NON-REFOULEMENT IN INDIA: CONSTITUTIONAL PROMISE OR EXECUTIVE DISCRETION?

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ABSTRACT

India has long offered shelter to people fleeing war, persecution, and political unrest, from Tibetans and Bangladeshis to Sri Lankan Tamils, Afghans, and Rohingyas. Yet the country still has no dedicated refugee law, and refugees remain governed by ordinary immigration statutes. The Foreigners Act, 1946 and the Passport (Entry into India) Act, 1920 have now given way to the Immigration and Foreigners Act, 2025, but this new law too makes no distinction between refugees and other foreign nationals. India is also not a party to the Refugee Convention and its Protocol.

Even without a specific statutory framework, Indian courts have on occasion read the principle of non-refoulement into the constitutional guarantees of equality and life under Articles 14 and 21. Cases such as *Gurunathan v. Government of India, National Human Rights Commission v. State of Arunachal Pradesh, and Nandita Haksar v. State of Manipur* show this constitutional willingness, while *Mohammad Salimullah v. Union of India* marks a shift toward a more restrictive approach, one that gives primacy to national security and executive discretion.

This paper asks whether non-refoulement has genuinely become a constitutional guarantee in India or whether refugee protection still hinges on executive policy. It examines the international legal position, India's constitutional and statutory framework, and the sweeping powers under the Immigration and Foreigners Act, 2025 and argues for a comprehensive refugee law, a fair asylum determination process, and stronger judicial oversight so that protection rests on legal right rather than discretion.

KEYWORDS

Non-refoulement, Refugee Protection, Articles 14 and 21, Immigration and Foreigners Act, 2025, Asylum.

I. INTRODUCTION

India has long opened its doors to those escaping war, violence, fear or oppression in their homelands. This spirit traces back to the old Indian ideal of Vasudhaiva Kutumbakam – the belief that the entire world is essentially one large family. Ever since gaining independence, India has provided shelter to many refugee groups from different countries. Tibetans crossed the Himalayas in 1959 seeking safety, Bengalis escaped East Pakistan during the brutal 1971 war that eventually birthed Bangladesh, Sri Lankan Tamils sought refuge amid their homeland's civil war, Afghan Sikhs and Hindus fled once the Taliban tightened its grip, and displaced individuals from places as far-flung as Somalia, Sudan, Iraq and Uganda have likewise found sanctuary within Indian borders.

For many years, India relied on old legislation, the Foreigners Act, 1946[1] and the Passport (Entry into India) Act, 1920[2] which treated refugees like any other foreign nationals and gave wide powers to the government. These laws have given way to the Immigration and Foreigners Act, 2025, but the new law still offers no separate legal identity to those seeking asylum nor provides them with special legal protection. Although India has generally been welcoming towards refugees, its policies have not been applied equally.

India has never signed the 1951 Refugee Convention, nor did it join the 1967 Protocol. As a result, India has no legal framework that sets refugees apart as their own group. Under the Immigration and Foreigners Act, 2025 refugees are treated simply as "foreigners" just like tourists or other foreign nationals.

Non-refoulement stands as the cornerstone of global refugee protection. It functions as the rule that prevents a country from returning refugees to a place where they would face persecution, torture, or worse. India never signed the Refugee Convention, yet its courts have not ignored the principle, they have read it into the Constitution largely through Article 21[3]. Indian courts have in several cases protected refugees from forced deportation:

In *Gurunathan v. The Government of India*[4], the authorities gave their assurance to Sri Lankan refugees who feared forced return, and the Madras High Court accepted this. In *Nandita Haksar v. State of Manipur*[5], the bench went a step further, holding that

[1] Foreigners Act, 1946, No. 31, Acts of Parliament, 1946 (India).
[2] Passport (Entry into India) Act, 1920, No. 34, Acts of Parliament, 1920 (India).
[3] INDIA CONST. art. 21.
[4] *Gurunathan v. Government of India*, W.P. Nos. 6708 & 7916 of 1992 (Mad. H.C. Mar. 22, 1994) (India).
[5] *Nandita Haksar v. State of Manipur*, W.P. (Crl.) No. 6 of 2021 (Manipur H.C. May 3, 2021) (India).

non-refoulement could be drawn directly out of Article 21. However, in *Mohammad Salimullah v. Union of India*[6], the Supreme Court, in its interim order dated April 8, 2021, took a more restrictive approach and gave greater importance to national security and executive discretion.

The discussion below considers whether the principle of non-refoulement in India has evolved into a constitutional guarantee under Articles 14 and 21, or whether refugee protection continues to depend largely on executive discretion without a dedicated refugee law. To answer this question, the article examines the principle of non-refoulement under international law, analyses India's constitutional and statutory framework, evaluates judicial decisions, and proposes reforms for a more rights-based refugee protection regime.

II. UNDERSTANDING NON-REFOULEMENT: THE HEART OF REFUGEE PROTECTION

Understanding non-refoulement is essential: it determines whether refugee protection in India actually comes from constitutional rights, or whether it depends on executive discretion. And out of all the principles in international refugee law, this one matters the most. It is laid down in Article 33(1), which essentially says a refugee cannot be forced to return to a country where their race, faith, nationality, group membership, or political views might expose them to persecution, torture, or danger to their life or freedom. Article 33(2), however, carves out an exception, deportation becomes possible when there is solid reason to believe the person poses a security risk to the receiving country, or if they have been found guilty of a grave offence that makes them a threat to the community[7].

Even though India has not written non-refoulement into its own domestic laws, the Constitution still confers certain fundamental rights on citizens and non-citizens through Articles 14, 21, and 22. On top of that, India has signed several international human rights agreements, among them the International Covenant on Civil and Political Rights (ICCPR)[8] and the Bangkok Principles[9] — both of which back up protection against forced return.

Courts have recognised the principle of non-refoulement in numerous cases. In *State of Arunachal Pradesh v. Khudiram Chakma*[10] , the Supreme Court dealt with the relocation of

[6] *Mohammad Salimullah v. Union of India*, AIR 2021 SC 1789 (India).
[7] Convention Relating to the Status of Refugees art. 33, July 28, 1951, 189 U.N.T.S. 137.
[8] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.
[9] Bangkok Principles on the Status and Treatment of Refugees, 1966.
[10] *State of Arunachal Pradesh v. Khudiram Chakma*, AIR 1994 SC 1461, 1466 (India).

Chakma refugees. While allowing the government to shift them to their original settlement area, the court observed that although a refugee does not have an automatic right to enter another country, once asylum has been granted the host country should not send the refugee back to somewhere they may face danger. This reflects that the principle tries to strike a balance, protecting refugees on one hand, while still respecting the state's own interests on the other.

III. REFUGEES UNDER INDIAN LAW: PROTECTION WITHOUT A REFUGEE LAW

India has hosted refugees for many years, but it has no specific law that spells out who qualifies as a refugee or the rights owed to them. Instead, refugees fall under the same broad immigration rules that apply to everyone else, the Foreigners Act, 1946 (now succeeded by the Immigration and Foreigners Act, 2025) and the Passport (Entry into India) Act, 1920. Neither of these statutes draws any line between refugees, ordinary foreign nationals, or undocumented migrants, which leaves refugees without any distinct legal standing of their own.

Since there is no refugee law, refugees do not have clear legal status in India. They can end up detained, deported or denied jobs, schooling, medical care, and other basic entitlements. Their protection often depends on government policies rather than guaranteed legal rights. UNHCR registers refugees and issues identity cards to them. However, these cards do not have legal recognition under Indian law and cannot prevent detention or deportation if the executive decides to take such action[11].

India decides refugee matters on a case-by-case basis instead of following a uniform legal framework. Different refugee groups are treated differently, the level of protection they receive often shifts based on political ties, diplomatic relationships, or security concerns. For instance:

- Tibetan refugees have received land, residence rights and government support.
- Sri Lankan Tamil refugees have largely found themselves housed in camps, with limited rights.

[11] *A Lifetime in Detention: Rohingya Refugees in India, REFUGEES INTERNATIONAL, https://perma.cc/SJV6-LHMT* (last visited Sept. 14, 2026).

- Rohingya refugees have often faced detention, deportation and denial of legal recognition.

With no uniform legal framework, treatment of refugee communities varies widely, indicating that protection often depends more on executive policy than on enforceable legal rights.

IV. CONSTITUTIONAL PROMISE: CAN NON-REFOULEMENT BE READ INTO ARTICLES 14 & 21?

Article 14 guarantees equality before the law to "any person," and Article 21 protects the life and personal liberty of every person, not just Indian citizens[12]. Therefore, excluding Muslim refugees, particularly the Rohingyas, or denying protection to certain groups of refugees raises important constitutional questions about being treated equally under the law and having one's life and personal liberty protected. Indian courts have repeatedly clarified that these fundamental rights extend beyond citizens. They have recognised that foreigners and refugees too fall within the protective scope of Articles 14 and 21. In essence, protecting the life and liberty of anyone present in India is a constitutional obligation of the government. One of the strongest examples of this approach is *National Human Rights Commission v. State of Arunachal Pradesh*[13], where the court found that the Constitution protects even stateless persons and refugees. This judgment reflected the humanitarian spirit of the Constitution.

Several High Courts have read Article 21 as encompassing the principle of non-refoulement:

The Gujarat High Court, in *Ktaer Abbas Habib Al Qutaifi v. Union of India*[14], said Article 21 covers non-refoulement too, and paused the petitioner's deportation until the case was fully decided.

A narrower view was adopted by the Supreme Court in *Mohammad Salimullah v. Union of India*[15], which observed that freedom from deportation is not a separate fundamental right but is ancillary to the right to reside and settle in India under Article 19(1)(e), applicable exclusively to Indian citizens. This interim order gave greater importance to national security and executive discretion.

[12] INDIA CONST. arts. 14, 21.
[13] *National Human Rights Commission v. State of Arunachal Pradesh*, (1996) 1 SCC 742, 748 (India).
[14] *Ktaer Abbas Habib Al Qutaifi v. Union of India*, 1999 Cri LJ 919 (Guj.) (India).
[15] *Mohammad Salimullah,* AIR 2021 SC 1789 (India).

In *Nandita Haksar v. State of Manipur*[16], the court ruled that the principle of non-refoulement can be read into Article 21 and that refugees should not be deported merely because they violated immigration laws. The Court, however, made this protection subject to condition that it would not apply if the asylum seeker was seen as a threat to the country's security.

V. EXECUTIVE DISCRETION AND THE LIMITS OF CONSTITUTIONAL PROTECTION

India’s immigration policy does not have a clear and uniform system for dealing with refugees. Instead, decisions are often made on a case-by-case basis and government’s approach mainly focuses on national security rather than protecting people who fled persecution. India has no official legal process through which a person can apply for asylum, have their refugee status determined, or appeal if their application is rejected. Countries such as U.S. and Germany have established procedures with clear legal standards, and applicants can challenge decisions before tribunals[17].

The Ministry of Home Affairs has broad powers over refugee matters, with limited judicial oversight, leaving refugees to rely more on the government’s will than on any real legal safeguard. Although the Immigration and Foreigners Act, 2025 replaced older colonial laws, it still does not recognise refugees as a separate legal category. The Act gives very broad powers to the central government without clearly explaining:

a) Who qualifies as a refugee.
b) When a person can be detained.
c) What standards / procedures should be followed.

This is known as excessive delegation because Parliament has delegated essential legislative functions to the executive without clearly defining the limits of those powers.

The Broad Powers Handed to the Central Government Over Refugee Matters: Several provisions of Immigration and Foreigners Act, 2025 confer excessive powers on the executive, raising concerns about excessive delegation and inadequate safeguards.

Under section 3, the government can refuse entry into India or remove a foreigner from the country if it believes that the foreigner threatens national security, India's sovereignty, relations with foreign countries, public health or any other grounds specified by the

[16] *Nandita Haksar*, W.P. (Crl.) No. 6 of 2021 (Manipur H.C. May 3, 2021) (India).
[17] *See* 8 U.S.C. § 1158 (2018); Asylum Act, https://perma.cc/3CTS-U4U8 (last visited Sept. 15, 2026).

government. The problem is that the Act does not define what these terms mean. As these terms are not clearly defined, different authorities may interpret them differently. This creates uncertainty, increases the risk of arbitrary decisions, and makes judicial review more difficult.

Under section 7, the central government can regulate almost every aspect of foreigners' lives including movement, residence, activities, association, and even possession of certain articles. This Act uses the words "in particular" which means the list is not exhaustive.

Under section 27, the Act allows officials to use reasonable force during enforcement. The problem is that what level of force is reasonable, when force may be used, whether force should be last option, the Act does not answer these questions. As a result, different officials may apply the provision differently, increasing the risk of unfair or excessive use of force.

Under section 29, the Act refers to adverse security report without explaining what it means. The absence of a statutory definition allows executive authorities considerable discretion, making it difficult for affected individuals to challenge decisions and increasing the risk of arbitrary action.

Under section 33, the government can modify the law, or may exempt any country, person, or category of foreigners under the Act or apply different rules to them. This gives the executive almost legislative powers because it can selectively modify how the law operates. Such extensive delegated powers blur the distinction between legislative and executive functions and reduce parliamentary oversight over immigration and refugee policy[18].

There is an absence of clear deportation procedures. For example, the Puducherry police manual lacks proper legal guidelines[19]. As a result, different states may follow different practices, increasing the risk of arbitrary and unfair deportations. The 2025 Act provides no appeal mechanism for foreigners, leaving refugees unable to challenge wrongful decisions, which undermines natural justice and due process. Together these provisions demonstrate that the present framework prioritises executive discretion over legal certainty, judicial oversight, and refugee protection.

VI. THE CONSTITUTIONAL - EXECUTIVE TENSION: WHY THE PRESENT FRAMEWORK IS INADEQUATE

[18] Immigration and Foreigners Act, 2025, No. 13, Acts of Parliament, 2025, §§ 3, 7, 27, 29, 33 (India).
[19] Puducherry Police Manual, ch.9 (Foreigners) (2012), https://perma.cc/A5FS-JAZW (last visited Sept. 15, 2026).

India's current refugee and immigration system is not based on a clear or comprehensive legal framework. Instead, it relies mainly on government discretion and old immigration laws. This creates a conflict between constitutional rights and the wide powers exercised by the executive. As a result, India's current framework creates three major problems:

1. Uncertainty - In India, there is no separate refugee law, they are governed by general immigration laws that do not distinguish them from illegal immigrants. India also lacks a formal asylum system, refugee status determination process, and appeal mechanism, leaving decisions largely to the executive. Although the UNHCR issues refugee identity cards, these cards have no legal recognition in India and even cardholders may be detained without due process. India also follows a dualist approach, so treaties signed internationally do not carry legal force in domestic law unless separately enacted. Even if India signs or ratifies a treaty, it cannot be enforced in Indian courts unless parliament passes a law to implement it. This legal uncertainty leaves refugees without predictable rights and makes their protection dependent on changing executive policies rather than enforceable legal standards.

2. Inconsistency – India has historically provided shelter to many refugee groups, such as Tibetans, Tamils, Rohingyas. However, these groups have not been treated equally. This suggests refugee policy is shaped more by political convenience than by consistent humanitarian values. Certain constitutional rights extend to all persons, not just citizens, and courts in India have tied non-refoulement to the protections under Articles 14 and 21. The Citizenship Amendment Act, 2019[20], claims to protect persecuted minorities, but it excludes persecuted Muslim communities such as Rohingyas and Ahmadis. This has been criticised as discriminatory and in conflict with the constitutional principle of equality, raising questions about whether the Act is truly humanitarian. This unequal treatment creates uncertainty and raises questions about whether India's refugee protection follows any clear, consistent rules.

3. Weak Accountability – The Foreigners Act hands the government far-reaching powers to detain and deport foreign nationals. Another key problem is that the burden of proof falls on the individual to prove they are legally entitled to stay in India. Under section 16 of the Immigration and Foreigners Act, 2025, a person is presumed to be a foreigner unless they prove otherwise, and a similar presumption existed under section 9 of the old Foreigners Act, 1946[21]. For poor, illiterate or displaced refugees who often have no documents, this becomes extremely difficult. Government applies constitutional values selectively, protecting some

[20] Citizenship (Amendment) Act, 2019, No. 47, Acts of Parliament, 2019 (India).
[21] Immigration and Foreigners Act, 2025, § 16; Foreigners Act, 1946, § 9.

refugee groups while denying similar protection to others. The government often prioritises national security over humanitarian principles, leading to inconsistent treatment of refugees and weakening constitutional values of equality, justice and human dignity. The Supreme Court's interim order in *Mohammad Salimullah* case reflects a different judicial approach. It demonstrates increasing judicial deference to the executive rather than stronger protection of refugee rights. Without effective judicial review, refugees may not get a fair chance to challenge detention or deportation, weakening legal protection and accountability.

These weaknesses show that India's refugee system lacks certainty, consistency, and accountability. Refugee protection should depend on clear legal rules, not executive discretion.

VII. THE WAY FORWARD: FROM DISCRETION TO RIGHTS

India needs a comprehensive refugee law to establish a consistent, transparent and "rights-driven" protection framework. Such legislation should clearly define who qualifies as a refugee, establish a just and workable Refugee Status Determination process, secure legal aid and appeal rights, embed non-refoulement within domestic law, and balance national security priorities with India's constitutional and human rights commitments.

Even though India has never joined the 1951 Refugee Convention or its 1967 Protocol, non-refoulement has acquired importance under international human rights law. India should formally recognise this principle within domestic legislation to ensure clear and consistent legal protection for refugees. Instead of leaving refugee protection entirely to executive discretion, an independent Refugee and Asylum Commission should be established to determine asylum claims in a fair, transparent and impartial manner.

The judiciary also has an important role in safeguarding refugee rights by enforcement of Articles 14, 21 and 32 of the Constitution. Courts should scrutinise detention and deportation decisions to ensure that executive actions do not violate constitutional rights of equality, life, personal liberty and due process. The Supreme Court, in *National Human Rights Commission v. State of Arunachal Pradesh*, held once again that Article 21 covers everyone and protected Chakma refugees from forcible eviction.

In exceptional cases where executive actions result in manifest injustice, the Supreme Court may exercise its authority under Article 142[22] to deliver complete justice. At the same time,

[22] INDIA CONST. art. 142.

immigration and asylum decisions should be transparent, reasoned and subject to review and appeal. Following natural justice and procedural fairness would make decisions more transparent and fair, and would help reduce misuse of power.

India should move from executive discretion toward a rights-based system of refugee protection by introducing a comprehensive refugee statute and recognising non-refoulement as part of domestic legislation, establishing an independent Refugee and Asylum Commission, ensuring judicial review and appeals, making deportation procedures transparent, and balancing national security with constitutional values and human rights.

VIII. CONCLUSION

Non-refoulement forms the backbone of refugee protection since it makes sure no one is sent back to a place where they face oppression, abuse and grave danger. Although India lacks a dedicated refugee law, the rights conferred under the constitution, particularly Articles 14 and 21, together with judicial interpretation, provide a strong foundation for protecting refugees against arbitrary deportation. However, without a dedicated refugee law in place, protection for refugees is left mostly at the mercy of executive discretion, resulting in uncertainty, inconsistent treatment, and limited procedural safeguards.

A country with India's long humanitarian tradition should not rely solely on administrative policy to protect vulnerable individuals. A comprehensive refugee statute that formally acknowledges non-refoulement, establishes a fair Refugee Status Determination process, provides independent review and appeals, and balances national security with constitutional values would bring greater certainty, accountability, and fairness to India's refugee regime.

Ultimately, the real question is not whether India has the capacity to protect refugees, but whether such protection should remain a matter of executive choice or become a legal commitment. Moving from executive discretion to a rights-based framework would better reflect the Constitution's promise of equality, dignity, and justice for every person within India's territory.