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# **JUDICIAL APPROACH TO REFUGEE PROTECTION** **IN INDIA: AN ANALYSIS OF CONSTITUTIONAL** **SAFEGUARDS AND JUDICIAL ACTIVISM**

AUTHORED BY - SACHIN SHEORAN<sup>1</sup> & DR. NEHA MISHRA<sup>2</sup>

## **Abstract**

The question of refugee protection in India exists at a complex intersection of constitutional morality, international humanitarian obligations, and concerns of national sovereignty. Despite being one of the largest host countries for refugees, including Tibetans, Sri Lankan Tamils, Chakmas, and Rohingyas, India does not possess a dedicated statutory framework governing refugee rights. Nor is it a signatory to the 1951 Refugee Convention or its 1967 Protocol. This legislative vacuum has resulted in refugees being legally categorized as “aliens” under general laws such as the Foreigners Act, 1946, thereby subjecting them to executive discretion rather than rights-based protection. In this context, the judiciary has emerged as a pivotal institution in shaping refugee jurisprudence through constitutional interpretation and selective judicial intervention.

This paper critically examines the evolving judicial approach to refugee protection in India, focusing particularly on the interpretation of fundamental rights under Articles 14 and 21 of the Constitution. Indian courts have, at various points, adopted a progressive stance by extending the right to equality and the right to life and personal liberty to all “persons,” including non-citizens. Through landmark decisions such as *National Human Rights Commission v. State of Arunachal Pradesh*, the judiciary has upheld the principle that refugees are entitled to protection against arbitrary state action, including forcible eviction and threats to life. Moreover, courts have implicitly incorporated the principle of non-refoulement into domestic jurisprudence by linking it to the right to life under Article 21, thereby aligning Indian law with international human rights norms despite the absence of formal treaty obligations.

However, this judicial approach has not been uniform. In recent cases, particularly those

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<sup>1</sup> Research Scholar, Amity Law School, Amity University, Haryana

<sup>2</sup> Assistant Professor, Amity Law School, Amity University, Haryana

involving Rohingya refugees, the Supreme Court has demonstrated a more restrained stance, emphasizing national security considerations and deferring to executive authority. Decisions such as *Mohammad Salimullah v. Union of India* reflect a shift toward prioritizing state interests over humanitarian concerns, thereby exposing an inherent tension within Indian refugee jurisprudence. This oscillation between judicial activism and restraint reveals the limitations of relying solely on constitutional interpretation in the absence of comprehensive legislation.

The paper argues that while the judiciary has played a crucial role in advancing refugee protection, its inconsistent approach underscores the urgent need for a codified refugee law in India. Such legislation would provide clarity, ensure uniformity, and harmonize constitutional principles with international standards, thereby reducing judicial ambiguity and strengthening the protection framework for refugees.

**Keywords:** Refugee Protection, Judicial Activism, Constitutional Safeguards, Article 21, Article 14, Non-Refoulement, Judicial Restraint, National Security, Human Rights, Foreigners Act 1946.

## 1. Introduction: Between Humanity and Sovereignty

“*Salus populi suprema lex esto*” - the welfare of the people is the supreme law. Yet, in a world marked by forced displacement, persecution, and statelessness, a fundamental question arises: *who constitutes “the people”*? Does the protection of law extend only to citizens, or does it also embrace those who cross borders seeking refuge from violence, oppression, and existential threats?

India presents a unique and paradoxical case in this regard. Rooted in a long civilizational ethos of hospitality, reflected in the principle of “*Atithi Devo Bhava*” (the guest is akin to God), India has historically provided shelter to diverse refugee communities, including Tibetans fleeing Chinese occupation, Sri Lankan Tamils escaping civil war, Chakmas from Bangladesh, and more recently, Rohingya refugees from Myanmar. Despite this consistent humanitarian practice, India lacks a formal legal framework specifically governing refugee protection. It is neither a signatory to the 1951 Refugee Convention nor its 1967 Protocol, thereby maintaining a position of legal distance from the global refugee regime.<sup>3</sup>

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<sup>3</sup> Available at: <https://www.worldlii.org/int/journals/ISILYBIHRL/2001/7.html> (last visited on March 17, 2026)

In the absence of dedicated refugee legislation, refugees in India are legally treated as “aliens” under statutes such as the Foreigners Act, 1946<sup>4</sup>, and the Passport (Entry into India) Act, 1920<sup>5</sup>. These laws do not distinguish between refugees and other categories of migrants, such as illegal entrants or economic migrants. Consequently, refugees are often subjected to a regime of executive discretion, where their entry, stay, and potential deportation are governed more by administrative policy than by enforceable legal rights. This creates a precarious condition where humanitarian considerations may be subordinated to political and security concerns.

It is within this legislative vacuum that the Indian judiciary has assumed a critical role. Through constitutional interpretation, particularly of Articles 14 and 21, courts have sought to carve out a protective space for refugees. The judiciary has repeatedly emphasized that fundamental rights, especially the right to life and personal liberty, are available to all “persons” within the territory of India, irrespective of citizenship. This interpretation has enabled courts to extend certain safeguards to refugees, thereby partially compensating for the absence of statutory protection.

However, this judicial engagement is neither linear nor uniform. The Indian judiciary’s approach to refugee protection is characterized by a constant tension between humanitarian obligations and state sovereignty.<sup>6</sup> On one hand lies the moral and constitutional imperative to protect human dignity - what may be described as *jus humanitatis*. On the other hand, lies the doctrine of *raison d’état*, which prioritizes national security, territorial integrity, and sovereign control over borders. Courts are thus often placed in the difficult position of balancing these competing considerations, particularly in cases involving politically sensitive refugee groups.

This tension becomes more pronounced in contemporary contexts, where refugee movements are increasingly linked with concerns of terrorism, demographic change, and resource allocation. Judicial decisions in recent years, especially in cases involving the deportation of Rohingya refugees, reflect a noticeable shift toward judicial restraint and deference to executive authority. Such decisions underscore the judiciary’s recognition of the limits of its role in matters intersecting with foreign policy and national security.

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<sup>4</sup> The Foreigners Act, 1946 (Act 31 of 1946)

<sup>5</sup> The Passport (Entry into India) Act, 1920 (Act 34 of 1920)

<sup>6</sup> Ahmad, N. (2017). The Constitution-Based Approach of Indian Judiciary to The Refugee Rights and Global Standards of the UN Convention. *King's Student L. Rev.*, 8, 30.

At a broader level, the Indian experience raises important jurisprudential questions about the nature and scope of constitutional protections. Can fundamental rights truly be universal if their application is contingent upon judicial discretion? Does the absence of legislation justify a case-by-case approach, or does it necessitate a more structured legal framework?<sup>7</sup> The maxim “*Ubi jus ibi remedium*” - where there is a right, there is a remedy, becomes particularly relevant here, as courts attempt to provide remedies in situations where formal rights are undefined or ambiguous.

This paper seeks to critically analyze this evolving judicial landscape. It examines how Indian courts have interpreted constitutional provisions to address refugee concerns, the extent to which judicial activism has filled legislative gaps, and the emerging trend of judicial restraint in recent jurisprudence. By situating these developments within the broader framework of constitutional law and international principles, the paper aims to assess whether the judiciary has functioned as a robust protector of refugee rights or merely as an intermediary navigating between compassion and caution.

Ultimately, the introduction sets the stage for a deeper inquiry into whether India’s refugee jurisprudence reflects a coherent constitutional philosophy or remains an ad hoc response shaped by shifting political and judicial priorities.

## **2. Constitutional Framework: Expanding Rights Beyond Citizenship**

The Indian Constitution, though silent on the specific category of “refugees,” provides a broad and dynamic rights framework that has enabled the judiciary to extend certain protections to non-citizens. This has been made possible through a purposive and liberal interpretation of fundamental rights, particularly those that are available to “persons” rather than being restricted to citizens. In the absence of a dedicated refugee law, constitutional provisions have thus become the primary legal foundation for refugee protection in India.<sup>8</sup>

At the heart of this framework lies Article 14, which guarantees “equality before the law” and “equal protection of the laws” to *any person* within the territory of India. The deliberate use of

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<sup>7</sup> Burbank, S. B. (1988). Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law. *Notre Dame L. Rev.*, 63, 693.

<sup>8</sup> Debbarma, M. (2025). Refugees experience and the host communities: Critical analyses on absence of refugee law in India. *Journal of Asian and African Studies*, 60(5), 3204-3218.

the term “person” instead of “citizen” reflects the inclusive nature of this provision. The judiciary has consistently interpreted Article 14 to apply to all individuals, irrespective of nationality or legal status. For refugees, this means that they cannot be subjected to arbitrary or discriminatory state action.<sup>9</sup> Any classification affecting them must satisfy the test of reasonable classification, ensuring that state policies are not arbitrary or unjust.

Closely linked to Article 14 is Article 21, which guarantees the right to life and personal liberty. Over the years, judicial interpretation has transformed Article 21 from a narrow procedural guarantee into a substantive and expansive right encompassing human dignity, security, and protection from inhumane treatment. The watershed moment in this transformation came with *Maneka Gandhi v. Union of India*<sup>10</sup>, where the Supreme Court held that any procedure depriving a person of life or liberty must be “just, fair, and reasonable.” This interpretation has profound implications for refugees, as it imposes substantive limits on state action, including detention and deportation.

In the context of refugee protection, Article 21 has been invoked to argue that deporting individuals to a place where they face persecution, torture, or death would violate their right to life. This has led to the indirect incorporation of the principle of non-refoulement into Indian constitutional jurisprudence. Although not explicitly codified, the essence of this principle - prohibiting the return of individuals to territories where their life or freedom is at risk - has found resonance within the expansive interpretation of Article 21.<sup>11</sup> This reflects a harmonious reading of domestic law with international humanitarian norms, consistent with Article 51(c) of the Constitution, which encourages respect for international law.

Another significant provision is Article 22, which provides safeguards against arbitrary arrest and detention. While certain protections under Article 22 are specifically designed for citizens, its broader procedural guarantees apply to all persons, including foreigners. Refugees, therefore, are entitled to be informed of the grounds of their detention and to have access to legal representation. These safeguards are particularly important given that refugees are often detained under immigration laws without clear timelines or due process.

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<sup>9</sup> Chowdhury, P. R. (2011). Judicial activism and human rights in India: a critical appraisal. *The International Journal of Human Rights*, 15(7), 1055-1071.

<sup>10</sup> *Maneka Gandhi v. Union of India*, AIR 1978 SC 597

<sup>11</sup> Antia, D. (2024). Analyzing the impact of judicial activism in human right protection. *Indian Journal of Law and Legal Research Volume VI Issue III* | ISSN: 2582-8878.

The constitutional framework is further enriched by the judiciary's willingness to interpret fundamental rights in light of international human rights instruments. Although India follows a dualist approach, where international treaties do not automatically become part of domestic law, the courts have often adopted a harmonious construction, reading constitutional provisions in consonance with international obligations.<sup>12</sup> This approach was affirmed in cases such as *Vishaka v. State of Rajasthan*<sup>13</sup>, where the Supreme Court held that international conventions could inform constitutional interpretation in the absence of conflicting domestic law. By analogy, this reasoning has been applied in refugee-related cases to draw upon global human rights standards.

The application of these constitutional provisions is guided by the enduring maxim "*Ubi jus ibi remedium*". In the absence of statutory rights for refugees, the judiciary has relied on this principle to ensure that constitutional guarantees are not rendered illusory. Courts have entertained writ petitions under Articles 32 and 226, thereby providing refugees with direct access to judicial remedies against violations of their fundamental rights.

However, it is important to note that not all fundamental rights are available to non-citizens. Rights such as those under Articles 15, 16, and 19 are explicitly restricted to citizens, thereby limiting the scope of refugee entitlements. This creates a layered rights structure, where refugees enjoy certain basic protections but remain excluded from the full spectrum of constitutional rights.

In essence, the Indian constitutional framework operates as a surrogate refugee protection regime, filling the legislative void through judicial interpretation. While this approach has enabled the extension of essential safeguards, it remains inherently limited and contingent upon judicial discretion. The absence of a codified legal framework means that these protections are neither uniform nor guaranteed, underscoring the need for a more structured and comprehensive approach to refugee law in India.<sup>14</sup>

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<sup>12</sup> *Supra* Note 4.

<sup>13</sup> *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011

<sup>14</sup> *Supra* Note 6

### 3. Judicial Activism and Progressive Interpretation

In the absence of a dedicated legislative framework governing refugees, the Indian judiciary has often assumed an active and creative role in shaping refugee protection through constitutional interpretation. This phenomenon, commonly described as judicial activism, reflects the courts' willingness to step beyond a strictly literal reading of the law and instead adopt a purposive approach aimed at safeguarding human dignity and fundamental rights. In the context of refugee protection, such activism has been instrumental in bridging the gap between India's constitutional commitments and its lack of formal adherence to international refugee conventions.<sup>15</sup>

A defining feature of this judicial approach has been the expansive interpretation of Article 21, which guarantees the right to life and personal liberty. The Supreme Court has consistently held that this right is not confined to mere physical existence but extends to a life of dignity, security, and freedom from inhumane treatment. By applying Article 21 to all "persons," including non-citizens, the judiciary has effectively created a constitutional shield for refugees against arbitrary state action. This approach embodies the maxim "*Fiat justitia ruat caelum*" - let justice be done though the heavens fall - signifying the court's commitment to uphold justice even in the absence of explicit statutory backing.

One of the most significant illustrations of judicial activism in this domain is the landmark case of *National Human Rights Commission v. State of Arunachal Pradesh*<sup>16</sup>. This case arose out of threats faced by Chakma refugees, who were being forcibly evicted and subjected to hostility from local groups. The Supreme Court intervened decisively, directing the State to ensure the protection of the refugees' life and liberty. It categorically held that the State is constitutionally obligated to safeguard the rights of every person within its territory, regardless of citizenship status. This judgment not only reinforced the applicability of Article 21 to refugees but also underscored the role of the judiciary as a guardian of vulnerable populations.

Another important dimension of judicial activism has been the implicit incorporation of the principle of non-refoulement into Indian constitutional jurisprudence. Although India is not a

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<sup>15</sup> Antia, D. (2024). Analyzing the impact of judicial activism in human right protection. *Indian Journal of Law and Legal Research Volume VI Issue III* | ISSN: 2582-8878.

<sup>16</sup> *National Human Rights Commission v. State of Arunachal Pradesh*, AIR 1996 SC 1234

party to the 1951 Refugee Convention, courts have interpreted the right to life under Article 21 to include protection against deportation to a country where an individual faces persecution or threat to life. This interpretive strategy reflects a broader trend of aligning domestic constitutional principles with international human rights norms. The judiciary has thus demonstrated a willingness to draw upon customary international law and global humanitarian standards, even in the absence of formal treaty obligations.

This approach is further supported by the constitutional directive under Article 51(c), which encourages the State to respect international law and treaty obligations. While this provision is non-justiciable, courts have used it as a guiding principle to harmonize domestic law with international norms. In doing so, the judiciary has adopted what may be described as a quasi-monist approach, where international principles are not directly enforceable but can inform and enrich constitutional interpretation.

Judicial activism in refugee protection has also been evident in the procedural domain. Courts have entertained petitions filed on behalf of refugees under Articles 32 and 226, thereby expanding access to justice. Public Interest Litigation (PIL) has played a crucial role in this regard, allowing human rights organizations and concerned individuals to approach the courts on behalf of marginalized refugee communities. This procedural flexibility has ensured that refugees, who often lack the resources or legal awareness to assert their rights, are not left without recourse.

However, it is important to recognize that judicial activism in this area is not without its limitations. The absence of a clear legislative framework means that judicial interventions are often case-specific and reactive, rather than part of a coherent and consistent policy. Moreover, courts must operate within the broader constitutional structure, which allocates primary responsibility for matters of immigration and foreign policy to the executive. As a result, judicial activism is sometimes tempered by considerations of institutional restraint and separation of powers.<sup>17</sup>

Nevertheless, the judiciary's proactive role has had a profound impact on the development of

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<sup>17</sup> Birla, A. (2023). 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?. *International Journal of Refugee Law*, 35(1), 81-100.

refugee jurisprudence in India. By expanding the scope of fundamental rights, incorporating international principles, and ensuring access to remedies, the courts have transformed constitutional provisions into effective tools of protection. This reflects the enduring maxim “*Ubi jus ibi remedium*” - where there is a right, there must be a remedy, demonstrating the judiciary’s commitment to ensuring that even the most marginalized individuals are not beyond the reach of constitutional justice.

In sum, judicial activism has functioned as a crucial, albeit imperfect, substitute for legislative action, shaping a framework of refugee protection that is rooted in constitutional values and humanitarian principles.

#### 4. Judicial Restraint and the Security Paradigm

While the Indian judiciary has, at various stages, demonstrated a progressive and humanitarian approach toward refugee protection, recent jurisprudence reveals a discernible shift toward judicial restraint, particularly in cases involving national security and foreign policy considerations. This transition underscores the inherent tension between constitutional ideals of human dignity and the practical imperatives of state sovereignty. In such situations, courts have increasingly deferred to the executive, recognizing the limits of judicial intervention in matters perceived as falling within the domain of governance and security.

The principle guiding this restrained approach can be understood through the maxim “*Salus reipublicae suprema lex*” - the safety of the State is the supreme law. This reflects the idea that the preservation of national security and public order may, in certain circumstances, justify limitations on individual rights, especially for non-citizens. In the context of refugee protection, this has translated into a cautious judicial stance where humanitarian considerations are balanced against concerns such as illegal migration, demographic impact, and potential security threats.

A pivotal case illustrating this shift is *Mohammad Salimullah v. Union of India*<sup>18</sup>, which dealt with the proposed deportation of Rohingya refugees. The petitioners argued that deportation to Myanmar would expose them to grave risks, including persecution and violence, thereby violating their fundamental rights under Articles 14 and 21 of the Constitution. They also

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<sup>18</sup> *Mohammad Salimullah v. Union of India*, AIR 2021 SC 1789

invoked the principle of non-refoulement as part of customary international law. However, the Supreme Court declined to grant interim relief, allowing the deportation process to proceed subject to procedural compliance.

In its reasoning, the Court emphasized that while Article 21 applies to all persons, including non-citizens, the right not to be deported is not a fundamental right. It further noted that issues relating to foreign nationals, including their entry and exit, fall primarily within the executive's domain. The Court also acknowledged the government's argument that the presence of certain refugee groups could have implications for national security. This decision marked a significant departure from earlier judgments that had placed greater emphasis on humanitarian protection.

The Rohingya cases more broadly highlight the judiciary's evolving approach. Unlike earlier refugee groups such as Tibetans or Sri Lankan Tamils, who were often viewed through a sympathetic lens, the Rohingyas have been treated within the framework of illegal migration and security concerns. Courts have shown reluctance to intervene decisively, often limiting their role to ensuring that deportation procedures comply with existing legal requirements rather than questioning the substantive justification for such actions.

This shift toward restraint can also be attributed to the judiciary's adherence to the doctrine of separation of powers. Matters relating to immigration, border control, and foreign relations are traditionally considered part of the executive's prerogative. Courts have repeatedly held that they lack the institutional competence to assess complex issues involving national security and international diplomacy. As a result, judicial review in such cases tends to be limited, focusing on procedural fairness rather than substantive rights.

Another factor contributing to judicial restraint is the absence of a clear statutory framework governing refugees. Without legislative guidance, courts are often hesitant to establish broad principles that may have far-reaching policy implications. Instead, they adopt a case-by-case approach, which allows for flexibility but also leads to inconsistency. This is evident in the contrasting outcomes of cases involving different refugee groups, reflecting the influence of contextual factors such as geopolitical considerations and public sentiment.

The restrained approach also raises important concerns regarding the protection of fundamental rights. While the judiciary continues to affirm that Article 21 applies to all persons, its

reluctance to extend this protection to prevent deportation in certain cases creates a narrowing of constitutional safeguards. Critics argue that this undermines the principle of non-refoulement and weakens India's commitment to human rights, even if such commitment is not formally codified in domestic law.

At a doctrinal level, this tension reflects the competing maxims of "*Fiat justitia ruat caelum*" (let justice be done though the heavens fall) and "*Salus republicae suprema lex*" (the safety of the State is supreme). The judiciary's recent approach suggests a growing preference for the latter, particularly in cases involving sensitive political and security issues.

The emergence of judicial restraint in refugee jurisprudence signals a shift from a purely rights-based approach to one that is more state-centric and pragmatic. While this may be justified in certain contexts, it also highlights the limitations of relying solely on judicial intervention for refugee protection. The balance between humanitarian values and national security remains delicate, and the judiciary's role continues to evolve within this complex and contested space.

### **5. Oscillation Between Activism and Deference**

The judicial approach to refugee protection in India cannot be described as uniformly progressive or consistently restrictive; rather, it is best understood as oscillatory, moving between phases of judicial activism and judicial deference. This fluctuation reflects the judiciary's attempt to reconcile competing constitutional, political, and humanitarian considerations within a legal vacuum. In the absence of a codified refugee law, courts have been compelled to respond to refugee issues on a case-by-case basis, resulting in a jurisprudence that is both dynamic and, at times, inconsistent.

In its earlier phase, the judiciary adopted a markedly activist approach, emphasizing the universality of fundamental rights and the importance of protecting vulnerable populations. Decisions such as *National Human Rights Commission v. State of Arunachal Pradesh* demonstrated a clear willingness to intervene decisively in favor of refugees. The Court, in that case, not only affirmed the applicability of Article 21 to non-citizens but also directed the State to actively ensure the safety and well-being of Chakma refugees. This phase of jurisprudence reflected a strong commitment to the maxim "*Ubi jus ibi remedium*" - where there is a right, there must be a remedy - underscoring the judiciary's role as a protector of human dignity.

During this period, the courts also exhibited openness to international legal principles, particularly the doctrine of non-refoulement. By reading such principles into Article 21, the judiciary effectively bridged the gap between domestic constitutional law and international humanitarian norms. This approach indicated a broader vision of constitutionalism, one that transcended rigid territorial boundaries and embraced universal human rights.

However, as refugee issues became increasingly entangled with concerns of national security, illegal migration, and political sensitivity, the judiciary's approach began to shift toward a more balanced and cautious stance. In this transitional phase, courts continued to acknowledge the importance of fundamental rights but simultaneously recognized the executive's authority in matters of immigration and foreign policy. Judicial reasoning during this period often reflected an attempt to strike a middle ground, ensuring procedural fairness while avoiding direct confrontation with executive policy decisions.<sup>19</sup>

The most recent phase of jurisprudence, particularly in cases involving Rohingya refugees, reveals a clear movement toward judicial restraint and deference. In *Mohammad Salimullah v. Union of India*, the Supreme Court declined to halt deportation proceedings, emphasizing that the right not to be deported is not a fundamental right. This decision marked a departure from earlier activist tendencies and signaled a greater willingness to prioritize state interests over individual protections. The Court's reasoning highlighted the importance of national security and the executive's prerogative in regulating the presence of foreign nationals.

This oscillation can be attributed to several underlying factors. First, the absence of a comprehensive refugee law has left courts without clear legislative guidance, compelling them to rely on constitutional interpretation and judicial discretion. This inevitably leads to variability in outcomes, as different benches may adopt different interpretive approaches based on the facts and context of each case.

Second, the judiciary operates within a constitutional framework that mandates separation of powers. While courts are tasked with protecting fundamental rights, they must also respect the executive's domain in matters of policy, particularly those involving international relations and national security. This institutional limitation often results in a cautious approach, especially

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<sup>19</sup> Chatterjee, I., & Sudha, P. S. (2026). Migration and Asylum in India: Legal Frameworks and Case Studies on the Rohingyas. *Janus*, 17(1).

in politically sensitive cases.

Third, the changing geopolitical and domestic context has influenced judicial attitudes. Earlier refugee groups, such as Tibetans and Sri Lankan Tamils, were often perceived as politically neutral or aligned with India's strategic interests. In contrast, contemporary refugee issues, particularly those involving the Rohingya, are viewed through a more complex lens involving security concerns and regional politics. This shift in perception has inevitably impacted judicial responses.

At a theoretical level, this oscillation reflects the tension between two competing judicial philosophies: activism, which prioritizes rights and moral considerations, and deference, which emphasizes institutional limits and respect for executive authority. The maxim "Fiat justitia ruat caelum" symbolizes the former, while "Salus republicae suprema lex" embodies the latter. Indian refugee jurisprudence exists at the intersection of these two principles, with courts navigating a delicate balance between them.

The consequence of this oscillatory approach is a lack of predictability and coherence in refugee protection. While some decisions have significantly advanced the cause of human rights, others have curtailed protections, creating uncertainty for refugees and policymakers alike. This inconsistency not only affects the lives of refugees but also raises broader questions about the reliability of constitutional safeguards in the absence of legislative support.

The Indian judiciary's fluctuating approach to refugee protection highlights both its strengths and its limitations. While it has demonstrated the capacity to act as a powerful instrument of justice, its reliance on case-specific adjudication and its deference in sensitive matters underscore the need for a more structured and consistent legal framework. Until such a framework is established, refugee jurisprudence in India will likely continue to oscillate between compassion and caution, reflecting the complex realities it seeks to address.

## **6. Limitations of Judicial Approach**

While the Indian judiciary has undeniably played a significant role in advancing refugee protection through constitutional interpretation, its approach is marked by several structural and functional limitations. These limitations stem primarily from the absence of a dedicated

legislative framework, institutional constraints, and the inherent boundaries of judicial power. As a result, the protection afforded to refugees in India remains fragmented, inconsistent, and contingent, rather than systematic and rights-based.<sup>20</sup>

One of the most fundamental limitations is the absence of a comprehensive refugee law. Unlike many countries that have codified refugee rights and procedures, India relies on general laws such as the Foreigners Act, 1946, which do not distinguish between refugees and other categories of migrants. In this legal vacuum, the judiciary is compelled to fill the gaps through interpretation of constitutional provisions. However, judicial decisions are inherently reactive rather than proactive; they address specific disputes brought before the courts but do not establish a uniform, forward-looking policy framework. Consequently, refugee protection in India operates on an ad hoc basis, dependent on the facts of individual cases and the interpretive inclinations of particular benches.

This leads to a second major limitation—inconsistency in judicial outcomes. While some decisions have robustly upheld the rights of refugees, others have adopted a more restrictive approach, particularly in cases involving national security concerns. The lack of binding precedent specifically tailored to refugee law exacerbates this inconsistency. As a result, similarly situated groups may receive markedly different levels of protection, undermining the principle of equality embodied in Article 14.<sup>21</sup> This inconsistency also creates uncertainty for refugees, who are left without a clear understanding of their legal status or rights within the country.

A third limitation arises from the doctrine of separation of powers, which circumscribes the judiciary's role in matters of policy. Issues relating to immigration, border control, and foreign relations fall primarily within the executive's domain. Courts have repeatedly acknowledged that they lack the institutional competence to evaluate complex considerations of national security and diplomatic relations. This often results in judicial deference to executive decisions, particularly in cases involving deportation or detention of refugees.<sup>22</sup> While such deference may be constitutionally appropriate, it limits the judiciary's ability to provide substantive

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<sup>20</sup> Zarbiyev, F. (2012). Judicial activism in international law—a conceptual framework for analysis. *Journal of International Dispute Settlement*, 3(2), 247-278.

<sup>21</sup> Cover, R. M. (1981). The origins of judicial activism in the protection of minorities. *Yale LJ*, 91, 1287.

<sup>22</sup> Chopra, S. (2015). National security laws in India: The unraveling of constitutional constraints. *Or. Rev. Int'l L.*, 17, 1.

protection, reducing its role to ensuring procedural compliance rather than safeguarding broader humanitarian principles.

Closely linked to this is the problem of executive supremacy in refugee matters. In the absence of statutory safeguards, the executive enjoys wide discretionary powers to regulate the entry, stay, and expulsion of foreign nationals. Judicial review of such decisions is often limited in scope, focusing on whether due process has been followed rather than questioning the underlying rationale. This creates a situation where refugee protection is heavily influenced by political considerations and administrative priorities, rather than by consistent legal standards.

Another significant limitation is the phenomenon of selective humanitarianism. The level of protection extended to refugees in India has varied depending on their origin, political context, and perceived impact on national interests. For instance, groups such as Tibetans and Sri Lankan Tamils have historically received more favorable treatment, including access to residence permits and social support. In contrast, other groups, particularly the Rohingyas, have faced a more hostile legal and political environment. This differential treatment highlights the absence of a principled and uniform approach, raising concerns about arbitrariness and discrimination.<sup>23</sup>

Furthermore, the judiciary's reliance on constitutional interpretation alone has inherent constraints. While Articles 14 and 21 provide a broad foundation for protection, they do not address many practical aspects of refugee management, such as determination of refugee status, rights to employment and education, or procedures for asylum. Courts are not equipped to design and implement comprehensive policy frameworks, and their interventions are often limited to addressing immediate violations rather than establishing long-term solutions.

The maxim "*Lex non cogit ad impossibilia*", the law does not compel the impossible, aptly captures this limitation. The judiciary cannot be expected to single-handedly create a complete refugee protection regime in the absence of legislative support. Its role, though crucial, is inherently supplementary and cannot substitute for a structured legal framework enacted by the legislature.

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<sup>23</sup> Mate, M. (2017). Judicial supremacy in comparative constitutional law. *Tul. L. Rev.*, 92, 393.

Additionally, access to justice remains a challenge for many refugees. Legal proceedings can be time-consuming, expensive, and complex, making it difficult for marginalized individuals to effectively assert their rights. Although Public Interest Litigation has mitigated this to some extent, it cannot fully address the systemic barriers faced by refugee communities.

While the judiciary has acted as an important safeguard against arbitrary state action, its approach to refugee protection is constrained by structural, institutional, and practical limitations. The reliance on judicial intervention alone has resulted in a system that is uneven and uncertain. To move beyond these limitations, there is a pressing need for a comprehensive and coherent legislative framework that can provide clarity, consistency, and durability to refugee protection in India.

## 7. Need for Judicial Consistency and Legislative Intervention

The evolving judicial discourse on refugee protection in India reveals both the strength and fragility of a system that relies predominantly on constitutional interpretation in the absence of statutory guidance. While the judiciary has, at critical junctures, stepped in to safeguard refugee rights, its approach has been marked by inconsistency and contextual variability. This underscores an urgent need not only for greater judicial coherence but also for comprehensive legislative intervention to establish a stable and predictable framework for refugee protection in India.<sup>24</sup>

At the outset, the importance of judicial consistency cannot be overstated. The fluctuating nature of judicial decisions, ranging from proactive protection in cases like *National Human Rights Commission v. State of Arunachal Pradesh* to restraint in *Mohammad Salimullah v. Union of India* creates uncertainty regarding the scope and enforceability of refugee rights. Such inconsistency undermines the rule of law, as similarly situated individuals may receive divergent treatment based on shifting judicial perspectives or contextual factors. The maxim “*Stare decisis et non quieta movere*”, to stand by decided matters and not disturb settled points highlights the need for stability and predictability in legal reasoning. A more consistent judicial approach would ensure that constitutional protections are not rendered contingent upon the subjective inclinations of different benches.

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<sup>24</sup> Benvenisti, E. (2008). Reclaiming democracy: the strategic uses of foreign and international law by national courts. *American Journal of International Law*, 102(2), 241-274.

Judicial consistency also requires the development of clear doctrinal principles governing refugee protection. Courts must articulate a more definitive stance on key issues such as the applicability of the principle of non-refoulement, the extent of protection under Article 21 in deportation cases, and the balance between individual rights and national security. By establishing coherent standards, the judiciary can provide guidance not only to lower courts but also to administrative authorities, thereby reducing arbitrariness in decision-making.

However, judicial consistency alone is insufficient to address the structural gaps in India's refugee regime. The absence of a dedicated legislative framework remains the most significant impediment to effective and uniform protection. Unlike constitutional adjudication, which is inherently reactive and case-specific, legislation can provide a comprehensive and prospective framework addressing the full spectrum of refugee-related issues. This includes procedures for refugee status determination, rights and entitlements of refugees, conditions for detention and deportation, and mechanisms for integration or repatriation.<sup>25</sup>

A well-crafted refugee law would serve multiple purposes. First, it would clearly distinguish between refugees and other categories of migrants, thereby preventing the conflation of humanitarian protection with issues of illegal immigration. This distinction is crucial for ensuring that individuals fleeing persecution are not subjected to the same legal regime as those entering for economic or other reasons. Second, it would codify the principle of non-refoulement, providing a statutory guarantee against forced return to situations of danger. This would align India's domestic law with widely accepted international norms, even in the absence of formal treaty obligations.

Third, legislation would enable the establishment of institutional mechanisms, such as specialized tribunals or administrative bodies, to handle refugee claims in a systematic and efficient manner.<sup>26</sup> Currently, the absence of such mechanisms places an undue burden on the judiciary, which is not designed to function as a primary decision-maker in refugee matters. By creating dedicated institutions, the State can ensure timely and fair adjudication while allowing courts to focus on their core function of judicial review.

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<sup>25</sup> Weinshall, K. (2024). Reconceptualizing judicial activism: intervention versus involvement in the Israeli supreme court. *Journal of Law & Empirical Analysis*, 1(2), 343-357.

<sup>26</sup> Punia, A. A COMPARATIVE ANALYSIS OF INDIA'S LEGAL FRAMEWORK FOR REFUGEES VERSUS INTERNATIONAL CONVENTIONS.

The need for legislative intervention is further reinforced by the constitutional directive under Article 51(c), which encourages the State to respect international law and treaty obligations. Although India is not a party to the 1951 Refugee Convention, many of its principles, including non-refoulement, have attained the status of customary international law. Incorporating these principles into domestic legislation would demonstrate India's commitment to global humanitarian standards while preserving its sovereign discretion.

At a normative level, the call for reform is guided by the maxim "*Fiat justitia ruat caelum*" let justice be done though the heavens fall. Justice, in this context, demands a system that is not only compassionate but also consistent, transparent, and accountable. A legal framework grounded in these values would ensure that refugee protection is not left to the uncertainties of judicial discretion or the fluctuations of political policy.

Moreover, legislative clarity would also benefit the State by providing a structured basis for balancing humanitarian obligations with national security concerns. Clear guidelines and procedures would enable authorities to address security risks without resorting to blanket or arbitrary measures, thereby achieving a more nuanced and effective approach.

The future of refugee protection in India depends on a dual process: the development of consistent judicial principles and the enactment of a comprehensive refugee law. While the judiciary has laid an important foundation through its interpretive efforts, it cannot substitute for legislative action. Only through a coordinated and coherent framework can India ensure that its constitutional values of equality, dignity, and justice are meaningfully extended to those who seek refuge within its borders.

## **8. Conclusion: Between Constitutional Morality and State Realpolitik**

"*Fiat justitia ruat caelum*" - let justice be done though the heavens fall. This enduring maxim captures the moral aspirations of any constitutional democracy: that justice must prevail irrespective of political convenience or institutional hesitation. Yet, in the context of refugee protection in India, the application of this ideal remains complex and contested. The Indian judiciary, situated at the intersection of humanitarian values and state imperatives, has crafted a refugee jurisprudence that is both progressive in principle and cautious in practice.

At its core, the judicial approach to refugee protection in India reflects an attempt to reconcile constitutional morality with state realpolitik. Constitutional morality demands that the rights to life, dignity, and equality, which are enshrined in Articles 14 and 21, be extended to all persons within the territory of India, irrespective of citizenship. This vision aligns with the broader ethos of human rights, where the protection of the vulnerable is seen as a fundamental obligation of the State. Through landmark decisions such as *National Human Rights Commission v. State of Arunachal Pradesh*, the judiciary has affirmed this inclusive understanding, recognizing that refugees, despite their non-citizen status, are entitled to protection against arbitrary and inhumane treatment.

However, the judiciary does not operate in a vacuum. It functions within a constitutional structure that assigns significant authority to the executive in matters of immigration, foreign policy, and national security. These domains are inherently sensitive, often involving considerations that extend beyond legal reasoning into the realms of diplomacy, geopolitics, and internal stability. As a result, the courts have increasingly exhibited a degree of restraint, particularly in cases involving politically contentious refugee groups. The decision in *Mohammad Salimullah v. Union of India* exemplifies this shift, where the Court prioritized procedural compliance and executive discretion over a broader assertion of refugee rights.

This duality, between judicial activism and judicial restraint, has produced a jurisprudence that is neither entirely rights-oriented nor wholly state-centric. Instead, it is characterized by ambivalence, reflecting the judiciary's ongoing struggle to balance competing imperatives. On one hand, the courts have expanded the scope of fundamental rights to include non-citizens, thereby providing a constitutional foundation for refugee protection. On the other hand, they have refrained from establishing absolute safeguards, particularly in the context of deportation and national security. This selective application of constitutional principles reveals the inherent limitations of relying solely on judicial intervention in the absence of a clear legislative framework.

The maxim "*Salus republicae suprema lex*", the safety of the State is the supreme law, often operates as a counterbalance to humanitarian considerations. While this principle is essential for preserving sovereignty and public order, its invocation must be carefully calibrated to ensure that it does not eclipse the fundamental rights of individuals. The challenge lies in achieving a proportionate balance, where security concerns are addressed without undermining

the core values of justice and human dignity.

The Indian experience thus raises broader questions about the nature of constitutional governance. Can a judiciary, however proactive, sustain a comprehensive regime of refugee protection in the absence of legislative support? Does the reliance on case-by-case adjudication enhance flexibility, or does it lead to unpredictability and inconsistency? These questions point to the need for a more structured and coherent approach, where judicial principles are complemented by legislative clarity.

Ultimately, the judiciary's role in refugee protection can be seen as that of a constitutional sentinel, intervening where necessary to prevent violations of fundamental rights, but not replacing the functions of the legislature and executive. Its contributions have been significant in shaping a rights-based discourse, yet they remain inherently limited by institutional constraints and contextual considerations.

The true measure of a constitutional democracy lies in its treatment of those who are most vulnerable, those who, in many ways, exist outside the traditional boundaries of political community. Refugees, by definition, occupy this precarious space. They are individuals without the protection of their home State, seeking safety in a foreign land. In such circumstances, the promise of the Constitution must extend beyond formal citizenship to embrace the universal values of justice and humanity.

In conclusion, the judicial approach to refugee protection in India is best understood as an evolving and unfinished project. It reflects both the potential and the limitations of constitutional interpretation as a tool for social justice. While the judiciary has laid a strong foundation, the realization of a truly just and effective refugee protection regime will ultimately depend on legislative action, institutional reform, and a sustained commitment to humanitarian principles. Until then, the courts will continue to navigate the delicate balance between compassion and caution, striving to ensure that justice, even if not absolute, remains attainable.