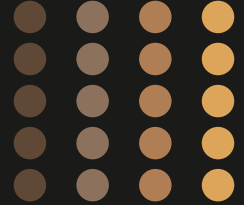


Journal of National Law University Delhi

Volume 12
2026



Articles

Constitutionalism Beyond Rights: Why Structure Matters

*Hon'ble Justice
B.V. Nagarathna*

Existing Between Gaps: The Crisis of Refugee Protection in
India in the Backdrop of Immigration and Foreigners Act, 2025

*Bharti Yadav and
Nyamat Sekhon*

Deconstructing the Probation Paradigm: A Critical Analysis
of the Probation of Offenders Act, 1958 & the Bharatiya Nagarik
Suraksha Sanhita, 2023

Oshin Sharma

Case Comments

Dividend Distribution Tax: More than Meets the Eye –
A Critical Analysis of *Polycab India Ltd. v. Assistant Commissioner
of Income-tax*

*Ashrita
Prasad Kotha*

Case Comment on *Vanashakti v. Union of India: Ex Post Facto
Environmental Clearances as De Facto Practice?*

Nikita Samarnath

॥ न्यायस्तत्र प्रमाणं स्यात् ॥



NATIONAL LAW UNIVERSITY DELHI

EDITORIAL BOARD

Chancellor

Justice Devendra Kumar Upadhyaya

Chief Justice, High Court of Delhi and Chancellor, National Law University Delhi

Editor in Chief

Prof. (Dr.) G.S. Bajpai

Vice Chancellor, National Law University Delhi

Editor

Prof. (Dr.) Risham Garg

Professor of Law & Registrar, National Law University Delhi

Advisory Board

Prof. (Dr.) A. Jayagovind

Former Vice Chancellor, NLSIU

Prof. (Dr.) Philippe Cullet

SOAS, UK

Prof. (Dr.) Anupam Jha

University of Delhi

Prof. (Dr.) Umakanth Varottil

NUS, Singapore

Prof. (Dr.) Dipa Dube

IIT Kharagpur

Managing Editor

Prof. (Dr.) Amita Punj

Professor, National Law University Delhi

Senior Editor

Dr. Mukul Raizada

Professor, National Law University Delhi

Associate Editor

Dr. Monika Negi

Assistant Professor, National Law University Delhi

Assistant Editor

Dr. Dakshina Chandra

Assistant Professor, National Law University Delhi

Administrative Editors

Dr. Priya Rai

University Librarian, National Law University Delhi

Dr. Samar Iqbal Bakhshi

Deputy Librarian, National Law University Delhi

Student Editors

Vidushi

B.A.L.L.B. (Hons.), National Law University Delhi

Ashwin Arun

B.A.L.L.B. (Hons.), National Law University Delhi

Chaitanya Chaturvedi

B.A.L.L.B. (Hons.), National Law University Delhi

MODE OF CITATION

12 J.NLUD <pg. no.> (2026)

NATIONAL LAW UNIVERSITY DELHI



Published by

National Law University Delhi Press
Sector-14, Dwarka, New Delhi-110078
www.nludelhi.ac.in

Journal of National Law University Delhi is published annually.

Print Subscription Price Rs. 400/- (Postage extra if applicable)

ISSN: 2277-4017

Copyright © 2026 National Law University Delhi, India

All rights reserved.

Disclaimer:

Views expressed in the Journal of National Law University Delhi are those of the contributors. The Editors and NLUD Press do not necessarily subscribe to the views expressed by the contributors. The Editors and NLUD Press disclaim all liability and responsibility for any error or omission in this publication. In the case of binding defect, misprint, missing pages etc. the publisher's liability is limited to replacement of the defective copy.

All enquiries regarding the Journal should be addressed to:

Managing Editor
Journal of National Law University Delhi
National Law University Delhi
Sector-14, Dwarka, New Delhi-110078
www.nludelhi.ac.in
Email: jnlud@nludelhi.ac.in
Tel. No: +91 11 28034255
Fax No: +91 11 28034254

ISSN 2277-4017



2 2 7 7 - 4 0 1 7

CONTENTS

Articles

- Constitutionalism Beyond Rights: Why Structure Matters 1
Hon'ble Justice B.V. Nagarathna
- Existing Between Gaps: The Crisis of Refugee Protection in India in the Backdrop of Immigration and Foreigners Act, 2025 18
Bharti Yadav and Nyamat Sekhon
- Deconstructing the Probation Paradigm: A Critical Analysis of the Probation of Offenders Act, 1958 & the Bharatiya Nagarik Suraksha Sanhita, 2023 55
Oshin Sharma

Case Comments

- Dividend Distribution Tax: More than Meets the Eye – A Critical Analysis of *Polycab India Ltd. v. Assistant Commissioner of Income-tax* 78
Ashrita Prasad Kotha
- Case Comment on *Vanashakti v. Union of India: Ex Post Facto* Environmental Clearances as *De Facto* Practice? 93
Nikita Samarnath

EXISTING BETWEEN GAPS: THE CRISIS OF REFUGEE PROTECTION IN INDIA IN THE BACKDROP OF IMMIGRATION AND FOREIGNERS ACT, 2025

Bharti Yadav and Nyamat Sekhon***

Abstract

This paper examines the systemic crisis of refugee protection in India, a nation characterized by a profound structural dissonance between its historical tradition of sanctuary and its deliberate avoidance of a formal legal regime. Despite hosting one of the world's largest displaced populations, including Tibetans, Sri Lankan Tamils, Rohingyas and Afghans, India remains a non-signatory to the 1951 Refugee Convention and its 1967 Protocol. This refusal, rooted in critiques of Eurocentrism and a lack of international burden-sharing, has resulted in a framework of "strategic ambiguity" governed primarily by ad hoc executive policies and judicial interpretation. The research offers a critical analysis of the recently enacted Immigration and Foreigners Act, 2025, which repeals several colonial-era statutes but fails to provide a dedicated legal status for refugees. By maintaining the undifferentiated "foreigner" paradigm, the 2025 Act continues to conflate refugees with illegal migrants, thereby subjecting vulnerable populations to arbitrary executive discretion, securitized narratives, and objective criminalization of unauthorized entry. Such statutory silence exacerbates legal precarity, leading to the systemic denial of "secondary rights" such as healthcare, education, and formal employment. Furthermore, the paper explores the tension between India's international obligations—including the jus cogens principle of non-refoulement and treaties like the ICCPR and CAT—and its dualist constitutional architecture, which requires explicit domestic legislation for enforceability. While the judiciary has historically employed "judicial creativity" to extend protections via Article 21, this constitutional shadow refuge remains inconsistent and increasingly defers to executive, assertions of national security. Ultimately, this study advocates for a shift from a "charity-based" to a "rights-based" framework. It proposes essential doctrinal reforms, including an expanded refugee definition reflective of the Global South's complexities and the establishment of a quasi-judicial National Commission for Asylum to institutionalize stability and dignity for all forcibly displaced persons.

Keywords: *Immigration and Foreigners Act, 2025, Judicial Creativity, Non-Refoulement, Rights-Based Framework, Strategic Ambiguity*

* Associate Professor, National Law University Delhi.

** Academic Fellow, S. K. Malik Chair on Access to Justice, National Law University Delhi.

I. INTRODUCTION

The persistent regulation of human mobility has continually tested the elasticity of national sovereignty, positioning migration and refugee flows as defining challenges in contemporary international law. Global involuntary displacement, driven by persecution, conflict, violence, and institutional collapse, has reached unprecedented scales with approximately 117.3 million people globally recognised as forcibly displaced out of which 36.4 million are categorised as refugees and 8.4 million as asylum seekers.¹ In response, the international protection framework, centered on instruments such as the 1951 Convention Relating to the Status of Refugees² and its 1967 Protocol,³ are constantly confronted by competing national security narratives and humanitarian imperatives. Countries have devised thorough legal structures to streamline the process of incorporation of these people by classifying them into separate categories of migrants, refugees and asylum seekers, subjecting each to a fixed procedure and treatment under law. This distinction aligns with the purpose and object for the migration to the receiving country, with refugees and asylum seekers saving themselves from war and persecution in their home countries.⁴ However, a clear distinction between non-citizens is absent in the Indian legal system. Therefore, no special segregation is made for the refugees and asylum seekers from the other categories of non-citizens in the country.

India's accommodation of refugees is fraught with shortcomings. This subjects them to varying degrees of protection, making it intractable as it has been conflated with the charged socio-economic discourse on 'illegal migrants in India' since most commentaries don't distinguish between migrants and refugees, and view all foreigners with the same lens.⁵ Therefore there is no

¹ Office of the High Commissioner for Refugees (UNHCR), 'Refugee Data Finder' <<https://www.unhcr.org/refugee-statistics>> accessed 25 November 2025.

² Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

³ Protocol Relating to the Status of Refugees (adopted on 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (Protocol).

⁴ Karen Jacobsen, 'Factors Influencing the Policy Responses of Host Governments to Mass Refugee Influxes' (1996) 30 *The International Migration Review* 3.

⁵ Sumita Das Majumder, 'Refugee Management in India: Policy Introspection' (2005) 5 *ISIL YB International Human & Refugee Law* 142.

separate record of the number of refugees and asylum seekers hosted in India as available for the global level. Moreover, the country is not a signatory to the Convention, 1951⁶ or the Protocol of 1967.⁷ Within this non-signatory context, India offers a peculiar paradox. Historically, the nation has maintained an exemplary, though unsystematic, tradition of sheltering vast numbers of displaced persons, hosting one of the world's largest refugee populations since the mid-twentieth century. Significant waves of protection have been extended to Tibetan refugees since 1959, Sri Lankan Tamils since the 1980s, and, more recently, individuals from Afghanistan and Myanmar.⁸ Yet, despite this longstanding humanitarian ethos, India has deliberately avoided enacting a formal national refugee law, resulting in a framework characterized by what scholars term strategic ambiguity.⁹ Refugee protection in India is thus governed largely through *ad hoc* executive policies, judicial interpretations of the Constitution, and governmental discretion.¹⁰

The recently enacted and enforced Immigration and Foreigners Act, 2025 repeals the following Acts: (i) the Passport (Entry into India) Act, 1920, (ii) the Registration of Foreigners Act, 1939, (iii) the Foreigners Act, 1946, and (iv) the Immigration (Carriers' Liability) Act, 2000.¹¹ While it exempts certain groups of people from some immigration requirements, it largely remains silent on the dealing of refugees and asylum seekers. This gray area manifests itself in

⁶ Refugee Convention (n 2).

⁷ Protocol (n 3).

⁸ Josh Watkins, 'Forced Migration Management and Politics of Scale: How Scale Shapes Refugee and Border Security Policy' (2021) *Globalizations* 1 <<https://www.tandfonline.com/doi/full/10.1080/14747731.2021.1950424>> accessed 25 November 2025.

⁹ B Acharya, 'The Future of Asylum in India: Four Principles to Appraise Recent Legislative Proposals' (2016) *NUJS Law Review* <https://nujslawreview.org/wp-content/uploads/2017/01/2016-9-3-4-Bhairav-Acharya-The-Future-of-Asylum-in-India_Four-Principles-to-Appraise-Recent-Legislative-Proposals.pdf> accessed 25 November 2025.

¹⁰ Radhika Nair, 'Refugee Protection in India in the Absence of Specific Legislation: An Overview' (2021) Social and Political Research Foundation <https://sprf.in/wp-content/uploads/2021/10/SPRF-2021_CV_Refugee-Protection-in-India_Final-1.pdf> accessed 17 July 2026.

¹¹ Immigration and Foreigners Act, 2025 <<https://prsindia.org/billtrack/the-immigration-and-foreigners-bill-2025>> accessed 26 November 2025.

the form of bureaucratic red tape as ambiguous, inconsistent and vague rules pertaining to refugee status in the country. Further, compounding the problems faced by the refugees in India is the dualistic process for the recognition of their status by the Home Ministry at the central level and at the State level left to the discretion of individually functioning authorities at healthcare facilities, schools and other places of approach for particular needs.¹² This aggravates the hurdles faced by the refugees in the country.¹³

The absence of a comprehensive national refugee law fundamentally entrenches discriminatory governance and creates distinct hierarchies of protection for various displaced populations. India's approach relies heavily on *ad hoc* policies and domestic immigration statutes, which permit state-sanctioned discrimination rather than rights-based protection.¹⁴ The legal vacuum enables differential rights access primarily through the mechanism of strategic ambiguity and the prioritization of geopolitical interests over humanitarian needs.¹⁵ In the absence of a dedicated refugee law, asylum seekers and refugees are legally classified as "foreigners" under stringent deportation-oriented statutes, subjecting their status and rights to arbitrary government policies and case-by-case judicial assessment.¹⁶ The result is an inequitable system where protection levels are determined by political utility, ethnic background, or religious affinity, rather than the vulnerability of the individual.¹⁷

¹² Hamsa Vijayaraghavan, 'Gaps in India's Treatment of Refugees and Vulnerable Internal Migrants Are Exposed by the Pandemic' (Migration Policy Institute, 10 September 2020). <<https://www.migrationpolicy.org/article/gaps-india-refugees-vulnerable-internal-migrants-pandemic>> accessed 26 November 2025.

¹³ Omar Chaudhary, 'Turning Back: An Assessment of Non-Refoulement under Indian Law' (2004) 39 EPW 29.

¹⁴ Monika Barthwal-Datta and Shweta Singh, 'Populism and Foreign Policy: India's Refugee Policy towards the Rohingya' (2024) 100 International Affairs 1983.

¹⁵ Watkins (n 8).

¹⁶ N Ahmad, 'The Constitution-Based Approach of Indian Judiciary to The Refugee Rights and Global Standards of the UN Convention' (2017) 8 King's Student Law Review 1, 30 <<https://papers.ssrn.com/sol3/Delivery.cfm?abstractid=2903964>> accessed 25 November 2025.

¹⁷ Iram Sarver and Savita Kumari, 'Beyond Ad Hocism: Towards Rights Based Refugee Protection in India' (2025) 2 Synergy: International Journal of Multidisciplinary Studies 105.

This foundational structural dissonance, which defines refugee protection through *ad hoc* executive policies and strategic ambiguity, necessitates a rigorous examination of the legal mechanisms at play. This paper traces the evolution of India's refugee policy or lack thereof, by establishing its obligations under International Law despite being a non-signatory to the Refugee Convention. Subsequently, the paper as its central problem identifies and analyses the lack of a specific definition within the legislative framework governing refugee and asylum seekers in India, specifically addressing the efficacy of the Immigration and Foreigners Act 2025. It also underscores the multifaceted role of judicial interpretations in bridging the gaps of legislative frameworks on refugee policy. Finally, this paper concludes by examining past legislative proposals and proposing essential doctrinal reforms necessary to establish a rights-based, rather than discretionary, framework that ensures stability and dignity for all forcibly displaced persons in India.

II. INDIA AND INTERNATIONAL LAW: OBLIGATIONS WITHOUT ACCESSION

The nation's governance of displaced populations is defined by its strategic position as a prominent host country that remains fundamentally detached from the core international regime governing refugee protection.¹⁸ The legal posture of India concerning international refugee instruments establishes a critical tension within its humanitarian tradition and the reality of its execution.

A. The "Non-Signatory" Defense: Rejection of the 1951 Convention

India has persistently refused to accede to the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. This refusal stems from a complex, historically rooted critique of the existing international refugee protection framework. India was concerned by the Eurocentrism of the original Refugee Convention and its drafting process. The first drafts largely ignored non-European displacement, reflecting a 'Europe only' approach. India, despite being a founding member of the United Nations, found its input marginalized.

¹⁸ Maja Janmyr, 'The 1951 Refugee Convention and Non-Signatory States: Charting a Research Agenda' (2021) 33 International Journal of Refugee Law 2, 188 <<https://doi.org/10.1093/ijrl/eeab043>> accessed 28 November 2025.

The Convention's focus on defining a refugee solely as an individual, rather than as a constituent of a group or community, is rooted in European *weltanschauung*.¹⁹ For India, with its history of large-scale mass influxes, an individualist asylum system was deemed inappropriate, as individuals within a mass influx are often unable to prove individual persecution.²⁰

The structural chasm in India's refugee governance is not an accidental legislative oversight but a deliberate policy architecture informed by a complex interplay of security imperatives, regional geopolitical calculations, and a historical critique of the international legal order.²¹ The refusal to ratify the 1951 Refugee Convention is deeply intertwined with its historical experiences of mass displacement, notably the Partition of 1947, which led to the greatest single refugee trek in world history, followed by the influx of approximately 10 million refugees during the 1971 Bangladesh crisis. Critics have contended that the Convention is an outdated document, failing to cover contemporary issues such as persecution based on economic, social, or cultural rights, or displacement resulting from generalized violence or natural disasters, which are prevalent in the Global South.²² The Convention's singular focus on individual persecution ignores the scale and complexity of mass influxes common to India and its neighbours.

India argues that accession to the Convention would impose an "indefinite legal responsibility" for the vast number of persons seeking shelter, which an "over populated and economically strained nation like India" cannot afford, especially when the Convention lacks strong provisions for "predictable

¹⁹ S Sen, 'Understanding India's Refusal to Accede to the 1951 Refugee Convention: Context and Critique' (ESPMI Network, May 28, 2015) <<https://refugeereview2.wordpress.com/2015/05/28/understanding-indias-refusal-to-accede-to-the-1951-refugee-convention-context-and-critique/>> accessed 26 November 2025.

²⁰ Bimalkumar Natvarlal Patel, 'The State Practice of India and the Development of International Law: Selected Areas'(2015) University of Leiden <<https://scholarlypublications.universiteitleiden.nl/access/item%3A2861201/view>> accessed 27 November 2025.

²¹ *ibid.*

²² Durlav Borah and Boikuntha Das, 'India's Refugee Policy: A Critical Analysis' (2024) 44 Library of Progress-Library Science, Information Technology & Computer 3.

and equitable burden-sharing".²³ Given that nations in the Global South host the majority of the world's refugee population, laws constructed by the North that prevent refugees from entering their territories should not impose unilateral demands on Southern host countries without corresponding cost-sharing mechanisms.²⁴ India argues that wealthy nations in the Global North have dismantled the spirit of the Convention by building walls and externalizing border controls, effectively shifting the burden to developing countries that lack the means to share it.²⁵ Therefore resulting in asymmetric burden sharing in refugee management globally.

The Convention is also criticized for failing to deal comprehensively with mixed migration, which involves a combination of voluntary and forced movements. The lack of provisions for preventing statelessness is another significant concern, for India having not signed the relevant conventions.²⁶ Moreover, by remaining outside international conventions, India avoids being answerable to the countries of origin or international oversight bodies, thereby maintaining cordial relations with neighbouring states while performing its duties only to the extent that it finds feasible.²⁷ The structural inadequacy, coupled with the geopolitical freedom in the region, gained by not being answerable to originating countries, reinforces India's decision to govern asylum through its own policies.

The paramountcy of national security serves as the primary justification for India's reliance on executive discretion. Given its position in a volatile neighbourhood characterized by porous borders, persistent insurgent activities and past experiences, the Indian state views large-scale forced migration through a prism of "securitization."²⁸ It argues that the lack of rigorous mechanisms in the international legal framework to differentiate between a

²³ *ibid.*

²⁴ Jacobsen (n 4).

²⁵ Janmyr (n 18).

²⁶ Ayesha Sharif and Mohammed Mubashir, 'Legal Challenges Related to Refugee Rights in India' (2024) 7 *International Journal of Law Management & Humanities* 3, 2067.

²⁷ Majumder (n 5).

²⁸ Saurabh Bhattacharjee, 'India Needs a Refugee Law' (2008) 43 *EPW* 73.

perceived threat and a genuine asylum seeker necessitates unfettered executive control.²⁹ Additionally, the non-signatory defense is often used to avoid accountability to international human rights commitments and obligations in the garb of national security,³⁰ as India maintains that refugee issues are inherently a source of bilateral and not multilateral relations.³¹ But despite not signing the 1951 Convention for the above stated concerns India ought to have a national law on refugee protection as presently the resulting absence of a national law on refugee protection which is characterized as the preferred strategic flexibility leading to strategic ambiguity, enables discretionary control to the executive over who receives protection. Thus, leading to an infringement of their rights granted under various international law instruments.³²

B. Customary International Law and the Imperative of *Non-Refoulement*

Despite abstaining from the 1951 Convention, India is not wholly exempt from international obligations. The legal architecture imposes duties stemming from customary international law (CIL) and human rights treaties to which India is a party.³³

(i) The Jus Cogens Status of Non-Refoulement

The principle of *non-refoulement*—the obligation not to expel or return a person to a territory where their life or freedom would be threatened on

²⁹ Alexander Betts, *Protection by Persuasion: International Cooperation in the Refugee Regime* (Cornell University Press 2011).

³⁰ Patel (n 20).

³¹ Betts (n 29).

³² Anuttama Ghose, Sanjana Bharadwaj and S Mahmud Ali, 'Políticas de Masacre: Una Revisión Crítica Del Fracaso Constitucional En Myanmar e India Durante La Crisis de Los Rohingya' (2023) 17 *Novum jus* 251 <<https://novumjus.ucatolica.edu.co/article/download/5131/4800>> accessed 24 November 2025.

³³ Ranabir Samaddar, 'Power and Responsibility at the Margins: The Case of India in the Global Refugee Regime' (2017) 33 *Refuge: Canada's Journal on Refugees* 42. <<https://refuge.journals.yorku.ca/index.php/refuge/article/download/40447/36440>> accessed 26 November 2025.

account of specified grounds — has been widely recognized as a guiding principle of refugee law since 1933.³⁴ Importantly, *non-refoulement* has achieved the status of a *jus cogens* (peremptory norm).³⁵ It has been incorporated into the reading and implementation mechanisms of human rights conventions beyond the 1951 Convention like the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 1997) which expands its scope of operation beyond refugees.³⁶ And also vide orders and conclusions of the UNGA and Executive Committee of the High Commissioner's Programme ('ExCom').³⁷ This character means that the obligation is non-derogable and binding even upon states like India, which are non-parties to the Refugee Convention.³⁸

But the Indian position on the matter favours the stance that there is an ongoing contestation of the *jus cogens* character of non-refoulement due to lack of evidence of consistent state practice and *opinio juris*.³⁹ But even if this view is considered and derogation is permitted it cannot be in the form of complete exclusion and closure of borders as the assessment should be conducted on an individual basis. In India the implementation is problematic where the state in its legal framework does not recognize entrants as 'refugees' but regards them merely as illegal migrants or under the umbrella term of foreigners.⁴⁰ Even in

³⁴ Sonali Rajan and L Delovarova, 'Contemporary Refugee and Forced Migrants Issues: An Analysis in the Context of Legal Framework' (2018) 82 International Relations and International Law Journal 97 <<https://bulletin-ir-law.kaznu.kz/index.php/1-mo/article/download/788/763>> accessed 26 November 2025.

³⁵ Jean Allain 'The Jus Cogens Nature of Non-Refoulement' 13(4) IJRL 539 (2002).

³⁶ Seshaiiah Shastri, 'The Role of International Organisations in protection of Refugees' in Rafiqul Islam and Jahid Hossain Bhuiyan (eds), *An Introduction to International Refugee Law* (Martinus Nijhoff Publishers 2013) 246.

³⁷ UNGA Res 48/116, (1993); UNHCR ExCom Conclusion No. 82 (XLVIII), 12A (A/52/12/Add.1) (1997) para. d(vi); UNHCR ExCom Conclusions Nos. 19(XXXI) (1980), para. (e); 22(XXXII) (1981) para. (b); 36(XXXVI) (1985) para (f).

³⁸ AKM Ahsan Ullah and Jannatul Ferdous, 'Introduction Connecting Governance, Migration, International Relations, and Security' in Ullah, A.A., Ferdous, J. (eds) *Governance, Migration and Security in International Relations* (Springer 2024).

³⁹ James C. Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press, 1st edn., 2005) 279.

⁴⁰ Samaddar (n 33).

such instances, the obligation of non-refoulement operates because in the very least the principle operates as *just cogens* where there is a "high probability that the migrant, upon repatriation, would be subjected to inhuman or degrading treatment or even torture,"⁴¹ invoking human rights obligations.⁴² Arguments to permit exceptions for the Indian regime on the basis of national security, especially those against the Rohingya, are critically flawed when done in a blanket manner. International norms demand the individual assessment of cases and do not envisage a blanket generalization or "collective basis" exclusion over an entire population.⁴³ Extending national security as a blanket ban against the prohibition of *refoulement* is thus difficult to reconcile with India's binding human rights obligations.⁴⁴ Therefore, the principle of non-refoulement must be made a non-negotiable human right for refugees in India's legal system.

(ii) Treaty Obligations under Human Rights Treaties

India has acceded to several key international human rights instruments, including the International Covenant on Civil and Political Rights (ICCPR, 1979) and is signatory to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 1997). These treaties impose direct obligations relevant to refugee protection, which, according to international law scholars, *ought* to be reflected in the legislative framework of India. This liability stems from the commitment India made upon accession, affirming that these Conventions created positive obligations aimed at protecting the rights of individuals, including refugees.⁴⁵

Article 3(1) of CAT explicitly prohibits a state party from expelling, returning (*refoule*), or extraditing a person to another state if there are substantial grounds for believing they would be in danger of being subjected to torture.⁴⁶ The

⁴¹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 7.

⁴² Hathaway (n 39).

⁴³ Ullah and Ferdous (n 38)

⁴⁴ Barthwal-Datta and Singh (n 14).

⁴⁵ Samaddar (n 33).

⁴⁶ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (opened for signature 10 Dec 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT) art 3(1).

jurisprudence of this norm has evolved in such a manner that this *non-refoulement* obligation arises even in situations where individuals are not formally recognized as refugees but are instead designated as illegal migrants. The human rights obligations follow because there is a high probability and imminent threat to human rights faced by the migrant upon repatriation. This non-derogable treaty obligation thus provides a wider legal basis for respecting the principle of *non-refoulement* than the narrow persecution definition of the 1951 Convention. Therefore, while India has not ratified CAT and only remains a signatory it still creates a semblance of a non-derogable obligation on India.⁴⁷

Additionally, ICCPR guarantees fundamental rights to all persons within a state's jurisdiction.⁴⁸ While Article 13 ICCPR deals with the expulsion of aliens lawfully present in the territory, allowing exceptions for national security. India reserved its right to apply its municipal law related to aliens under this Article.⁴⁹ However, the enforceability of ICCPR provisions concerning foreigners is significantly constrained by a formal reservation India lodged upon ratification. This reservation permitting India to apply its domestic law functions as a critical mechanism, a dualist barrier that allows the Executive to selectively limit accountability. Nonetheless, other provisions, such as Article 7 prohibiting torture and cruel, inhuman, or degrading treatment, buttress and embolden the principle of *non-refoulement*.⁵⁰

Furthermore, India is a party to other international human rights instruments that indirectly provide minimum protection standards to refugees. For instance, India is a party to the International Convention on the Elimination of All Forms of Racial Discrimination⁵¹ (CERD, ratified in 1969), the Convention on the Elimination of All Forms of Discrimination against Women⁵²

⁴⁷ Sarver and Kumari (n 17).

⁴⁸ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 2.

⁴⁹ Aayush Bhardwaj and Heena Parveen, 'India's State Practice on Reservations to International Human Rights Treaties' (2025) SSRN <<http://dx.doi.org/10.2139/ssrn.5106940>> accessed 25 November 2025.

⁵⁰ Bazo Gil and Teresa María, 'Refugee protection under International Human Rights Law: From non-refoulement to residence and citizenship' (2015) 34 Refugee Survey Quarterly 1, 11.

(CEDAW, ratified in 1993), and the Convention on the Rights of the Child (CRC, acceded in 1992), with Article 22⁵³ of the latter addressing refugee children and family reunification. These commitments collectively serve as a robust legal foundation for national refugee legislation, asserting that the right to protection stems not only from political expediency but also from universal human rights norms. Therefore, India being a signatory to the human rights instruments under international law becomes obligated to incorporate these provisions into its domestic laws which operate on refugees and asylum seekers in its territory.⁵⁴ Nonetheless, Indian courts do not possess the automatic authority to enforce these provisions unless they are incorporated into municipal law by legislation under the dualist constitutional framework. The lack of codification ensures that adherence remains a matter of executive policy rather than a legally enforceable domestic right.

C. The Dualist Barrier for Implementation of International Laws

The practical implementation of these international norms within India is hampered by its constitutional structure, which adheres to a dualist model. In India's dualist system, international treaties do not automatically develop into national law; legislative action by the Parliament is necessary to incorporate international treaty obligations into the domestic legal system.⁵⁵ Although the Constitution grants Parliament the power under Article 253 to make laws for implementing treaties, the judiciary cannot enforce treaty provisions unless such laws are enacted.⁵⁶

⁵¹ International Convention on the Elimination of All Forms of Racial Discrimination (UNGA Res 2106 (XX), 21 December 1965) UNTS 660, 195.

⁵² Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (adopted 18 December 1979) UNTS 1249, 13.

⁵³ Convention on the Rights of the Child (CRC) (adopted 20 November 1989) UNTS 1577, 3, art 22.

⁵⁴ Prabodh Saxena, 'Creating Legal Space for Refugees in India: The Milestones Crossed and the Roadmap for the Future' (2007) 19 International Journal of Refugee Law 246 <<https://academic.oup.com/ijrl/article/19/2/246/1582270>> accessed 27 November 2025.

⁵⁵ R. Rajesh Babu and S. Pandiaraj, 'India's Refugee Protection and Border Control: Some Reflections on State Practice' (2022) 28 Asian Yearbook of International Law 49.

⁵⁶ *Gramophone Company of India Ltd v Birendra Bahadur Pandey*, (1984) 2 SCC 534.

This legal dynamic creates a critical dualist barrier or gap where India's international commitments remain largely unenforceable domestically without enabling legislation. The judiciary's stance, as confirmed in judicial pronouncements, holds that while Customary International Law forms part of the law of the land, it is only so long as it is not explicitly ousted or contradicted by municipal law.⁵⁷ National courts cannot supersede Parliament's authority.⁵⁸

In order to incorporate the rights given under the ICCPR the Indian Parliament has adopted the Protection of Human Rights Act, 1993 which forms the statutory basis for the National Human Rights Commission (NHRC) operating in India.⁵⁹ But the legislation remains silent on the rights and obligations of the Indian State towards ensuring refuging and asylum rights.⁶⁰ It merely provides a forum with the NHRC to address the human rights concerns of refugees and asylum seekers in the country. While the NHRC can monitor and regulate such rights, it cannot operate beyond the direction of the government in actively safeguarding refugee and asylum seekers in the country.⁶¹ Consequently, refugee protection, including adherence to *jus cogens* norms like *non-refoulement*, continue being mediated through fragile mechanisms in the domestic law and remain exclusively in the domain of the executive.

III. THE STATUTORY VACUUM: “REFUGEE” VS. “ILLEGAL MIGRANT”

The primary legislations operating in India which broadly cover refugees and asylum seekers under their fold are the ones which regulate the entry and exit of foreigners in the country and those which cover the grant of citizenship. These laws serve only as a piecemeal attempt to accommodate the refugee population in the country under an umbrella legal framework for foreigners.

⁵⁷ *State of Gujarat v Vora Fiddali* AIR 1964 SC 1043.

⁵⁸ *ibid.*

⁵⁹ The Protection of Human Rights Act, 1993 s. 3.

⁶⁰ Kundan Kumar Singh, Mayank Singh, and Ujjawal Agnihotri, 'India's Refugee Crisis: A Legal Scrutiny' (2022) 6 International Journal of Health Sciences S4, 3660.

⁶¹ *ibid.*

A. Lack of Definition : A Legislative Abyss

The Indian legal framework does not define the term “refugee” or “asylum seeker” in its legislations concerning the regulation of non-citizens within the territory of India. Instead, the laws conflate all the different types of non-citizens present within the country under the umbrella term of “foreigner” which is defined generically as a person who is not a citizen of India under Section 2(a) of the Foreigners Act, 1946⁶² and even the Section 2(f) of the Immigration and Foreigners Act, 2025.⁶³ Therefore, there is no differentiation in the various categories of non-citizens in India. The law treats diverse groups—including tourists, expatriate workers, fugitives, refugees, and economic migrants uniformly under a monolithic regime.⁶⁴ Consequently, refugees and asylum seekers are legally classified merely as “foreigners”. This invisibility in the legal framework makes them subject to an array of administrative and political discretion.

The laws governing entry by foreigners in India have historically rested upon objective compliance with mandated documentation and entry points, defining the offense of unauthorised entry based on the breach of statutory regulations rather than the subjective intent underlying the arrival. The criminalization occurs if a person:

*“...enters into or stays in any area in India without the valid documents required for such entry or for such stay, as the case may be, under the provisions of any order made under this Act or any direction given in pursuance thereof.”*⁶⁵

The legal definition of the offense does not incorporate defenses or mitigating factors based on the foreigner's motivation, whether that motive stems from persecution (a refugee claim) or economic migration. The burden of

⁶² The Foreigners Act, 1946 (31 of 1946) s 2(a).

⁶³ Immigration and Foreigners Act 2025 (13 of 2025) s. 2(f).

⁶⁴ Acharya (n 9).

⁶⁵ The Foreigners Act, 1946 (31 of 1946) s. 14A(b).

proof regarding nationality or class membership rests entirely upon the person concerned, making the legal structure highly stringent.⁶⁶

The new comprehensive legislation, the Immigration and Foreigners Act, 2025, which repeals the Foreigners Act 1946, the Passport (Entry into India) Act, 1920, the Registration of Foreigners Act, 1939, and the Immigration (Carriers' Liability) Act, 2000, maintains this objective standard for criminalization. The foundational requirement for lawful entry is set forth in Section 3, stipulating that no person proceeding from outside India shall enter unless in possession of a valid passport or other travel document, and in the case of a foreigner, "also a valid visa."⁶⁷ Analogous to the repealed legislation, the criminal offense under the 2025 Act is defined by the objective fact of entry without the legally mandated documentation, rather than requiring the prosecution to prove malicious intent or distinguishing between types of unauthorized entry based on the subjective motive (persecution, economic need, or otherwise).⁶⁸ This lack of legislation and definitional framework leads to uncertainty in consequences for the people seeking refugee and asylum status in India.

B. Consequences of Similar Treatment in Legislation

The fundamental similarity in treatment stems from India's position as a non-signatory to the 1951 Refugee Convention and its 1967 Protocol, leading to the absence of a comprehensive national legislative framework specifically dedicated to refugee protection, which is discussed in the previous section. Therefore, the rules for regulation and recognition of a particular non-citizen group are handled by national agencies like the Ministry of Home Affairs, which is not bound by the Refugee Status Determination (RSD) done under the aegis of the United Nations High Commission on Refugees (UNHCR).⁶⁹ This creates two

⁶⁶ Deepak Tomar, 'Refugees, Citizenship and the Laws : An Indian Perspective' (2024) 33 *Contemporary Social Science* 3.

⁶⁷ Immigration and Foreigners Act 2025 (13 of 2025) s 3.

⁶⁸ Vinayak Uniyal, Sachin Kumar, 'Illegal Immigration in India: A Legal Study on the Current Scenario' (2025) 6 *International Journal of Research Publication and Reviews* 4, 2075.

⁶⁹ Garima Tiwari, 'Promoting Effective Refugee Protection in India: Balancing National Interests and International Obligations' (2024) 10 *Athens Journal of Law* 221.

parallel systems which do not overlap creating a dual system of compliance that the refugees have to navigate in order to have access to these rights. India need not be a signatory to the 1951 Refugee Convention, but the legislation conflating the treatment of refugees and asylum seekers with those of foreigners and illegal migrants creates a series of hindrances in ensuring compliance with international commitments under human rights laws under which India is obligatory. But the classification of refugees as "foreigners" or "illegal immigrants" denies them the formal legal standing required to access basic state provisions, mirroring the deprivation experienced by undocumented migrants.⁷⁰

Firstly, due to the absence of a separate national refugee law, refugees live in a state of legal limbo.⁷¹ Consequently, refugees often face difficulties accessing fundamental rights and protections, specifically education, healthcare, and employment. Even groups like the Rohingya, whose refugee status is acknowledged by the UNHCR, face difficulties accessing basic amenities because their legal status lacks government endorsement, leading local authorities to treat them as unauthorized individuals.⁷² Secondly, similar treatment leads to the systemic exclusion that means that both asylum seekers and illegal migrants lack legal pathways to formal socio-economic participation. For example, the absence of legal work permits forces refugees, like Rohingya Muslims in Delhi and Jammu, into vulnerable daily-wage labor under potentially exploitative conditions, a situation common among undocumented economic migrants.⁷³ Moreover, refugee children are frequently denied entry into public schools because they lack documentation such as birth or transfer certificates, reflecting the same bureaucratic barrier faced by undocumented families.⁷⁴ They are typically excluded from public health schemes, such as

⁷⁰ *ibid.*

⁷¹ Sarigama R Nair, 'Asylum Without A Policy: India's Refugees And The Crisis Of Accommodation' (2025) 10 *International Journal of Novel Research and Development* 5.

⁷² Sridhar Patnaik, Dabiru, and Nizamuddin Ahmad Siddiqui, 'Problems of refugee protection in international law: An assessment through the Rohingya refugee crisis in India' (2018) 14 *Socio-Legal Rev* 1

⁷³ Christina Velentza, 'Book Review: Refugee Law in India: The Road from Ambiguity to Protection, S. P. Sarker' (2022) 9 *Asian Journal of Legal Education* 253.

⁷⁴ Moumala Bhattacharjee, Somdatta Mukherjee, and Priyanka Karmakar, 'Upholding Indian Refugee Child Rights in the Contemporary World: Challenges, Progress, and Strategies for Advocacy' (2024) 7 *Int'l J.L. Mgmt. & Human* 2, 901.

Ayushman Bharat and face high out-of-pocket expenses, language barriers, and prejudice at hospitals.⁷⁵ UNHCR-issued identity cards are frequently ignored by local authorities outside of major urban clusters like Delhi, restricting access to essential services.⁷⁶

Furthermore, the Foreigners Act, 1946, was a stringent deportation-oriented law, granting the government extensive authority to detain individuals, expel them from the country, and employ force as needed to ensure compliance.⁷⁷ The Immigration and Foreigners Act, 2025, preserves this essential power. Section 29 authorizes the Central Government to "direct the removal of a foreigner from India for contravention of any of the provisions of this Act" or upon "an adverse security report".⁷⁸ Given the objective criminalisation of unauthorized entry, this power of removal applies equally to refugees who enter without documentation and economic migrants who overstay or violate visa conditions. Since the law treats all foreigners uniformly, this power can be applied indiscriminately, exposing both genuine refugees and economic migrants to detention and forcible expulsion without minimal judicial review.⁷⁹ The reliance on *ad hoc* measures and domestic immigration legislations, coupled with the absence of a comprehensive definition of a "refugee," prevents the consistent and uniform application of rights, thereby creating systemic marginalization for the most vulnerable populations. The legislative gap further leaves ambiguous the other national concerns of India with the existing international legal structure regulating refugees and asylum seekers.

C. Deficiencies of the Immigration and Foreigners Act, 2025

The recently passed Immigration and Foreigners Act, 2025, beacons as an improvement from the colonial era legislations operating on foreigners in

⁷⁵ *ibid.*

⁷⁶ Douglas McDonald, 'Credibility Assessment in Refugee Status Determination' (2014) 26 National Law School of India Rev 2.

⁷⁷ The Foreigners Act, 1946 (31 of 1946) s 3(2)(g) & s 4.

⁷⁸ Immigration and Foreigners Act 2025 (13 of 2025) s 29.

⁷⁹ Mike Sanderson, 'The role of international law in defining the protection of refugees in India' (2015) 33 Wis. Int'l LJ 46.

India, still attaches itself to the silence of the past legislations on the question of refugees and asylum seekers. This section gives a critical insight on the lacunae of the new legislation. The lacunae highlighted herewith further strengthen the argument given in favour of a dedicated national legislation highlighting India's stance on refugees and ensuring a uniform framework across the country stepping away from an *ad hoc* and charity-based approach currently in place for handling refugees and asylum seekers.

(i) Maintenance of the Undifferentiated "Foreigner" Paradigm

The most critical lacuna in the Immigration and Foreigners Act, 2025 is that it maintains the status quo of the previous legislations and fails to provide a dedicated legal status or a legal definition for refugees and asylum-seekers, perpetuating the archaic practice of treating them under the broad, colonial-era umbrella definition of a "foreigner."⁸⁰ A refugee, by definition, is fundamentally distinct from a mere foreigner. A refugee is compelled to flee their country due to a well-founded fear of persecution, war, or violence, a circumstance entirely different from that of a foreigner entering voluntarily.⁸¹ The existing legislative framework, which the Immigration and Foreigners Act, 2025 consolidates, lacks the nuance required to recognize the special status of refugees on humanitarian grounds or under international law.

The object and reasons of the predecessor laws, and by extension the framework of the Immigration and Foreigners Act, 2025 which remains broadly consolidating instead of modifying, are designed to regulate the rights and duties of foreign nationals entering or exiting India voluntarily. The previous laws, having originated during extraordinary periods such as the World Wars, were ill-equipped to handle complex contemporary issues like mixed migration movements and asylum seekers. Consequently, the reliance on such a consolidated framework means that refugees remain at the mercy of the State rather than on a rights regime that could provide them a life of stability and dignity.⁸²

⁸⁰ Immigration and Foreigners Act 2025 (13 of 2025) s 2(f).

⁸¹ Refugee Convention (n 2) art. 1.

⁸² Garima Tiwari and Ankit Dhotrekar, 'Refugee Protection in India: The Conundrum of Human Rights and State Sovereignty' (2019) 5 Indian JL & Pub Pol'y 1.

(ii) Continuation of Arbitrary Executive Discretion

The lack of specific provisions for refugees within the Immigration and Foreigners Act, 2025 facilitates the continuation of arbitrary decision-making powers vested in the executive branch regarding the fate of asylum seekers in India. It empowers the Union government to regulate the entry, presence, and departure of aliens. It explicitly grants the Central Government the authority to issue orders for the removal of foreigners. Consistent with the colonial-era legislations, the Immigration and Foreigners Act, 2025 retains the provision that the "*onus of proving that such person is not a foreigner or is not a foreigner of such particular class or description [...] shall [...] lie upon such person.*"⁸³ This mechanism places a profound legal hurdle upon individuals seeking protection.

Moreover, the Act includes a broad exclusionary clause stipulating that no foreigner shall be allowed to enter or stay if deemed inadmissible due to a "threat to national security, sovereignty and integrity of India, relations with a foreign State or public health."⁸⁴ The decision of the Immigration Officer in this regard is declared "final and binding" subject only to a revision by the Central Government.⁸⁵ This emphasis on national security concerns allows the government to utilize legal provisions to restrict movements, mandate documentation, and limit opportunities for refugees. The lack of consistency in determining refugee status and the absence of a specialized body exacerbate the plight of displaced persons.

(iii) Inadequacy Regarding International and Constitutional Protection Norms

While India's Supreme Court has proactively read fundamental constitutional rights into the protection of non-citizens and refugees, the reliance on general non-citizen legislation, now consolidated in the Immigration and Foreigners Act, 2025, stands irreconcilable with this pro-refugee jurisprudence. The power conferred upon the executive to deport a foreigner without compliance with extended due process risks contravenes the principle of *non-*

⁸³ Immigration and Foreigners Act 2025 (13 of 2025) s 16.

⁸⁴ *ibid.* s 3(1).

⁸⁵ *ibid.* s 3(2).

refoulement, recognized as a norm of customary international law binding on all States, as a cardinal principle in refugee protection. The non-specific nature of the Immigration and Foreigners Act, 2025 means that India continues to deal with issues of border protection and refugee rights, facing continuous "diplomatic issues" due to the absence of a robust, domestic, rights-based legislative framework.⁸⁶ The silence entrenched in the Act concerning refugees and asylum seekers fails to address India's commitments to the international human rights protection given under ICCPR and also does not clearly establish on issues concerning the matter as a whole. The *ad hoc* and charity-based model that is currently operating at the behest of the executive machinery and judicial pronouncements leaves extensive scope for ambiguous and inconsistent decision making on the matter concerning refugees and asylum seekers. The enactment of the Immigration and Foreigners Act, 2025, while simplifying certain aspects of immigration law, fails entirely in introducing the specialized legal status and protection mechanisms required, consequently reinforcing the problematic status quo of executive arbitrariness and leaving genuine refugee protection dependent on often contradictory judicial interpretations.

D. Executive Discretion Rooted in Legislative Silence

The legal approach adopted in legislation aligns with the concept of "crimmigration," which describes how immigration laws criminalize forced migrants.⁸⁷ The framework has been in the past utilised to justify aggressive policies like arbitrary arrests, detentions, and deportations. It facilitates the systemic exclusion of marginalized groups by conflating them with illegal migrants or terrorists in political rhetoric.⁸⁸

⁸⁶ A. Suganthini and Ambika Kumari, 'Challenges Faced by Refugees in India and Their Position in India' (2023) 5 Indian JL & Legal Rsch 2.

⁸⁷ Sujata Ramachandran, 'The Contours of Crimmigration Control in India' (Global Detention Project Working Paper No 25, August 2019) <<https://www.globaldetentionproject.org/wp-content/uploads/2019/08/GDP-Working-Paper-25-The-Contours-of-Crimmigration-Control-in-India.pdf>> accessed 23 November 2025.

⁸⁸ Tania Mondal, 'Refugee Crisis and Human Rights: India on the Path to Empathy and Solutions' (2025) 7 International Journal for Multidisciplinary Research <<https://www.ijfmr.com/papers/2025/3/49751.pdf>> accessed 25 November 2025.

The critical legal analysis of India's refugee protection framework reveals that the phenomenon of executive discretion is not merely an administrative oversight, but a structural dissonance inherent in the nation's governance of forced migration. Since India is neither a signatory to the 1951 Refugee Convention or its 1967 Protocol, nor possesses dedicated domestic legislation for refugee rights, the Executive continues to rely upon colonial-era immigration and citizenship statutes, thereby perpetuating a regime of arbitrary control over the forcibly displaced. This can be assessed from the contrast in the treatment meted out to different groups of non-citizens seeking refugee/asylum status in India since Independence.

Categorisation of the refugees in three groups helps in a deeper understanding of how the lack of a defined uniform refugee/asylum law leads to disparate treatment and rights access creating a politically motivated hierarchy among people seeking refugee status in India. In the first category are the groups that are supported by the State and given that supporting them aligns with India's strategic or ethno-political interests they receive structured governmental assistance at all levels. Examples in this category are the Sri Lankan Tamils, who receive comprehensive support directly from the Indian government. Their inclusion is rooted in ethno-political solidarity with the majority in Tamil Nadu. They are granted access to government-funded camps, identification cards (IDs), and education.⁸⁹ Within this category the Indian government also grants Tibetans quasi-citizenship through Registration Certificates, allowing them to establish self-governed settlements and schooling. Their protection is motivated by their strategic value as anti-China symbols.⁹⁰ The second category comprises refugees recognized by the United Nations High Commissioner for Refugees (UNHCR) which operates within a parallel system which is acknowledged by the government, but they lack formal state support or

⁸⁹ C Valatheeswaran and S Irudaya Rajan, 'Sri Lankan Tamil Refugees in India: Rehabilitation Mechanisms, Livelihood Strategies, and Lasting Solutions' (2011) 30 *Refugee Survey Quarterly* 4, 111.

⁹⁰ Tunga Tarodi, 'Tibetans in Bylakuppe : Political and Legal Status and Settlement Experiences' [2011] *Research Papers in Economics* <<http://www.isec.ac.in/WP%20260%20-%20Tunga%20Tarodi.pdf>> accessed 24 November 2025.

documentation.⁹¹ Under this falls refugees like the Afghans who are recognized by the UNHCR and are afforded the principle of *non-refoulement* and aid. However, they lack state documentation, leading to legal precarity.⁹² The UNHCR works in close collaboration with the Indian government, but its role in the Refugee Status Determination (RSD) which is done under the 1951 Convention remains constrained as India is a non-signatory to the Convention, and therefore such a recognition does not amount to official recognition by the Indian State which is done by the executive under the Ministry of Home Affairs.⁹³ The scope of work for UNHCR towards recognition, rehabilitation and assimilation of refugees thus remains contingent and limited as these are not widely recognised by the State authorities. It works depending on its alignment with the executive machinery in order to have a definitive impact on refugee management and assistance.⁹⁴ The third category comprises those groups which are subjected to systemic denial by the State and are subjected to securitization, exclusion, and vilification, often based on religious grounds, revealing the selective nature of India's humanitarianism. For example, the Rohingya Muslims are systematically excluded and disproportionately harmed. They are vilified as 'infiltrators' by the Ministry of Home Affairs (MHA), denied documentation, and subjected to mass deportations despite having UNHCR status.⁹⁵ Additionally, the Chin Community (in Mizoram) refugees lack formal recognition by both the Indian government and the UNHCR, relying instead on ad hoc support from local communities.⁹⁶

⁹¹ McDonald (n 76).

⁹² Stuti Bhatnagar and Shivangi Seth, 'Uncertain Haven: Afghan Refugees in India' (The Strategist, 23 March 2023) <<https://www.aspistrategist.org.au/uncertain-haven-afghan-refugees-in-india/>> accessed 25 November 2025.

⁹³ ActionAid Association, 'Refugees in India: A National Survey of Refugee Communities' Access to Education, Healthcare and Livelihoods' (NHRC 2024) <https://nhrc.nic.in/assets/uploads/training_projects/Refugees_in_India.pdf> accessed 13 April 2026.

⁹⁴ Roshni Shanker and Hamsa Vijayaraghavan, 'Refugee Recognition Challenges in India' (2020) 65 *Forced Migration Review* <<https://www.fmreview.org/recognising-refugees/shanker-vijayaraghavan/>> accessed 13 April 2026.

⁹⁵ Patnaik, Dabiru, and Siddiqui (n 72).

⁹⁶ Jenny Yang, 'Chins in Mizoram State, India: A Faith-Based Response' (2014) 48 *Forced Migration Review* 62 <<https://www.fmreview.org/faith/yang/>> accessed 28 November 2025.

The systematic exclusion of groups categorized as highly vulnerable, such as the Rohingya Muslims, provides the clearest evidence of this discriminatory framework. Their treatment illustrates the operationalization of securitization theory, where populations are framed as existential threats to justify rights violations. The shift in discourse has moved away from humanitarian concern to one rooted purely in national security, resulting in their criminalisation. The Ministry of Home Affairs' (MHA) 2017 public declaration designating the Rohingya as a "security threat," often citing alleged links to extremist networks despite a lack of credible evidence, was used to justify aggressive policies, including arbitrary arrests, detentions, and forced deportations.⁹⁷ The securitisation of refugee identities facilitates state surveillance, social alienation, and the erosion of legal protections, effectively turning victims of persecution into perceived threats. Additionally, legislations like the Citizenship Amendment Act (CAA) of 2019 further institutionalise this discrimination by fast-tracking citizenship only for non-Muslim refugees from neighboring countries, specifically excluding Muslim groups like the Rohingya, thus reinforcing a religious bias in refugee governance.⁹⁸ This exacerbates the existing framework of unequal treatment where protection levels are determined by political considerations and strategic interests rather than vulnerability.⁹⁹

The inevitable outcome of being classified under the uniform foreigner status is that refugees live in a state of chronic legal uncertainty, or legal limbo. This absence of status denies them crucial documentation, legal residency, and pathways to long-term residency or citizenship.¹⁰⁰ Consequently, they face

⁹⁷ Government of India, Ministry of Home Affairs, Lok Sabha Starred Question No. †*181 <<https://www.mha.gov.in/MHA1/Par2017/pdfs/par2018-pdfs/ls-31072018-English/181.pdf>> accessed 28 November 2025.

⁹⁸ Ishita Chakrabarty, 'Show Your Religion, Claim Your Citizenship: The Citizenship Amendment Act, 2019' (2021) *Emory International Law Review Recent Developments* <<https://scholarlycommons.law.emory.edu/cgi/viewcontent.cgi?article=1028&context=eilr-recent-developments>> accessed 29 November 2025.

⁹⁹ A Muthulakshmi, Babu G and Saleh Ahmed, 'Critical Analysis of CAA (2019) as a Refugee Framework in India' (2024) 11 *International Journal of Research and Analytical Review*, 4, 680 <<https://papers.ssrn.com/sol3/Delivery.cfm?abstractid=5204424>> accessed 28 November 2025.

¹⁰⁰ Mondal (n 88).

difficulties accessing fundamental rights and protections, specifically the denial of what are often termed secondary rights, including access to education, healthcare, employment, and adequate housing. Without formal integration policy, refugees, including those recognized by the UNHCR, are often ignored by local authorities outside of major metropolitan areas, leaving them with no formal means to access essential services.¹⁰¹ This legal precarity forces refugees, even skilled individuals, into vulnerable daily-wage labour under exploitative conditions due to the lack of legal work permits. Ultimately, this systemic exclusion not only violates basic humanitarian norms but also entrenches the marginalisation of refugees, making them reliant on *ad hoc* and case-to-case implementation of their rights, rather than robust, legally guaranteed entitlements. The lack of a specific law exacerbates the plight of the already disadvantaged asylum seekers and refugees. This stratified treatment of different groups of refugees and asylum seekers in the country is also inconsistent with the obligations of India under international law by being a signatory to human rights conventions like the ICCPR and CAT.¹⁰² With the legislative and executive branches being guided by the questions of economy and strategy, the judicial outlook on the matter opens a more balanced approach incorporating a rights-based understanding to the objective operation of the law.

IV. JUDICIAL CREATIVITY AS A SUBSTITUTE FOR LEGISLATION

The lack of distinction between immigrants, foreigners and refugees or asylum seekers coupled with the lack of definition in the legislation for the latter section of people, has prompted the judiciary to extend protection for humanitarian purposes to such groups of the population.¹⁰³ The attempt to bridge this legislative void and ensure that the rights and protections available to the citizens under the constitution, also extends in spirit to the entire human population within its territory.¹⁰⁴ This can be traced through a series of

¹⁰¹ *ibid.*

¹⁰² Suganthini and Kumari (n 86).

¹⁰³ Jai S Singh, 'Refugee Law and Policy in India: Efforts of Indian Courts' (2009) 9 /SIL YB Int'l Human & Refugee L 211.

¹⁰⁴ Bhattacharjee (n 28).

pronouncements over the years with a few stark anomalies in the recent years. Since there is no legal recognition of refugees separately in the India legal framework the concept of the same is conflated into the terms and decisions concerning migration and citizenship.¹⁰⁵

In the first decades post-independence the Judiciary was faced with deciding numerous cases concerning various rights like right to disposal of property, allocation of property, etc. owing to the massive influx of people from across the newly established borders. These cases were decided on the basis of various legislations like the Displaced Persons (Compensation and Rehabilitation) Act, 1954 enacted during that time for enabling smooth transition. The question of rights of foreigners against the Government and *vice versa* appeared before the Court from 1980s -1990s onwards. One of the first such cases was *Louis Deraedt v. Union of India*¹⁰⁶ which established that the rights conferred under the ambit of Article 21 of the Indian Constitution concerning freedom of life and personal liberty are available to all human beings present within the territory of India. It also confirmed that the reading of Article 21 does not include the right to reside and settle in this country as mentioned in Article 19(1)(e) which is applicable only to the citizens of this country. It relied on the case of *Central Bank of India v. Ram Narain*,¹⁰⁷ which upheld the absolute power of the Government of India to expel foreigners and there being no provision in law fettering its discretion, when deciding the matter of expulsion of foreigners from Indian territory.

This sets the subsequent tone for how the Judiciary attempts to balance the powers of the Government by the provision of rights available to all persons irrespective of citizenship. But it also underscores the deference towards the Parliamentary powers in order to regulate the inflow and outflow of foreigners in India. Subsequently, in the case of *State of Arunachal Pradesh v. Khudiram*

¹⁰⁵ Jimmy Jose, Karun Sanjaya and Nuvita Kalra, 'Legal Alchemy in Defence of the Displaced: A Canvas of India's Legal and Juridical Response to Refugee Rights' (2025) 17 International Journal of Public Policy 5 <<https://www.inderscienceonline.com/doi/abs/10.1504/IJPP.2024.144086>> accessed 27 November 2025.

¹⁰⁶ (1991) 3 SCC 554.

¹⁰⁷ AIR 1955 SC 36.

Chakma,¹⁰⁸ the Court addressed the claim of Chakma migrants for Indian citizenship under Section 6A of the Citizenship Act, 1955, after having migrated from erstwhile East Pakistan in 1964 and subsequently settling in Arunachal Pradesh. The Court held that the condition of having been "ordinarily resident in Assam" from the date of entry till the incorporation of Section 6A (December 7, 1985) was not satisfied by the appellants. The Chakmas had stayed in Assam for a short period in 1964 before shifting to Miao, Arunachal Pradesh, in 1966. The Court explicitly adopted the definition from *Smt. Shanno Devi v. Mangal Sain*¹⁰⁹ (1961), stating that 'ordinarily resident' means 'resident during this period without any serious break.' The Court affirmed that the decision regarding settlement of foreigners is a matter of policy; it is well-settled law that the Court does not interfere in a matter of governmental policy since it is for the Government to decide. The State's right to expel a foreigner is unlimited and absolute. Balancing this with the principles of natural justice, the Court mandated that the State was required to direct that an opportunity be afforded to the appellants by the Chief Minister and grant such relief as he deems fit.

Reaffirming the rights of non-citizens, in the case of *National Human Rights Commission (NHRC) v. State of Arunachal Pradesh*¹¹⁰ wherein a public interest litigation, filed by the National Human Rights Commission (NHRC), sought to enforce the fundamental rights of the Chakmas and Hajongs who were facing persecution threats in Arunachal Pradesh. The Court held that our country is governed by the Rule of Law, and the State is bound to protect the life and liberty of every human being, citizens or otherwise. The State is bound to protect the threatened group from such assaults and must fulfill this obligation as a constitutional as well as statutory duty.

Limiting the scope of migration into the country and reaffirming the power of the State on the subject regulating influx of non-citizens in the country the Court in the case of *Sarbananda Sonowal v. Union of India*,¹¹¹ declared the Illegal Migrants (Determination by Tribunals) Act, 1983 (IMDT Act),

¹⁰⁸ 1994 Supp (1) SCC 615.

¹⁰⁹ 1961 SCR (1) 576.

¹¹⁰ (1996) 1 SCC 742.

¹¹¹ (2005) 5 SCC 665.

unconstitutional. The Court stated that large-scale illegal migration into Assam amounted to "external aggression" and an "internal disturbance" prompting the central government to act under Article 355 of the Indian Constitution to protect the state. The IMDT Act was viewed as a major hurdle to the identification of illegal migrants and was seen as violative of Article 14 (right to equality before law) as it created an unequal system for identifying foreigners in Assam compared to other states.

On a matter similar to the *NHRC case*, in the case of *Committee for Citizenship Rights of the Chakmas of Arunachal Pradesh v. State of Arunachal Pradesh*¹¹² addressed the persistent failure of the Government to grant citizenship to the eligible Chakmas and Hajongs despite earlier judicial directions and government commitments. The Government of India and the State of Arunachal Pradesh were directed to finalise the conferment of citizenship rights on eligible Chakmas and Hajongs and to ensure compliance with directions regarding protection of life and liberty and against discrimination in any manner. The Court stated that once these Chakma refugees have been granted citizenship, they are entitled to enjoy all the rights and privileges that flow on becoming a citizen of this country and they are entitled to have their rights protected and safeguarded.

Marking a significant shift in the accommodative assessment of Chakma Refugees, the Court in the case of *Mohd. Salimullah v. Union of India*¹¹³ concerning the application for interim relief by Rohingya refugees against detention and deportation to Myanmar. The Court reiterated that the rights guaranteed under Articles 14 and 21 are available to all persons who may or may not be citizens. However, the right to reside or settle in any part of the territory of India, guaranteed under Article 19(1)(e), is only available to citizens. The right not to be deported is not a right under Articles 14 and 21. The Court ultimately deferred to the executive's assertion of national security, ruling that deportation should not occur "unless the procedure prescribed for such deportation has been followed," but not prohibiting the removal itself. This outcome confirms that

¹¹² (2016) 15 SCC 540.

¹¹³ (2021) 19 SCC 191.

judicial protection often succumbs to the executive's power of expulsion when national security is invoked, highlighting the inconsistency and personality-driven nature of the protection currently afforded. Additionally, The principle of non-refoulement is applicable only to "contracting States". India is not a signatory to the United Nations Convention on the Status of Refugees, 1951, or the Protocol of 1967. And Section 3 of the Foreigners Act empowers the Central Government to issue orders regulating the entry or departure of foreigners wherein the right of the Government to expel a foreigner is unlimited and absolute. The Court did not interfere with the Government's decision to deport Rohingyas as it was argued to be based on serious allegations regarding internal security and illegal immigration. Adding an element of safeguard against arbitrariness the Court while refusing to grant the interim relief against deportation, made clear that the Rohingyas in Jammu shall not be deported unless the procedure prescribed for such deportation is followed.

Reiterating the power of the state with regards to formulating laws on the matters of granting of citizenship and in-flow of non-citizens, the Court *In Re: Section 6A of the Citizenship Act, 1955*¹¹⁴ held that Section 6A falls within the bounds of the Constitution and is constitutionally valid. It was reasoned that Section 6A does not create an unreasonable classification which violates Article 14. The differential treatment of Assam compared to other border states was based on intelligible differentia (the unique historical circumstances of Assam and the enactment of the Assam Accord) and had a direct nexus with the object of the statute. Legislatures are "free to recognize degrees of harm" and classifications do not require "mathematical precision". In the context of other rights the majority rejected claims that Section 6A violated the rights of the indigenous population to conserve their culture (Article 29), their right to life and liberty (Article 21), or their political rights (Article 326), stating that any negative impact was incidental, often caused by post-1971 illegal immigration, which Section 6A sought to curb. The Court also reaffirmed that the rights except those in Article 14 and 21, are only available to citizens and restricted from non-citizens.

¹¹⁴ (2024) INSC 789.

Additionally, in the case of *Suhas Chakma v. Union of India*,¹¹⁵ wherein a writ petition was filed seeking direction compelling the Union of India, States, and Union Territories to prevent torture, cruel, inhumane, and degrading treatment or punishment of prisoners due to overcrowded and unhygienic jail conditions. The Court clarified that the foreigners incarcerated under Indian laws are also entitled to the protections of prisoners given in the Constitution under the provisions of fundamental rights as Protection in respect of conviction for offences (Article 20) and Protection against arrest and detention in certain cases (Article 22). Herein, the broad understanding of foreigners covers both the refugees and asylum seekers in its interpretation.

However, recently in *Yousif Haroun Yagoub Mohamed v. Union of India*,¹¹⁶ the Court dismissed a writ petition filed by a Sudanese national regarding protection against the arbitrary detention of African nationals in Delhi. During the hearing, the Court raised concerns about the process used by the United Nations High Commissioner for Refugees (UNHCR) to issue refugee cards, with the Bench suggesting the agency's office was “operating like a showroom that handed out certificates too easily.”¹¹⁷ Even though it was assured to the Court that the UNHCR's verification process was rigorous and lengthy, the bench noted that India's lack of ratification of the 1951 Refugee Convention meant there was no enforceable municipal legal framework supporting the petitioner's claim.¹¹⁸ The Writ Petition was ultimately dismissed because the petitioner and his family had already approached the National Human Rights Commission (NHRC) for similar relief.

The judiciary has employed creative interpretation of the Constitution (Article 21) to grant a shadow refuge and uphold the right to life and dignity for

¹¹⁵ 2024 SCC OnLine SC 3031.

¹¹⁶ Writ Petition(s)(Civil) No(s).931/2025.

¹¹⁷ Ritwik Choudhury, 'UNHCR has opened a showroom here to issue refugee certificates to everyone: Supreme Court' (*Bar & Bench*, 8 October 2025) <<https://www.barandbench.com/news/unhcr-has-opened-a-showroom-here-to-issue-refugee-certificates-to-everyone-supreme-court>> accessed 28 November 2025.

¹¹⁸ The Wire Staff, 'Opened a Showroom...': SC Justice Surya Kant Taunts UNHCR For Issuing Refugee Cards in India' (*The Wire*, 8 October 2025) <<https://thewire.in/rights/opened-a-showroom-sc-justice-surya-kant-taunts-unhcr-for-issuing-refugee-cards-in-india>> accessed 28 November 2025.

refugees, in compliance with India's commitments under ICCPR and other instruments of human rights. But this protection is inconsistent and fragile against the statutory might of deportation-oriented laws. The courts have, at times, upheld executive deportation orders, emphasizing the government's paramount authority in foreign policy and security matters. The series of cases discussed indicate that the judiciary can act as a regulating mechanism to check government excesses; it operates within the framework of division of powers.

The judiciary is generally effective only in providing a negative right (i.e., halting deportation), but it cannot legislate positive rights essential for durable solutions, such as securing livelihood, formal work permits, housing, or access to public education and healthcare.¹¹⁹ Crucially, this constitutional protection remains theoretically fragile against the statutory powers of the executive, especially when issues of national security are raised, a vulnerability demonstrated by judicial deference in recent deportation cases.¹²⁰ It acknowledges the unfettered power of the Parliament to formulate laws on the matters concerning grant of citizenship and monitoring migration of population into the country. While it can ensure that these powers are not arbitrarily used by government bodies, it cannot get into the domain of legislation in order to establish uniformity of operations for all. It is bound by the constitutional framework, which permits the government to operate on a case to case manner in matters concerning non-citizens residing in India. The judiciary can merely ensure that there is no manifest arbitrariness in the decision and it is being weighed in on the scale of national security and internal peace of the country.¹²¹ The refugee community thus exists precariously, suspended between the restrictive legal gap established by the national legislations, and the aspirational but non-institutionalized constitutional protections.

¹¹⁹ Nibhrit Mishra, 'Constitutional Safeguards And Human Rights of Refugees And Asylum Seekers in India' (2025) National University of Advanced Legal Studies, Kochi <<http://14.139.185.167:8080/jspui/bitstream/123456789/1666/1/LM0124014NIBHRIT.pdf>> accessed 28 November 2025.

¹²⁰ Aishwarya Birla, 'Evaluating the Indian Refugee Law Regime: How Has the Judiciary Responded to Refugee Claims in Light of International Law Obligations, and How Can It Do Better?' (2023) 35 International Journal of Refugee Law 1, 81 <<https://doi.org/10.1093/ijrl/cead013>> accessed 28 November 2025.

¹²¹ Jose, Sanjaya and Kalra (n 105).

V. REIMAGINING THE FRAMEWORK: FROM THE 2015 BILL TO A NEW LEGISLATION

There have been only a few attempts in the Indian Parliamentary history for bringing about a new legislative framework completely dedicated to the concerns and regulation of refugees and asylum seekers. This section traces the Asylum Bills placed on the table in 2015 and 2021 and subsequently suggests the reforms which ought to be introduced in the legal tapestry of India for uniform recognition and grant of rights to refugees and asylum seekers.

A. Lessons from the Asylum Bills, 2015 and 2021

The necessity for a specific legal framework addressing refugee protection in India is underscored by the continued reliance on archaic statutes and judicial processes which are consistently deemed inadequate for governing complex forced migration dynamics. In the face of this legislative vacuum, private legislative efforts, notably the Asylum Bill, 2015¹²² and its subsequent iteration in 2021,¹²³ provided indispensable blueprints for institutionalising protection. These Bills aimed explicitly to end the systemic ambiguity and arbitrariness inherent in the current executive-driven approach. Positively, they proposed concrete institutional machinery, specifically the National Commission for Asylum (NCA) and a National Appellate Board for Asylum (NABA), to provide a legal basis for Refugee Status Determination (RSD), cessation, and revocation of status. This mechanism would have ensured a reduction in arbitrariness and a uniform procedure for all who sought refugee or asylum status in India. The drafts also contained provisions to grant asylum-seekers general rights commensurate with those available to Indian citizens, including rights to healthcare, employment, and education, and asserted that individuals should not be expelled to a country where their life would be endangered, thereby enshrining a crucial element of the *non-refoulement* principle.

¹²² Asylum Bill, 2015 <https://shashitharoor.in/private_member_bills_details/5%22> accessed 24 November 2025.

¹²³ Asylum Bill, 2021 <[https://sansad.in/getFile/BillsTexts/LSBillTexts/Asintroduced/45%20of%202021%20As%20\(PDF\).pdf?source=legislation](https://sansad.in/getFile/BillsTexts/LSBillTexts/Asintroduced/45%20of%202021%20As%20(PDF).pdf?source=legislation)> accessed 24 November 2025.

However, the Asylum Bills were critically flawed, primarily due to their textual inertia; the content of the 2015 and 2021 Bills remained precisely similar or the same, failing to incorporate crucial doctrinal advancements despite the intervening six years of global refugee challenges.¹²⁴ Fundamentally, these drafts suffered from sticking too closely to the Eurocentric and arguably outdated definition of a refugee found in the 1951 Convention, neglecting the complexities of forced migration pertinent to the Global South, such as displacement driven by generalized violence or mixed migratory flows.¹²⁵ Moreover, key principles necessary for contemporary asylum management, including the recognition that asylum is "multifaceted" and demands flexible processing for "mixed migratory flows" and "mass influxes" over individualized procedures were not adequately addressed.¹²⁶ These omissions meant the Bills lacked the comprehensive flexibility and operational scope necessary for a modern legislative code adept for comprehensively addressing the regulation of refugee and asylum seekers in India. While bills were never concretised into laws owing to the lack of parliamentary viability of private member bills and were not flawless in their conceptualisation of a robust institutional framework. They certainly contained a roadmap for institutionalisation, which, if incorporated by tailoring it to the Indian context in the future legislations for refugee and asylum management will help formulate an intricate and well-structured standardised regulatory institutional framework in the country.¹²⁷

B. Proposed Doctrinal Reforms

To move beyond the existing *ad hoc* governance and address the long-standing scholarly and judicial calls for a permanent solution, two key doctrinal reforms are essential in order to introduce a robust refugee and asylum protection mechanism in India.

¹²⁴ Partha Pratim Mitra, 'Struggles to Reconcile Theory and Practices: Comments on the Asylum Bill 2021' (2022) ISIL YB Int'l Human. & Refugee L 22, 157.

¹²⁵ *ibid.*

¹²⁶ *ibid.*

¹²⁷ Marina Sharpe, 'The Regional Law of Refugee Protection in Africa' (University of Oxford, 2016) <<https://ora.ox.ac.uk/objects/uuid:cfa6b452-1949-4b4c-8946-b7acf036c123>> accessed 27 November 2025.

First, there should be a separate refugee law in India with a broad definition covering Indian experiences and concerns. But in the interim before a separate legislation is formally drafted and enacted, the existing Foreigners and Immigration Act, 2025 should have a separate section defining refugees and asylum seekers as presently they are conflated with the definition of illegal immigrants or foreigners. The complete legislative silence on the matter prevents the refugees seeking to enter into the country to receive proper redressal for their concerns. India need not sign the 1951 Convention as its narrow persecution-centric approach is inadequate for contemporary issues, including cross-border forced migration caused by climate change, serious human rights violations, or events gravely disrupting public order. But Indian legal framework needs to define refugees and asylum seekers under its own legislation as for a robust domestic law there should be a broader definition, potentially mirroring the spirit of the Organisation of African Unity (OAU) Convention, which recognizes individuals fleeing external aggression or generalized violence,¹²⁸ this addresses the objections that India has raised against the 1951 Convention. The adoption of a broader definition recognising contemporary concerns and mirroring India's own history of mass migrations makes a systemic shift from a persecution-centric definition which fails to accommodate India's concerns and experiences. Such an expansion is vital to achieving the necessary uniform legal and conceptual understanding of refugees in India shifting away from the discretionary ad-hoc policy framework followed presently by the executive. A modern code must also adopt a multifaceted pre-defined criteria, providing for different categories of protection, and explicitly addressing cross-border forced migration stemming from environmental factors like climate change and sea-level rise, recognizing India's status as a frontline country in this regard with many neighbouring countries endangered with extreme climate stress.¹²⁹ These concerns if left unaddressed in the national legal frameworks could lead to further burden

¹²⁸ *ibid.*

¹²⁹ Susan Kneebone, 'Comparative Regional Protection Frameworks for Refugees: Norms and Norm Entrepreneurs' (2016) 20 *International Journal of Human Rights* 2 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2818163> accessed 28 November 2025.

sharing and security concerns for India and the region as a whole. Such an expansion is essential to achieve a uniform holistic legal and conceptual understanding of existing refugees in India and also addresses potential future influx from neighbouring countries owing to such factors.

Second, the proposed solution requires the establishment of specialised government agencies as an institutional framework well-equipped to handle refugee issues, thereby strengthening governance and providing dignity and stability.¹³⁰ The absence of a separate legislative and institutional framework necessitates relying on *ad hoc* case-by-case assessment by executive organs, which leads to arbitrary decisions and exacerbates the plight of refugees and asylum-seekers. This institutional machinery must be quasi-judicial, functioning as a dedicated RSD body, like the NCA and a NABA as proposed in the bills, vested with powers akin to a civil court to streamline the acceptance/rejection procedure and ensure uniformity.¹³¹ Procedural fairness must be safeguarded by guaranteeing the statutory right to appeal, which is also a fundamental right when decisions affect an individual's liberty.¹³² Concomitantly, the principle of *non-refoulement* must be explicitly enforced in India's legal system as a non-negotiable human right for refugees.¹³³ Critically, the concept of "interim protection" must be codified, explicitly prohibiting the detention or penalization of asylum-seekers solely for illegal entry or stay pending the final determination of their application.¹³⁴ Moreover, the new legislation must carve out necessary provisions for individuals who fail the strict refugee criteria but whose return would still breach India's binding international human rights obligations.¹³⁵

¹³⁰ *ibid.*

¹³¹ Saxena (n 54).

¹³² *Maresh Singh Banzara v State of Madhya Pradesh* (2025) LiveLaw (SC) 28.

¹³³ Shreyanshu Kumar and Tisa Agarwal, 'Amending Citizenship in a Shifting World: India's CAA and the Global Refugee Landscape' (2024) *LawFoyer Int'l J. Doctrinal Legal Rsch* 2, 168.

¹³⁴ *ibid.*

¹³⁵ Pallavi Saxena and Nayantara Raja, 'The Global Compact on Refugees: India's Stepping-Stone to a National Asylum System' in Jessica Field and Srinivas Burra (eds.) *The Global Compact on Refugees: Indian Perspectives and Experiences* (Academicians Working Group & UNHCR India, 2020) <<https://discovery.ucl.ac.uk/id/eprint/10104295/1/2020%20Field%20and%20Burra%20%28ed%29%20-%20The%20GCR-%20Indian%20Perspectives%20and%20Experiences.pdf>> accessed 28 November 2025.

Therefore, in order to have a uniform framework for refugees and asylum seekers which addresses national concerns as well as clearly lays down the human rights and humanitarian commitments of the country, it is imperative that there is a predefined national legislation and institutional machinery.

VI. CONCLUSION

India's posture regarding international refugee law is characterized by a fundamental, structural dissonance, wherein a robust, time-honored tradition of offering sanctuary operates in deliberate opposition to the formal global legal regime.¹³⁶ The steadfast reliance on the non-signatory defense, rooted in objections concerning the perceived Eurocentrism of the 1951 Convention, the absence of robust burden-sharing mechanisms, and overriding national security concerns, cultivates a policy of strategic ambiguity.¹³⁷ This stance, however, cannot legally insulate the nation from its obligations under customary international law, specifically the *jus cogens* prohibition of *non-refoulement*, a principle reinforced by India's ratification of instruments such as the ICCPR and CAT.¹³⁸ Nevertheless, the effectiveness of these binding norms is perpetually curtailed by India's dualist constitutional architecture, which requires explicit parliamentary enactment to confer domestic enforceability.

The legislative consolidation under the new Immigration and Foreigners Act, 2025, which repeals and subsumes control-oriented statutes like the Foreigners Act, 1946, perpetuates this critical gap by failing to define or differentiate refugees and asylum seekers, thus managing forcibly displaced persons solely as "foreigners" or "illegal migrants". This statutory regime grants the executive expansive and "unfettered discretion" over entry, detention, and removal, ensuring that protection remains discretionary, politically contingent,

¹³⁶ Shuvro Prosun Sarker and Shreyasi Bhattacharya, 'India's Approach towards Refugees and Asylum Seekers: A Narrative of Promises and Indifference' in Shashikala Gurpur, Aakarsh Banyal (eds) *International Law in Pursuit of Global Justice* (Routledge 2025).

¹³⁷ Ivan Ng Yan Chao, 'Cosmopolitanism and Nationalism: A Critique of the Effectiveness of the International Refugee Regime' (2020) *Kyiv-Mohyla Law and Politics Journal* 6, 159 <<https://doi.org/10.18523/kmlpj220747.2020-6.159-176>> accessed 27 November 2025.

¹³⁸ Arya S Thamban and Sheikh I Humayun, 'Colouring with the Same Brush: Revisiting Undocumented Migration in South Asia' (2022) 6 *Imgelem* 435 <<https://dergipark.org.tr/en/download/article-file/2644230>> accessed 26 November 2025.

and structurally fragile within a framework wholly unsuited to the requirements of non-derogable human rights. In the absence of a legal framework that provides clear benchmarks for accountability, India remains exposed to legal, political, and administrative uncertainties. The sustained legislative vacuum risks diplomatic backlash and internal inconsistency, particularly as migration flows intensify.

The difficulties India faces are multi-faceted, encompassing humanitarian and security concerns, alongside the complex interplay of international geopolitics and domestic politics of border control. Increased emphasis on geopolitical considerations necessitates that modern India seeks legal arrangements that are acceptable and judicious to all stakeholders. Without such codified domestic law, India's actions risk being perceived as demonstrating defiance of international rules or creating heightened uncertainty regarding immigrant politics integrated with domestic politics, thus potentially damaging India's international image. Consequently, India's international obligations exist primarily as abstract commitments, often resisted on grounds of political expediency, requiring the judiciary to resort to inconsistent and tenuous constitutional interpretations to offer a provisional, rather than systematized, measure of protection.

The reliance on executive discretion and *ad hoc* administrative arrangements, while often exhibiting the civilisational ethos of hospitality, fails to grant refugees the stability and dignity they require. Although the Supreme Court of India and High Courts have intervened, employing "judicial creativity" to provide humane solutions, particularly regarding the principle of *non-refoulement* and the right to seek asylum, this is a temporary and inconsistent fix, and comprehensive legislation alone can furnish a permanent solution.¹³⁹

Therefore, India must effect a fundamental shift in its approach: from a "charity approach" wherein refugees are perceived merely as guests of the state, to a comprehensive "rights approach" where refugees are codified as subjects of law.¹⁴⁰ The constitutional foundation for this approach is robust, as the

¹³⁸ Saxena (n 54).

¹³⁹ Mondal (n 88).

fundamental rights and basic human rights enshrined in the Constitution, including Article 14 (right to equality) and Article 21 (right to life), are protected for all persons, citizens and aliens alike, within the territory of India. Future legislation must capitalise on this constitutional protection and institutionalise the basic rights, such as healthcare, employment, and education, which were proposed in earlier legislative blueprints like the Asylum Bill, 2021. Only by enacting strong domestic rights-based legislation can India achieve the uniform legal and conceptual clarity necessary for refugee protection.

¹³⁸ Saxena (n 54).

¹³⁹ Mondal (n 88).



NATIONAL LAW UNIVERSITY DELHI

Sector-14, Dwarka, New Delhi-110078

Phone : +91 11 280 34253, Fax : +91 11 280 34256

Website : www.nludelhi.ac.in