INDIA WITHOUT A REFUGEE LAW: BALANCING NATIONAL SECURITY AND HUMAN RIGHTS

Ai Disclosure Statement

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Abstract

India has a long humanitarian tradition of providing shelter to refugees fleeing persecution, conflict and violence despite not being a signatory to the *1951 refugee convention* and its *1967 protocol.* However, the absence of a specific domestic refugee framework leads to refugees being governed under the same general laws as foreigners creating uncertainty regarding their legal status and protection. This article examines India's refugee framework and analyses the constitutional and judicial safeguards available to refugees, under Article 14 and Article 21 of the *Indian Constitution*. It also explores the reasons behind India's decision not to accede to the *1951 Refugee Convention*, including concerns relating to national security, mass influxes of refugees, and the need for a greater reform in refugee management. This article critically examines the judicial balancing of humanitarian obligations and national security through landmark decisions such as ***NHRC v. State of Arunachal Pradesh, Louis De Raedt v. Union of India, Ktaer Abbas Habib Al Qutaifi v. Union of India, and Mohammad Salimullah v. Union of India***. It argues that although constitutional protection and judicial intervention have provided limited safeguards, they cannot substitute for a comprehensive statutory framework. The article concludes by advocating for a balanced domestic refugee law that clearly defines refugee status, establishes a fair refugee status determination process, incorporates the principle of non-

refoulement, and also addresses national security concerns through appropriate regulatory mechanism.

Keywords: Refugee Law; National Security; Human Rights; Non-Refoulement; 1951 Refugee Convention.

Introduction

The world is witnessing a growing global refugee crisis, as millions of people are forced to flee their homes due to armed conflict, violence, and persecution. They seek safety and protection in another country. Unlike immigrants who voluntarily move to another country for better employment opportunities and livelihood, refugees are forced to migrate because of circumstances beyond their control. As defined under Article 1 of the *1951 refugee convention* "Any person who is outside their country of nationality or habitual residence, and is unable or unwilling to return due to a well-founded fear of persecution based on their race, religion, nationality, membership of a particular social group, or political opinion" is a refugee.[1]

India has a long history of providing shelter to refugees for decades due to being multiregional, multiethnicity and multicultural, India tends to receive a large number of refugees from border countries due to shared bond and affection and also hosted them despite not being a signatory to the *1951 Refugee Convention* but the refugees require both legal protection and state support as well, while this creates tension between upholding the humanitarian principles and national security concerns.[2]

This article examines India's refugee framework, the constitutional and judicial protection available to the refugees, and the reason behind India's decision not to accede to the *1951 refugee convention*, how India tries to judicially balance, the national security and refugee protection inside the country, and the need for a balanced domestic refugee law.

India's Refugee Framework: Protection without a Dedicated Law

[1] *Convention Relating to the Status of Refugees* art. 1(A)(2), July 28, 1951, 189 U.N.T.S. 137.
[2] B.S. *Chimni , International Refugee Law: A Reader* 462 (2000).

India has a long tradition of providing shelter to refugees, According to United Nations estimates, almost 213,000 refugees and asylum seekers[3] from Afghanistan, Sri Lanka, China and Myanmar. Despite not being a signatory to the *1951 refugee convention*, India's location in the southern Asia- surrounded by the violence in the neighbor countries became the center of refugee movement. India does not have a specific domestic refugee framework which makes it difficult for recognizing the status of refugees, the rights and the protection available to them. While *UNHCR (United Nations High Commissioner for Refugees*) in India deals with giving status to refugees from countries such as Afghanistan, Bangladesh, those refugees registered and recognized by *UNHCR* are issued *UNHCR* identity documents for their identification so they can access certain essential services but they do not receive Passport, Indian citizenship or aadhar cards in India.

India deals with its refugees under laws such as *Foreigners Act*, *1946*[4], *Passport (Entry into India) Act, 1920*[5] , *Registration of Foreigners Act, 1939*[6], and the *Citizenship Act, 1955*[7]. These laws regulate the entry, deportation and residence of foreigners in India rather than providing protection to refugees fleeing persecution.

***Foreigners Act, 1946*:** This act legally defines the term "Foreigner'', gives authority to central government to regulate, restrict and prohibit the movements of foreigners in India, put the burden of proof on foreigners in question to prove their identity, since there is absence of refugee law in India, this act is also applicable for refugees, treating them as ordinary foreigners despite their distinct circumstances. The Registration of Foreigners Act requires specific categories of foreigners to register with prescribed authorities and provide them information regarding their stay in India.

***The Passport (Entry into India) Act, 1920*:** it is a colonial-era law that gives the government rule making authority to require passport and valid travel documents from every individual entering India through air, water or land and can restrict the entry of anyone who does not meet these requirements.

[3] U.N.High Comm'r for Refugees, *India Fact Sheet*,UNHCR, https://www.unhcr.org/in (last visited Sept.15, 2026), archived at https://perma.cc/C68U-9X7W.
[4] Foreigners Act, No. 31 of 1946 (India).
[5] Passport (Entry into India) Act, No. 34 of 1920 (India).
[6] Registration of Foreigners Act, No. 16 of 1939 (India).
[7] Citizenship Act, No. 57 of 1955 (India).

The Registration of Foreigners Act: This act mandates that every foreign national has to report their arrival, departure and their movements within India, failure to comply results in imprisonment or fine.

The Citizenship Act 1955**:** it deals with acquisition and termination of Indian citizenship through birth, descent, registration, naturalization and incorporation of territory; it does not provide refugee status but may later become important if refugees seek Indian citizenship under the law.

Collectively, these acts regulate foreigners in general rather than refugees specifically. Consequently, refugees are governed under the same laws such as ordinary foreigners despite seeking humanitarian protection from fleeing persecution. This highlights a strong need for a dedicated refugee law that differentiates refugees from other categories of foreigners.

Why India has not acceded to the 1951 Refugee convention?

For centuries, India as a country provided shelter to people fleeing persecution, conflict and violence. Despite hosting millions of refugees, including those displaced during the 1971 Bangladesh Liberation War, India has constantly chosen to not commit to the *1951 Refugee Convention*[8] or its *1967 Protocol*[9]. Since Independence, India has provided refuge to partition refugees from Pakistan, Tibetan refugees (1959), Chakma refugees, Sri Lankan Tamil refugees, and more recently Rohingya refugees from Myanmar. India has always been welcoming to refugees and demonstrated humanitarian tradition but it refused to bind to international obligations in writing.

Although India has never officially stated a single reason for not acceding to the Convention, several policy considerations have consistently been cited by scholars and government representatives. Most relevant cited reason is that convention was originally Eurocentric and designed especially for European problem as it was formulated during World War 2 and early cold war thus it prioritized the refugees of Western Europe. The delegate of India at 1951 conference on status of refugees objected to the convention stating that it put geographical and temporal restrictions that would exclude millions of people displaced across newly independent states of India and Pakistan that time. India believes that the definition of refugees is too narrow

[8] *Convention Relating to the Status of Refugees*, *supra note 1*.
[9] *Protocol Relating to the Status of Refugees*, Jan. 31, 1967, 606 U.N.T.S. 267.

that it does not cover the fundamental factors that drive refugee movement. Many refugees come to India not only as a result of persecution but from fleeing famine, environmental tragedies or generalized violence.

Another important concern is that the convention does not adequately address situations involving sudden mass influx of refugees. It addresses assessing the refugees as individuals it does not have provision for dealing with 10 million refugees at once. India's refugee experience has largely involved large-scale displacement caused by wars, or civil conflicts and political instability in neighboring countries.

The 1971 Bangladesh Liberation War[10] is the most significant example of such a mass influx in which more than 9 million refugees entered India within a short period while fleeing atrocities committed during the conflict. It was one of the highest numbers of refugees gathered in a place together after World War 2. India provided shelter in camps, food and clothes before facilitating their voluntary return after the war. However, the cost was too high for a developing country at that stage which placed enormous pressure on India's economy which also resulted in large numbers of death inside the camps from disease, lack of sanitation and inadequate resources. This taught the Indian government that what mass displacement requires, and showed that the international refugee convention has no provisions for it.

India also argues that its long and porous borders create unique national security challenges. The government maintains that distinguishing genuine refugees from illegal immigrants can be difficult during mass migration, which increases the concerns for illegal immigration, cross-border terrorism and internal security. Therefore, India prefers to retain flexibility in refugee management rather than being bound by treaty obligations. Nevertheless, although India is not a party to the *1951 refugee convention* but always recognized the principle of non-refoulement[11] through judicial decisions as it is a part of *customary international law* and have protected refugees through *Article 21*[12] and *Article 14*[13] providing them constitutional protection when appropriate.

Human Rights Protection through the Constitution and Judiciary

[10] *Chimni*, supra note 2, at (462).
[11] *Convention Relating to the Status of Refugees*, *supra* note 1, art. 33.
[12] INDIA CONST. art. 21.
[13] INDIA CONST. art. 14.

India does not have a separate refugee protection framework or any other domestic legislation specifically governing refugees. Thus, it treats refugees same as foreigners and deals with them under the *Foreigners Act 1946* which creates legal difficulties because there is difference between a refugee and a general foreigner coming to India. A refugee is a person who has to leave their home country due to fear of persecution, threat, violence on the other hand, a foreigner can be anyone coming to India for any purpose be it travelling, immigration, education etc. Deporting a foreigner back who violated immigration law may be an issue of immigration control but deporting a refugee back to their home country means returning them to persecution, violence and threat to their life. The circumstances and consequence of a refugee and a foreigner are different and the absence of a legal statutory framework dedicated to refugees in India leads to problem of identifying and protecting people fleeing persecution.

Despite the absence of a dedicated refugee law, refugees are protected in India through the *Constitution of India* under the scope of Article 14 and Article 21 as both the articles uses the word "person" rather than "citizen" extending their protection to citizens as well as non-citizens so the refugees can claim the right to equality before law under Article 14 and life and personal liberty under Article 21. This constitutional protection was recognized by the Supreme Court of India in the landmark ruling of *NHRC v. State of Arunachal Pradesh 1996*[14], Chakma and Hajong tribal of Arunachal Pradesh they had settled mainly in Arunachal after the displacement from the Chittagong Hill Tracts, then in East Pakistan. The Chakma's faced threats of forcible expulsion from local groups and the state was failing to protect them. Thus, *NHRC* filed the petition for them under *Art. 32 of Constitution*, the petition was for seeking the enforcement of Article 21 rights of over 65,000 Chakma tribal, The Supreme court delivered the judgement that state of Arunachal Pradesh has failed to protect the Chakma's Constitutional rights under Article 21, they are eligible for protection of life and personal liberty because non-citizens are also protected under Article 21, the state is bound to protect the life and liberty of every person.

Another landmark judgement concerning the constitutional protection available to foreigners in India is *Louis De Raedt v. UOI*[15],

[14] *Nat'l Hum. Rts. Comm'n v. State of Arunachal Pradesh*, (1996) 1 SCC 742.
[15] *Louis De Raedt v. Union of India*, (1991) 3 SCC 554.

The Supreme Court held that non-citizens are entitled to the protection of Article 21 but they are not entitled to the right to reside and settle in India under Article 19(1)(e), as it is available to only citizens. The life and personal liberty of foreigners are protected in constitution but constitution protection does not give them a legal right to permanently reside in India. Thus, while the constitution provides important human rights protection it does not by itself create a comprehensive legal framework for the status and long-term protection of refugees in India.

National Security vs Non-Refoulement: The Judicial Tension

One of the most difficult questions in refugees' law is balancing the principle of non-refoulement with the responsibility of state to protect its national security

The principle of non-refoulement is one of the most important principles of international refugee protection. It prohibits a state from returning a refugee or asylum seeker to a territory where they face a real threat to their life, freedom or persecution. Although, India is not a signatory to the *1951 refugee convention* but Indian courts have often discussed the principle of non-refoulement as it is considered as a part of International customary law.

India's national security concerns arise from its long and porous borders, which can lead to large-scale cross-border migration. The 1971 Bangladesh refugee crisis is an example of how a sudden influx of refugees can place significant pressure on the country's resources and administrative capability, at the same time; it may increase the possibility of illegal immigration, cross-border terrorism. Constraints on resources caused by a growing population and demographic challenges have also made refugee management a sensitive issue. Therefore, India seeks to balance its responsibility to safeguard national security with its humanitarian obligation under the principle of non-refoulement.

This conflict between the humanitarian protection and national security has been reflected in several judgements of Indian courts, on one hand courts have recognized the principle of non-refoulement for refugee protection in certain cases, and on the other hand they have also acknowledged the state's power to control the entry and deportation of foreigners in the interest

of national security. Two significant judgements that illustrate this judicial tension are *Ktaer Abbas Habib Al Qutaifi v. Union of India*[16] and *Mohammad Salimullah v. Union of India*[17].

***Ktaer Abbas Habib Al Qutaifi v. Union of India*:** In this case, two Iraqi nationals overstayed in India due to the fear of persecution in then regime of Iraq. They were recognized as "refugees" by *UNHCR*. In this case, the primary issue before the court was whether India was obligated to follow the principle of non- refoulement despite not being a signatory to *1951 refugee convention*. The Gujarat High court held that the petitioners were refugees and recognized that although India is not a signatory to the *1951 refugee convention*, the principle of non-refoulement forms part of *International customary law* and is therefore respected in India.

This judgement is important because it recognized non-refoulement as part of *international customary law*, showing that Indian courts may protect refugees even without India being party to the *Refugee Convention*.

***Mohammad Salimullah v. Union of India*:** The petitioners challenged the proposed deportation of Rohingya refugees from Jammu, arguing that they were recognized by *UNHCR* and that deportation would violate the principle of non-refoulement, which they claimed forms part of Article 21 of the Constitution. They also relied on the International Court of Justice's provisional measures in the *Gambia v. Myanmar*[18] concerning the persecution of the Rohingya and contended that Articles 14 and 21 extend protection to non-citizens. However, the Supreme Court observed that India is not a signatory to the *1951 Refugee Convention* and emphasized the State's sovereign power to regulate the entry and deportation of foreigners in the interest of national security. The Court declined to grant interim relief against deportation and held that any deportation must be carried out in accordance with the procedure established by law. It further clarified that while Articles 14 and 21 are available to both citizens and non-citizens, Article 19(1)(e)[19] which guarantees the right to reside and settle in India, is available only to Indian citizens. The judgment reflects the continuing judicial effort to balance humanitarian concerns with the State's obligation to protect national security.

[16] *Ktaer Abbas Habib Al Qutaifi v. Union of India*, 1999 Cri LJ 919 (Guj.) (India).
[17] *Mohammad Salimullah v. Union of India*, 2021 SCC Online SC 296 (India).
[18] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Provisional Measures, Order, 2020 I.C.J. Rep. 3 (Jan. 23, 2020).
[19] INDIA CONST. art. 19, cl. (1), sub-cl. (e).

These decisions demonstrate that Indian courts follow a case-by-case approach. While humanitarian principles influence judicial decisions, they do not override the State's authority to control immigration where national security is concerned. This balance between judicial reasoning and state's authority highlights the need for a balanced domestic refugee framework.

The Need for a Balanced Domestic Refugee Framework

The absence of a specific domestic refugee law has resulted in a case-by-case, and ad-hoc non-uniform refugee protection regime in India. India has historically provided protection to Tibetan refugees and Sri Lankan Tamil refugees. For example, Tibetan refugees fleeing China's rule were issued registration certificates for residence and work in India however, government has not provided similar protection to all refugee groups which raises the concern about unequal treatment.

Such a non-uniform protection regime may be influenced by political influence and has attracted international scrutiny therefore the absence of a dedicated refugee law, creates uncertainty and highlights the need for a balanced domestic refugee framework.

India therefore needs a specific law that clearly defines the term "refugee" and distinguishes refugees from categories of foreigners, there should be a law to establish a fair and transparent procedure for determination of refugees' status, and clearly specify the rights and responsibilities of refugees. It should guarantee access to essential services such as healthcare and education, the right to work, temporary residence. And at the same time, it should uphold the principle of non-refoulement, while ensuring that proper registration, identity verification and documentation of refugees to address national security concerns.

The law should also provide security safeguards such as biometric registration, identity verification, background screening, and cooperation with *UNHCR*[20] whenever appropriate and if any refugee violates Indian law, deportation must be done through due process of law. It will enable India to protect genuine refugees without compromising the national security. Furthermore, developing a comprehensive refugee law will help India in strengthen its international credibility while upholding its constitutional commitment to human dignity and

[20]U.N. High Comm'r for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* (2019).

humanitarian values[21]. A clear framework would reduce political influence, inconsistency in the treatment of refugees, promote transparency and accountability, it will improve India's international relations and reputation, and ensure that refugee protection and national security are balanced in a fair manner.

Conclusion

India has a long humanitarian tradition of providing shelter to people fleeing persecution, conflict and violence. The Indian ideal of "***Atithi Devo Bhava***" which translates to "***Guest is God***" reflects the country's long-standing tradition of hospitality, which is also seen in its history of providing shelter to refugees. Although India does not have a proper legal framework for refugees and the existing laws regulate only foreigners, not refugees but it has repeatedly provided them important safeguards through constitutional protections and judicial decisions, particularly through Article 14 and Article 21. However, judicial intervention alone cannot be considered a substitute for comprehensive legal framework.

As this article has demonstrated, respecting humanitarian obligations is as important as maintaining national security. These objectives should not be viewed as conflicting but must be balanced through a clear and comprehensive legal framework. Enacting a domestic refugee law would help India to distinguish refugees from other categories of foreigners, establish a fair refugee status determination procedure, uphold the principle of non-refoulement, and at the same time address legitimate national security concerns through proper screening and regulation. Such a legal framework would help India in strengthening its constitutional commitment to human rights while ensuring a more consistent, transparent and effective refugee protection framework.

[21] Guy S. Goodwin-Gill & Jane McAdam, *The Refugee in International Law* (3d ed. 2007).