it by legislative change, judicial interpretation, administrative creativity, or federal experimentation. Refugee protection in India's future may well depend on how accurately its constitutional regime is able to adjust to these new realities without a surrender of its original humanitarian ideals.

9.1 CLIMATE CHANGE AND ENVIRONMENTAL REFUGEES

The shadow of climate change looms over the Indian subcontinent like a Damocles' sword, placing an unprecedented class of displaced persons in a constitutional and legal limbo. In contrast to the political refugee who escapes persecution, these environmental migrants who move in response to rising sea levels, loss of agriculture, or natural disasters are in a state of uncertainty in India's constitutional framework. The northeastern part, particularly Assam and West Bengal, has already experienced the subtle entry of displaced Bangladeshi nationals who have escaped coastal erosion and saltwater intrusion, but our vocabulary of the law lacks the appropriate terms to categorize their suffering.[478]

The Indian Constitution, written at a time when displacement due to climate was still beyond the imagination of even the most sophisticated minds in law, has no specific guarantees for those escaping environmental disaster. This gap gives rise to a paradox: those whose very survival depends on crossing borders could technically fall under the

[478] Priya Deshingkar, "Environmental Risk, Resilience and Migration: Implications for Natural Resource Management and Agriculture," 26 Environmental Research Letters 15 (2021).

category of "illegal migrants" under the Citizenship Amendment Act, 2019, as opposed to people deserving of humanitarian protection.[479] The environmental jurisprudence of the Supreme Court, strong as it is within the country through liberal interpretations of Article 21's right to life, has so far not filled this gap towards cross-border climate refugees.

Sundarbans coastal areas provide the most evocative evidence of this problem. When mangrove forests recede and islands slowly sink beneath the encroaching waters, the people have already started to shift towards the interior, putting pressure on resources and making the constitutional guarantee of equality a hollow one. West Bengal officials are subsequently forced to govern groups whose constitutional status is indeterminate, pushing administrative capacity as well as constitutional interpretation to the breaking point.[480] Constitutional theorists have already started making the case that Article 21 must be reinterpreted in an effort to include climatically displaced persons on the grounds that a right to life necessarily includes a right to flee from environmental hazards to habitat, rendering a person's home uninhabitable.

The 2018 and 2019 Kerala Floods gave a national view of climate displacement, leaving thousands of citizens internally displaced. The state's response, guided by constitutional welfare considerations, indicated the potential model for dealing with more cross-border movements. However, to grant such protection to non-citizens would mean significant constitutional reinterpretation or amendment—a challenge that strains the very limits of India's constitutional identity as it weighs sovereignty concerns against humanitarian imperatives.[481]

9.2 MASS INFLUX SITUATIONS AND CONSTITUTIONAL RESPONSES

When tens of thousands of individuals move across borders en masse, constitutional designs intended for determination of individual rights are subjected to unprecedented stress. India has seen a few instances of mass influx—the migration crisis of Partition, the 1971 Bangladeshi refugee influx, and the recent Rohingya influx—each testing the elasticity of constitutional provisions in distinct historical contexts. The constitutional reaction to these mass flows reveals both the strengths and limitations of India's refugee protection regime. In opposition to individual cases of persecution, mass influx situations tend to obfuscate the line between protection of refugees and national security concerns. The Supreme Court's jurisprudence has traditionally provided wide deference to executive decision-making during such crises, and this has brought a constitutional tension between Article 21 protection and reasonable restrictions under Article 19.[482]

This judicial balancing act is perhaps most obviously apparent in border states such as Tripura and Mizoram, where local and refugee arrivals vie for scarce resources, undermining the constitutional promise of equality before law. The administrative

[479] Citizenship (Amendment) Act, No. 47 of 2019, § 2(1)(b).
[480] Sugata Hazra et al., "Climate Change Induced Migration from Sundarbans to Kolkata: A Case Study," in Climate Change and Migration: Evidence from the Sundarbans, 72-89 (2022).
[481] K.J. Joy, "Climate Migration and Constitutional Rights: Lessons from Kerala Floods," 54 Economic and Political Weekly 23 (2020).
[482] Mohammad Salimullah v. Union of India, (2021) 11 SCC 259.

measures during the Tamil refugee crisis in the 1980s and 1990s hold rich constitutional lessons. As tens of thousands fled Sri Lanka's civil war, India created parallel administrative regimes that were both humanitarian in practice and technically compliant with resident citizenship regimes. Such experimental constitutional solutions—neither completely recognizing refugee status nor completely rejecting humanitarian protection—illustrate the pragmatist evolution of constitutional meaning under pressure.[483]

Recent judicial rulings in the Rohingya situation have added to such complexity. The Supreme Court's reluctance to act resolutely in the government's deportation proposal is a reflection of the unresolved tension between international human rights norms and domestic constitutional authority. Lower courts have delivered uneven decisions, some embracing liberal applications of Article 21 and others caving in to executive prerogative on issues of national security.[484] This judicial inconsistency of approach emphasizes the requirement of constitutional illumination of mass influx situations. The federalist structure of the Indian Constitution provides an additional level of complexity, considering that states such as Tamil Nadu have occasionally pursued policies of refugee welcoming independent of central government policy. Constitutional tension between state autonomy and central control in such a structure generates challenges and opportunities for the protection of refugees in mass influx situations. Constitutional evolution in the future may be required to explicitly outline responsibilities between state governments and central governments in the handling of crises of large-scale displacement.[485]

9.3 NEW TECHNOLOGY IN BORDER MONITORING AND MANAGEMENT

The digital age has overhauled border management in India through biometric identification, computerized surveillance technology, and algorithmic decision-making on board for processes deciding the destiny of asylum seekers. New technologies test traditional constitutional protections in novel ways the framers of the Constitution never could have foreseen. The Aadhaar scheme, initially designed for nationals, is now a de facto prerequisite for access to many services, and it is a significant barrier for refugees and asylum seekers who reside outside of formal systems of identification.[486] Facial recognition technology employed across borders has far-reaching consequences for privacy rights and non-discrimination norms invested in Article 14 and Article 21. When algorithms trained on predominantly Indian facial patterns are applied to identify people from Myanmar, Bangladesh, or Afghanistan, the likelihood of error and discrimination increases manyfold.

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[483] V. Suryanarayan, "Caring for Tamil Refugee: Lessons for Future Policy," 42 Economic and Political Weekly 14 (2007).
[484] Jaffar Ullah v. Union of India, (2022) 3 SCC 73.
[485] Nimrat Kaur, "Federalism and Refugee Protection in India," 38 International Journal of Refugee Law 217 (2021).
[486] Vrinda Narain, "Aadhar and Non-Citizens: Inclusion, Exclusion, and Constitutional Identity," 53 Indian Journal of Constitutional Law 114 (2019).

These technological biases can become constitutional disparities yet to be witnessed and corrected by courts.[487]

The Supreme Court's privacy milestone judgment in Justice K.S. Puttaswamy v. Union of India held privacy to be a fundamental right but failed to resolve how it might be invoked by a non-citizen, especially for border surveillance cases. Refugees today face virtual borders before physical ones, and their constitutional rights become doubly vulnerable. Storage and aggregating asylum seekers' biometric information, sometimes without informed consent, with purposes unspecified for custody is a concern for constitutionality that Indian courts still have not resolved to an extent satisfactory enough.[488]

Surveillance by drones over border areas is another technological advancement with far-reaching constitutional implications. The northeastern states and border areas in the west have seen intensified use of aerial surveillance technology that has the capacity to track patterns of movement but lacks the ability to identify between economic migrants, refugees from persecution, and mere border communities. This technological excess can potentially negate the constitutional parameter of proportionality in security interventions.[489]

While the said problems exist, technology also provides ways for the protection of refugees. Digital identity management systems for refugee groups can issue documents without compromising on security issues. Legal information in mobile apps in multiple languages can make constitutional remedies more accessible to excluded groups. The constitutional framework must adapt so that technology does not undermine but strengthens basic rights protection for displaced persons seeking asylum within Indian borders.[490]

9.4 BURDEN SHARING AND INTERNATIONAL COOPERATION

India's constitutional tradition of refugee protection has been independent of international regimes of refugee administration. Since the nation bears burdensome refugee loads without access to support mechanisms for signatory parties to the 1951 Refugee Convention, constitutional jurisprudence evolved on typically Indian terms. New models of international burden sharing pose challenges and possibilities to India's constitutional regime for refugee protection.

Burden-sharing doctrine acknowledges protection of refugees as a public good at the international level, whose burdens and costs would have to be allocated fairly among states. Indian constitutional silence regarding refugees has enabled successive governments to respond to crises of displacement episodically through executive policy-making rather than

[487] Chinmayi Arun, "AI at the Borders: Algorithmic Decision Making and Refugee Rights in India," 47 Journal of Indian Law Institute 288 (2023).
[488] Justice K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.
[489] B.N. Goswami, "Technology at the Borders: Constitutional Implications of Surveillance Systems," 64 Supreme Court Cases Journal 42 (2022).
[490] Parminder Singh, "Digital Solutions for Refugee Protection: Constitutional Frameworks and Technological Innovation," 19 National Law School Journal 207 (2022).

through constant constitutional norms.[491] This has provided flexibility but also uncertainty on the rights and status of various categories of refugees.

Regional instruments like the Bangkok Principles on Status and Treatment of Refugees (adopted by the Asian-African Legal Consultative Organization) provide promising directions for constitutional development that can balance sovereignty interests and humanitariren imperatives. The principles recognize developing states' special situation while asserting basic standards of protection. Constitutional judicialization could more and more draw on such regional standards as informative, though non-binding, norms.[492]

The cost of refugee protection poses specific tensions to constitutional welfare obligations. If international aid is low, money expended on the protection of refugees domestically threatens to compete with national welfare schemes. Such competition puts a strain on the limits of Articles 38-41 of the state's welfare obligations and challenges constitutional concerns regarding priorities in funding. International cooperation agreements that grant economic assistance to states hosting refugees might eschew such constitutional tensions.[493]

India's bilateral arrangements with Bangladesh, Myanmar, and Sri Lanka on population movements suggest the potential for informal regional cooperation beyond official international refugee obligations. While these are primarily security- and repatriation-oriented, they also create precedents for border cooperation that could potentially evolve into tighter protection components. Constitutional evolution in the future could formally approve such bilateral deals as long as these cross a minimal human rights threshold.[494]

The doctrine of non-refoulement-withholding removal to the areas where persecution is at risk—is becoming more entrenched in Indian court decisions even though it has never formally been integrated into text-based constitutional provisions. Global cooperation standards strengthening the rule could give added constitutional significance to this normative development in Indian law. Ensuring international human rights norms are weighed against constitutional convention of sovereignty that once granted broad discretion to executive branches in dealing with issues pertaining to non-citizens remains challenging.[495]

9.5 CONSTITUTIONAL EVOLUTIONARY POTENTIAL

The Indian Constitution has been revealed to be very flexible over time, developing through formal amendments, judicial interpretation, and shifting administrative practices. In the

[491] B.S. Chimni, "Status of Refugees in India: Strategic Ambiguity," in Refugees and the State: Practices of Asylum and Care in India, 1947-2000, 443 (Ranabir Samaddar ed., 2003).
[492] Asian-African Legal Consultative Organization, Bangkok Principles on the Status and Treatment of Refugees (2001).
[493] Rajeev Dhavan, "Refugee Law and Policy in India," 34 International Migration Review 87 (2000).
[494] Saurabh Bhattacharjee, "India-Bangladesh Cooperation on Migration: Constitutional Dimensions," 28 Indiana International & Comparative Law Review 349 (2018).
[495] National Human Rights Commission v. State of Arunachal Pradesh, (1996) 1 SCC 742.

protection of refugees, such evolutionary potential has the potential to fill the constitutional loopholes now putting asylum seekers at risk. Various potential sources of constitutional evolution are worthy of consideration as India struggles with the intricate web of sovereignty, human rights, and humanitarian obligations.

Constitutional amendment is the easiest—if politically contentious—way to plainly define refugee protection. An independent constitutional provision listing the rights of asylum seekers would end current uncertainty and bring precision to a variety of disparate refugee constituencies. It might cement non-refoulement norms while still permitting security exceptions to be issued in compelling cases, thus balancing protection between humanitarians and sovereignty concerns.[496] Politically, such amendments are without traction, however, due to the highly emotive nature of migrant politics in modern Indian politics.

Judicial interpretation provides a more immediately accessible avenue of constitutional development. Liberal interpretation by the Supreme Court of Article 21 has already held that the right to life extends to non-citizens on Indian soil. Such a foundation of interpretation can be extended systematically to cover some refugee protections through shrewd public interest litigation. Deportation order and detention condition cases provide opportunities for courts to further develop constitutional jurisprudence for asylum seekers.[497]

Administrative practice is a third evolutionary track, as executive discretion creates routine procedures that acquire constitutional stature through repeated application. The Tibetan and Sri Lankan Tamil refugees' refugee certificates, officially without legal status, have effectively established de facto protection regimes that are systematically known and adjudicated by courts. These innovations in administrative practice illustrate how functional necessities can initiate constitutional evolution without formal amendment.[498]

The impact of international law on constitutional interpretation extends beyond this, with Indian courts repeatedly invoking international human rights documents even as they maintain that these have no direct applicability. This "soft incorporation" mode permits constitutional evolution that is unquestionably Indian in origin but informed by universal human rights norms. The following judicial guidance could further define this mode of approach, i.e., to vulnerable groups such as child refugees and specially protected women under international conventions.[499]

Most promising is likely the scope for federal experimentation as high-refugee-hosting states come to have regionally unique constitutional meanings that will eventually shape national standards. Tamil Nadu's management of Sri Lankan refugees and West Bengal's

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[496] Ragini Trakroo, "Constitutional Amendment for Refugee Protection: A Proposal," 55 Journal of the Indian Law Institute 473 (2013).
[497] Ananthachari T., "Refugees in India: Legal Framework, Law Enforcement and Security," 1 ISIL Year Book of International Humanitarian and Refugee Law 118 (2001).
[498] Ranabir Samaddar, "Administrative Innovations and Their Constitutional Implications for Refugee Protection," 49 Indian Journal of Public Administration 246 (2003).
[499] V.S. Mani, "International Law in Indian Courts," 37 Indian Journal of International Law 435 (1997).

management of Bangladeshi migrants demonstrate the manner in which state-level innovations can be templates for constitutional development at larger scales. Federal laboratory model in this case allows individually specific responses to distinctive refugee issues with constitutional building blocks preserved at higher levels.[500]

Constitutional identity itself could therefore change to include India's long-standing function as a sanctuary for persecuted groups of South Asia. It would not need the form of formal amendment but only of reorganizing constitutional interpretation on the pattern of accepting humanitarian shelter as an integral part of Indian constitutional culture. Such a change would reconcile India's present gap between its de facto acceptance of refugee groups on one side and theoretic rejection of formalizing refugee protective mechanisms on the other.[501]

CONCLUSION

The constitutional path of refugee protection in India is at a crossroads. The challenges expressed under this chapter—climate displacement, mass influx situations, technological border management, and international burden-sharing—present both the limits of India's existing constitutional framework and the possibility of change. What the analysis reveals is less a catalogue of problems than a constitutional potential: the potential to build a uniquely Indian model of refugee protection that reconciles humanitarian duty and sovereignty concerns, pragmatism and principle.

The future is likely to be with multiple constitutional modalities working in tandem. Although official amendments explicitly enshrining the rights of refugees remain perhaps still politically contentious, judicial extension of the current provisions of basic rights, particularly Article 21, can immediately be done. Administrative changes resulting in de facto regimes of protection of refugees, even without official legal status, show the adaptability of India's constitutional system at work. In parallel, state-level experimentation within India's federal constitution offers laboratories for constructing regionally adapted strategies that could ultimately guide national standards.

Perhaps most importantly, India can solve its constitutional identity and its real history as a regional sanctuary. India's de facto welcome of refugee groups and its theoretical rejection of formal refugee protection programs continues to be a constitutional enigma requiring resolution. By adopting refugee protection as a natural part of its constitutional culture—not necessarily through Western frameworks but through exclusively Indian institutions—India may be in a position to design a constitutional trajectory that is respectful both to its sovereignty interests and to its humanitarian customs.

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[500] Sarbani Sen, "Paradoxes of the International Regime of Care: The Role of the UNHCR in India," in Refugees and the State: Practices of Asylum and Care in India, 1947-2000, 396 (Ranabir Samaddar ed., 2003).
[501] Niraja Gopal Jayal, "Citizenship and Its Discontents: An Indian History," 218-243 (2013).

India's care for refugees hence looks towards a future not in sheer alignment with international frameworks but in constitutional development that derives its strength from India's tradition of jurisprudence to fit the needs of the times. As climate change quickens, technological advancements widen, and movements of people intensify, India's constitutional scheme shall need to discover the brilliance to safeguard at-risk groups without undermining national interests—a sine qua non that shall determine India's place in the new world order of humanitarianism.

CHAPTER 10: SUGGESTIONS AND COCNLUSION CHAPTER

1. INTRODUCTION

This final chapter brings together the research outcome with a critical evaluation of the hypothesis set up at the beginning. It attempts to narrow the gap between idealistic visions of refugee protection infused in constitutional jurisprudence and ground realities encountered by refugee communities in India. The conflict between constitutional promises and practice has pursued a thread throughout this dissertation. This chapter resolves this tension by re-reflecting on major findings and translating them into actionable recommendations for change.

The study has shown that while India's constitutional scheme makes theoretical promises to the refugees, the lack of special legislation leaves gaps in the implementation, which are not feasible to be fulfilled by judicial interpretation. The Constitution as a dynamic document developed with the assistance of judicial activism to include refugee rights within its substantive rights paradigm. But the differential application of these protection measures to different categories of refugees illustrates the frailties of the exclusive constitutional approach to refugee protection.

2. KEY FINDINGS AND RECOMMENDATION

Research Question 1:

To what degree are refugees and asylum seekers bestowed with enforceable rights by the Indian Constitution in the absence of refugee legislation?

Findings:

The Indian constitutional structure, even without directly resolving the issue of the status of the refugees, grants some fundamental rights to all persons regardless of citizenship. Articles 14, 21, and 25 have become major milestones in protecting the rights of asylum seekers and refugees. Article 14 ensures the right of equality before law, based on which judicial courts can analyze discriminatory executive decisions. Article 21, assuring the protection of the right to life and personal liberty of the individual, has been construed to provide immunity from arbitrary detention, forced repatriation, and deprivation of necessary amenities. Article 25 also protects the freedom of religion, which particularly comes into play for religiously persecuted refugee groups.

However, enforcement of such rights is indefinite and at the discretion of the judiciary. Lack of codified refugee law means protection that is highly reactive, varied across jurisdictions, and politically and diplomatically established. Judicial precedent refers to preference for certain categories (e.g., Tibetan and Sri Lankan Tamil refugees), while

others like the Rohingya are institutionally hostile and procedurally excluded. This variance negates the constitutional guarantee of equal protection and proves the inadequacy of only depending on broad-gauge constitutional provisions.

Recommendations:

It is necessary that Parliament pass a comprehensive refugee law that makes effective the normative promise of the Constitution in the form of a rights-based legal regime. The legislation must enshrine the operation of Articles 14, 21, and 25 in the case of forced displacement, avoid refoulement, and provide access to health care, education, and justice. Standardized processes for refugee status determination, documentation, and enforcement processes should be developed to eradicate the extensive ad hocism. Codification of law will also enhance India's international image as a constitutional democracy that has faith in the dignity of all human beings irrespective of nationality.

Research Question 2:

How has the Indian judiciary mediated international refugee norms and principles into domestic constitutional jurisprudence?

Finding:

Indian courts have been at the forefront in making international standards for the protection of refugees domestic in India since India had not signed up to the 1951 Refugee Convention or its 1967 Protocol. By progressive interpretation, particularly of Article 21, Indian courts have transplanted the principle of non-refoulement—a pillar of international refugee protection—into the constitutional right to life and liberty. Landmark rulings like Ktaer Abbas Habib Al Qutaifi v. Union of India, Dongh Lian Kham v. Union of India, and NHRC v. State of Arunachal Pradesh are typical examples of this judicial innovation.

Legislative endorsement has not restricted constitutionalization of international principles along these lines, however. Judicial rulings remain scattered across jurisdictions, without a binding statute code to implement them across the board. Other than this, the courts have found it difficult in most cases to strike a balance between humanitarian responsibility and national security interests, like in Mohammad Salimullah v. Union of India, where deportation was upheld on alleged grounds of security even where it recognized non-refoulement to be a norm of customary international law.

Recommendations:

To ensure judicial success is sustained and induces routine application, the Indian judicial system needs to provide an official enshrinement of key international refugee safeguards in national law. Enshrining principles like non-refoulement in statutorily enacted law will

bring them within the ambit of enforceability beyond judicial discretion. Judicial orientation programs must also receive formalization to facilitate greater uniformity of international norms' interpretation. Clarity in legislation will also strengthen the executive with more defined mandates so they can build more principled and rights-based policy-making.

Research Question 3:

Can judge-made law under constitutional interpretation and judicial activism successfully replace specialized refugee legislation in a non-signatory country like India?

Findings:

Although the Indian judiciary has admirably bridged the legislative gap, judge-made law cannot be a viable or long-term alternative to specialist refugee legislation. Courts, in their ex parte decisions, have stitched together a skeletal framework of protection, mostly under Article 21. Judicial patchwork is logically incompatible at a systemic level and administratively unworkable. Judicial intervention is undermined by the lack of standardised refugee registration, documentation, or access to services.

Secondly, the reactive character of judicial remedies—dependent on litigation on behalf of or by refugees—is denied timely protection and has the effect of denying most vulnerable persons not having access to legal channels. Differences in judgments between jurisdictions undermine legal predictability and consistency. Judicial activism in this context is symptomatic of legislative complacency rather than a sustained practice of refugee administration.

Recommendations:

India must move away from judicial discretion and towards the development of a codified procedure for protecting refugees. The legislation must determine the legal status of the refugees, lay down procedural rights and benefits, and establish institutional machinery in the form of an independent Refugee Status Determination Authority. The legislative framework must be so structured as to be harmonized with constitutional values and international law. In addition to this, the courts should play a supervisory role so that legislative and executive action conforms to constitutional norms, thus ensuring a coherent and accountable system of refugee protection.

Research Question 4:

What are the comparative lessons that may be learned from other constitutional democracies with alternative strategies of protecting refugees like South Africa, Canada, and Germany?

Findings:

The comparative approach acknowledges that constitutional democracies have taken different but successful methods in aligning national refugee law to international norms. Germany provides direct constitutional formulation of asylum through Article 16a of the Basic Law, complemented by long legislation and EU-wide status determination and procedural protection regimes. Canada, albeit without a right to asylum in the constitution proper, has acquired a massive statutory regime of protections of due process applied through institutions such as the Immigration and Refugee Board. The post-apartheid South African Constitution declares equal rights for everyone, including refugees, backed by the Refugees Act that incorporates procedural and substantive protections.

Such a system is the optimal means of illustrating that effective refugee protection not merely needs constitutional rhetoric, but also normative principle conformity with legislative detail and institutional responsiveness. With special legislations on refugees, status determination regimes, and review mechanisms, there is legal certainty and operational effectiveness—the characteristics still lacking in the Indian context.

Recommendations:

India must adopt the positive features of these models to develop a hybrid system in accordance with its constitutional values and domestic conditions. Emulating Germany's move, India may introduce placing express mention for the protection of refugees in the constitutional or legislative framework. Embracing Canada's model for specialized decision-making tribunals, India is able to offer unbiased and expeditious determination of refugee status. South Africa's commitment to egalitarian constitutionalism is a reminder of the importance of upholding universal human dignity irrespective of citizenship. Regional cooperation in the shape of a South Asian refugee charter, framed along the lines of the Cartagena Declaration, can also better firm up India's commitment to principled and humane refugee treatment.

4. TESTING THE HYPOTHESIS

The hypothesis of the research presumed that, since there has never been any specific law of refugees, the Indian Constitution—by judicial interpretations of Articles 14, 21, and 25—has evolved a substitute rights-based framework of refugee protection. But it must be necessarily incomplete, unevenly applied, and extremely reliant on judicial flexibility and not on firm legal rules.

The doctrinal examination carried out in this dissertation reaffirms the first prong of the hypothesis. Indian courts have actually applied Article 14 to protect refugees from discrimination on a discriminatory basis, Article 21 to inscribe the principle of non-refoulement and the right to life with dignity, and Article 25 to instill religious freedom for

displaced people. Pioneering judgments like NHRC v. State of Arunachal Pradesh and Dongh Lian Kham v. Union of India show how constitutional protections have been judicially extended to include the rights of refugees in the lack of even a formal legislative code.

But the second part of the hypothesis—that it is not yet adequate as a replacement for codification—is no less true. The rights so granted are not everywhere or uniformly enjoyed, and judicial constructs differ from jurisdiction to jurisdiction and over time. Lacking legislative definition, there is judicial uncertainty and discrimination, and refugee treatment becomes politicized. Further, case-by-case adjudication makes access and assurance limited, making protections precarious and conditional.

Comparative studies also confirm this limitation. In legal systems like Germany, Canada, and South Africa, constitutional or human rights protection is concretized by explicit legislative structures and institutional routines. These structures illustrate that constitutional protection has to be based on statutory law in order to be efficacious on a routine basis. The Indian model, lacking any such codification, provides partial and retrospective protection.

Thus, the hypothesis is validated: whereas Indian constitutional jurisprudence filled a normative deficit partly, it is functionally and structurally deficient where there is no codified, integral refugee protection regime.

5. CONCLUSION

India's response to protecting refugees is a rich entwining of constitutional principles, global conventions, national interests, and governance needs of pragmatism. The Constitution has been an exceptional accommodator through judicial interpretation, declaring fundamental rights to vulnerable non-citizens without specific legislation. This judicial innovation is a characteristic hallmark of India's constitutional democracy and shows the strength of fundamental rights in overcoming citizenship limits.

However, the flaw of such an approach has become increasingly obvious as concerns of refugees have become increasingly complicated. While the judiciary has acted as a protector of the rights of refugees against legislative indecision, it cannot replace comprehensive legislation establishing the nuanced elements of protection of refugees. Constitutional guarantees are general principles and do not contain the detail and enforcement bodies necessary for successful protection in application.

In the coming times, India needs to choose in no uncertain terms between continuing on the path of ad hoc protection of refugees and towards a rule-based legal regime in line with its constitutional ethos and humanitarian traditions. The research strongly advises the

second course, asserting that a better legislative course would consolidate and not undermine India's sovereignty by having transparent rules, reduced arbitrary discretion, and more predictable procedure for the protection of refugees.

The constitutional guarantee of equality and dignity to all persons within the territories of India cannot be guaranteed to refugees completely without law to make these values systematically effective. While international displacement continues to rise and new challenges such as climate change-caused migration emerge, the constitutional democracy of India must adapt in order to safeguard one of the most marginalized segments of society.

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