CHAPTER-V
(A) LEGISLATIVE ENACTMENTS, POLICIES & PROGRAMMES FOR REFUGEES IN INDIA

Refugees Policy of the Indian Government:

Various countries protect refugees in their territory by enacting refugee legislation based on internationally recognized principles. They often have a procedure for identifying refugees and addressing subsequent protection issues, such as durable solutions. Having enacted legislation, population movements across national boundaries are better controlled and concerns of national security are better addressed. Although the 1951 Convention provides a definition of refugees (i.e. the Criteria used to determine the refugee status), each contracting state can establish the procedure that it considers most appropriate with regard to its particular constitutional and administration structure (UNHCR, 1979: Para 189).

Nevertheless, there are certain minimum standards that the contracting states need to observe while deciding whether or not asylum-seekers should be granted refugee status. The UNHCR’s Executive Committee Conclusion No. 8 suggested the following minimum standards:

- Competent officials who deal with matters pertaining to immigration and border control should have clear instructions for dealing with asylum-seekers. They should respect the principle of non-refoulement and should refer the asylum-seekers to a higher authority with the jurisdiction to determine refugee status.
- Asylum-seekers should receive guidance as to the procedure to be followed.
• Asylum-seekers should be examined by a single Central authority.
• Asylum-seekers should be given the necessary facilities, including the services of a competent interpreter, for submitting their case and be informed of, as also given, the opportunity to contract UNHCR.
• Those whose cases are rejected should be allowed a reasonable period of time during which an appeal for a reconsideration of their applications can be made.
• Asylum-seekers should be permitted to remain in the country when their cases are being considered.

The lack of guidelines and procedure in a state can result in the authorities forcibly returning refugees to their country of origin, where they may be persecuted. This is in violation of the internationally recognized principle of non-refoulement. To avoid violating this important norm, it is therefore imperative for a state to have a clear and uniform policy and procedure for the determination of refugee status.

Although India has not signed the 1951 Convention, she has on various occasions extended protection to refugees in her territory. However, consistency in the procedure for determining refugee status is lacking. While India has taken care of large-scale refugee influxes from neighboring countries and recognized them on prima facie basis, others have been treated as ordinary foreigners. This recognition is not based on any law but on ad hoc policies. UNHCR mandate refugees are not considered to be “refugees” under Indian Law. Since the Indian government has no uniform procedure for determining refugee status and providing assistance to refugees, there is no Central Government Body that deals with refugees. Instead, various departments under the Central and State Governments handle the cases of refugees recognized on an ad hoc basis by the Government of India. A review of the
administrative practices suggests that India has gradually evolved a broad policy towards certain groups of refugees. It must be pointed out however that various gaps still exist in the mechanism for dealing with refugee protection. This is because the Indian Government has not enacted a specific national law on refugees or signed any international instrument relating to refugees.

India never had a clear policy as to whom to grant refugee status. When the question of adoption of a Convention and establishment of an agency for the international protection of refugees came for discussion in the Third Committee of the UN General assembly, in 1949, the Indian delegation expressed its views on these issues.\(^1\) Mr. Mujeeb, a member of the delegation, told the Third Committee that instead of establishing a new organization for the protection of refugees, the International Organization for Refugees should be maintained and the Third Committee should address itself to the drafting of the Convention on the legal protection of refugees. Again in the same committee another member of the Indian delegation, Mrs. Kriplani said that the Indian Government did not want to shrink from any of its international responsibilities, and it wished to take part in any humanitarian work under taken by the U.N.

She further said that in spite of its difficulties, India would have voted for the establishment of High Commissioner’s Office if it had been convinced that there was a great need to set up an elaborate international organization whose sole responsibility would be to give to refugees a legal protection. It was believed that at a time when its own refugees were dying of starvation, India felt obliged to vote against all the resolutions submitted, and hoped that its stand would not be misinterpreted.\(^2\) After the Convention was adopted India did not ratify or

\(^1\) Summary Records of the Third Committee meeting 259 (10 Nov. 1949) GAOR,Sixth Session, P. 8143; Mrs. Kriplani, ibid, mtg. 263 (15 Nov. 1949), P. 8144.

\(^2\) Ibid.
accede, and reasons for not doing so are never disclosed except that it was stated in the Parliament by the former External Affairs Minister, Mr. B.R. Bhagat that since the Government had come up with certain basic difficulties, the implication, if India ratifies these Conventions, were under study. In other words, India’s initial stand on treaty regime of the refugee law was declared to be a subject on the question of admission and non-refoulement, however, the Indian attitude is rather bleak. Even though India accepted the principle of non-refoulement as including non-rejection at the frontier under the “Bangkok Principles 1966”, it did not observe that principle in its practice. Ignoring the facts refugees leave their homes suddenly due to threats to their life and liberty, and by the nature of their flight they are unable to get the necessary travel documents from their home states, India deals with the question of admission of refugees and their stay. They are officially accorded refugee status, under legislation which deals with foreigners who voluntarily leave their homes in normal circumstances.

As for the minimum standard of treatment of refugees, India has undertaken an obligation by ratifying the International covenants on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights to accord on equal treatment to all non-citizens with citizen wherever possible. India is presently a member of Executive Committee on the UNHCR and it entails the responsibility to abide by the international standards on the treatment of refugees.

As early as 1953 the then Prime Minister of India, Mr. Jawaharlal Nehru informed Parliament that India would abide by international standards governing asylum by adopting similar, non-binding domestic policies. Since then, the Indian Government has consistently affirmed

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3 India, Lok Sabha Debates, Vol. XVII, 7 May 1986, Col. 32.
4 According to Article 51 of the non-binding Directive Principles of State Policy, India endeavors to “(a) promote international peace and security; (b) maintain just and honorable relations between nations; (c) foster respect for international law and treaty obligations.....and (d) encourage settlement of international disputes by arbitration.
the right of the state to grant asylum on humanitarian grounds. Based on this policy, India has granted asylum and refugee status to Tibetans and Tamils from Sri Lanka. The 1971 refugees from Bangladesh were officially called “evacuees” but were treated as refugees requiring temporary asylum. No other community or ground has been officially recognized as ‘refugees”. India claims to observe the principles of non-refoulement and thus never to return or expel any refugee whose life and liberty are under threat in his/her country of origin or residence.5

Refuting this claim, Indian human rights groups do point to specific cases of refoulement, where clear evidence and refugee testimony prove that forcible repatriation has taken place. A closer examination of Indians’ refugee policy reveals a number of intricate problems.

**Laws Relating to Refugees in India:**

India does not have specific legislation that is applicable to all the refugees in the country. Due to the lack of such a statute, the judicial system is constrained, when dealing with refugees, to invoke laws that are applicable to foreigners in general, such as the Foreigners Act, 1946. The exception to this rule is the legislation that has been passed regarding specific groups of refugees, like the Tibetans. Laws have also been enacted relating to large-scale refugee movements during the partition of India in 1947 and the partition of Pakistan in 1971. These acts regulate the movement of refugees and address issues relating to their rehabilitation and the award of compensation. The concept of “Refugee Law” in the Indian judicial system has evolved over a period of time. This chapter takes a brief look at the refugee-specific legislation

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5 Non-refoulement is an important principle to international refugee law, which act as a complete prohibition against the forcible return of people to a place where they will be subject to grave human rights violations or where their life or personal security will be seriously endangered... The principle of non-refoulement applies equally to refugees at the border of a state and to those already admitted, and it remains in force until the adverse conditions which prompted people to flee in the first place are alleviated.
that has been passed since India’s Independence. It also examines the Constitutional rights that refugees enjoy and important national legislation which regulates the stay of foreigners and refugees in India.

After the Second World War and shared European experience of massive displacement, the Refugee Convention was adopted with restricted geographical and temporal conditions to apply to Post-War Europe. In 1967, in effort to give the Convention Universal application, a Protocol relating to the Status of Refugees [“1967 Protocol”] that removed the restrictions on the Convention was added. Together, these two key legal documents provide the basic framework for refugee protection across the world. As of February 2006, 146 countries were States Parties to either the Convention or its Protocol or both.

However, India has repeatedly declined to join either the Refugee Convention or its 1967 Protocol. In addition, India has resisted demand for a national legislation to govern the protection of refugees. In doing so, India has met many refugee influxes into its territory through ad hoc system of executive action which is determined by the government’s policy towards the country of origin. The relative success that India has had led to an institutional complacency towards legal rights-enabling obligation, to refugees. There has also been a hardening of attitudes about foreigners in recent years in light of heightened security concerns. This has resulted in genuine refugees paying an unfortunate price in a country that otherwise has an impressive history of protecting refugees.

**Legislative Framework:**

Though the post-independence period did not come up with specific legislations regarding refugees, there existed different legislations specifically with regard to protection of rights of refugees in the pre-independence era. Some of them include the Patiala Refugees (Registration of Land Claims) Act of 1948, the UP Land Acquisition (Rehabilitation of Refugees) Act of 1948, the East Punjab Refugees
Rehabilitation (Building and Building sites) Act of 1948, and the East Punjab Refugee Rehabilitation (House Building Loans) Act of 1948 and the East Panjab Refugee Rehabilitation (Loans and Grants) Act of 1948. The most important aspect of these legislations is the fact that these legislations defined the term refugees much before it appeared in the 1951 Convention Relating to the status of Refugees. The term ‘refugee’ in those legislations meant a land owner in the territories now comprised in the Provinces of West Punjab, North West Frontier Province, Sindh or Baluchistan or in any State adjacent to any of the aforesaid Provinces and acceding to Pakistan and who has since the 1st Day of March, 1947, abandoned or has been made to abandon his land in the said territories on account of civil disturbances, or the fear of such disturbances, or the partition of the country. Most of the above mentioned pre-independence era legislations dealt with persons who were displaced due to civil disturbances or partition. These legislations can be said to be in tune with the 1951 Convention as the provisions contained a specific time frame, a specific location and the fact that the person is not able to return to his country of nationality.

With regard to post independence legislation, there exists no legislation specific to deal with refugees. The legislations that exist in India to deal with foreigners are the Registration of Foreigners Act 1939, the Foreigners Act of 1946 and the Foreigners Orders of 1948. These legislations are not adequate enough to deal with the issues in relation to refugee protection keeping in mind the obligations under of 1951 Convention. The Registration of Foreign Act, 1939 is mainly concerned with the registration of foreigner’s entry, when he or she is present in India and departing from India. The Passport (Entry into India) Act, 1920 empowers the Government to impose certain conditions in regard

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7 Ibid.
to possession of a passport for entry into India. Another important legislation dealing with foreigners, namely the Passport Act of 1967 is concerned with the issue of passports and travel documents to regulate the departure of the Indian citizens from India. The other existing laws are the Extradition Act of 1962, and as stated above, the Foreigners Order of 1948 which deals with the power to grant or refuse permission to enter and depart from India and the citizenship Act of 1954. The Foreigners Act of 1946 is an archaic legislation enacted to respond to the needs of the Second World War and its continuation even now is only because of the government’s desire to retain absolute powers in regard to matters concerning foreigners. 8 The Foreigner’s Act of 1946 is used to determine issues with respect to refugees in India currently. The Basic problem with the 1946 legislation is the fact that the term “refugee” can not be found anywhere in the statute and instead refugees are covered under the term ‘foreigners’. 9 In short, the Indian legal frame work places refugees in line with immigrants and tourists and ultimately what happens is that the refugees are deprived of their rights mandated by the 1951 refugee Convention. It may be true that the 1951 Refugee Convention seeks to have refugees in an even footing with other residents and hence if refugees are considered in the same way like immigrants and tourist, it is possible that some of their rights are met. It is often forgotten that the refugees flee from one country to the other because of imminent threats and dangers to their life and liberty and are hence unable to get the required travel documents from their country of origin. But the practice of dealing with refugees that has been followed by India shows that the question of their admission into the territory and giving permission for their continued stay within the territory are dealt

9 Nair, Arjun, National Refugee law for India: Benefits and Road blocks; www.ipcs.org last visited Nov. 11, 2013.
with only under the legislations that deal with foreigners who, unlike refugees, possess the travel documents as well as other documents and they are generally persons who voluntarily leave their home and they belong to entirely different category when compared to the refugees. The basic foundation is lost when refugees are dealt under legislations meant for an entirely different set of categories and there is no chance that such legislations take into account the obligations stated under the 1951 Refugee Convention. The Indian citizenship Act, 1955 though amended in 2003 is similar to the outdated Foreigners Act of 1946 in relation to refugee protection as it does not make any distinction between refugees and other immigrants or foreigners. The Illegal Migrants (Determination of Tribunals) Act of 1983 which extends to the whole of India, though it is only in force in the State of Assam, empowers the Government of India to constitute Tribunals for finding out illegal migrants for the purpose of expelling them.

In the absence of a specialized statutory framework, India relies on the Foreigners Act, 1946 to govern the entry, stay and exit of foreigners in India. However, the Foreigners Act is an archaic legislation that was enacted by a colonial government in response to the need of the Second World War.\textsuperscript{10} Its continued application in Independent India for more than sixty years after the end of the war can only be seen as an indication of the government’s desire to retrain almost absolute powers to deal with foreigners as “a person who is not a citizen of India”, thus covering all refugees within its ambit as well. Without a specialized governance regime for refugees they are usually treated at par with Foreigners and illegal migrants, without any special protection being accorded to them. However, it is necessary to draw a distinction between foreigners as a general class and refugees as a special subset of that class.

\textsuperscript{10} See the Statement of objects and Reasons of the Foreigners Act 1946
Section 3 of the Foreigners Act vests the Central Government with the power to issue orders to control foreigners in India. There are a number of such orders in force that restrict the movement, activity and residence of foreigners, and require their proof of identity and regular appearance before the police.\textsuperscript{11} In addition, Section 5 of this Act prevents foreigners from changing their name while in India. Section 6 requires masters of ships and pilots of aircraft to maintain records of travelling foreigners, Section 7 obliges hotel-keepers to maintain records of the stay of foreigners, Section 9 places the burden of proving that a person is not a foreigner in that person, Section 12 provides for the delegation of these powers, and, Section 14, 14A and 14B penalize foreigners and abettors found in contravention of the Act or any Order made there under.

The Foreigners Act gives the executive wide powers to remove foreigners from India that have generally been exercised free from judicial review. This power is given to the Central Government by Section 3(2) (c) of the Foreigners Act 1946.\textsuperscript{12} This is in addition to the power to refugee entry for non-fulfillment of entry condition that invites instant deportation. The unrestricted power of the executive to remove foreigners was first confirmed by the Supreme Court in 1955,\textsuperscript{13} where is held that:

“The Foreigners Act confers the power to expel foreigners from India. It vests the Central Government with absolute and unfettered discretion and, as there in no provision fettering this discretion in the constitution, an unrestricted right to expel remains”.

The untrammeled right to the executive to remove foreigners from


\textsuperscript{12} Section 3(2) (c) of the Foreigners Acts reads, “In particular and without prejudice to the generally of the foregoing power, orders made under this section may provide that the foreigners....shall not remain in India, or in any prescribed area therein.

\textsuperscript{13} Hans Muller of Nuremberg AIR 1955SC367 at pr. 36

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India has been upheld by Supreme Court in a number of subsequent decisions.\textsuperscript{14} Furthermore, while exercising this vast executive discretion, any foreigner may be deported without the executive being burdened to give a reason for the deportation. Thus, there is no need for the executive to comply with any form of extended due process or for giving a hearing to the persons to be deported.\textsuperscript{15}

The customary principle of non-refoulement which prohibits expulsion of refugees is not followed at all times in the Indian context.\textsuperscript{16} The Foreigners Act 1946 permits refoulement mainly through deportation and hence can be said to be in tune with the international customary law. In addition, the above mentioned legislations grant powers to the government to restrict the movement of foreigners within its territory to limit employment opportunities and to compel medical examination that are banned by the Refugee Convention of 1951 and furthermore it is highly unlikely that equality of treatment to all refugees is followed. \textsuperscript{17}

\textbf{Constitutional Law:}

The Constitution of India provides certain provisions under its VII Schedule under Entry 17\textsuperscript{18} and 19 \textsuperscript{19} of List I and Entry 27\textsuperscript{20} of List III in the field of protection of refugees. The VII Schedule of the Constitution primarily deals with the division of law making power between the

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\item \textsuperscript{14} See, Louis De Raedt (1991) 3 SCC 554 at pr. 13 and Sarbananda Sonowal (2005) 5 SCC 665 at prs. 74-79.
\item \textsuperscript{15} See generally, Hans Muller AIR 1955 SC 367 at Para 37; Abdul Sattar Haji Ibrahim Patel AIR 1965 SC 870 at pr. 10; Saranbnanda Sonowal (2005) 5 SCC 665 at prs. 49-52.
\item \textsuperscript{16} The case laws such as Louis de Raedt V. Union of India,(1991) 3 5 CC 554, case of Hans Muller of Nuremberg, AIR 1955 SC 367 and Sarabnanda Sonowal, (2005) 5 SCE 665 are examples for this position.
\item \textsuperscript{17} Bhairav Acharya, The Law, Policy and Practice of Refugee Protection in India, \url{http://y4e.in/pdf/wc/Refugees and displacement/Law, Policy and Practice of Refugee Protection, pdf}, last visited November 3, 2013.
\item \textsuperscript{18} Entry 17 of List I, Schedule VII, Constitution of India: Citizenship, Naturalization and aliens.
\item \textsuperscript{19} Entry 27 of List III, Schedule VII Constitution of India: Admission into, and immigration and expulsion from India, Passport and Visas.
\item \textsuperscript{20} Relief and Rehabilitation of persons displaced from their original place of residence by reason of the setting up of the Dominions of India and Pakistan.
\end{itemize}
Centre and the State Governments respectively.

The Indian Constitution does not deal with refugees explicitly in any of its provisions. The power and procedure relating to treaty making can be seen under Article 51 (c) and 253 of the Constitution. The enactment of a domestic law in relation to an international convention is empowered under this section. The main constitutional protections available to non-citizens of India which includes refugees as well are the protection guaranteed under Article 14 of the Constitution of India which provides for equality before law and equal protection of the laws and Article 21 of the Constitution of India which provides for protection of life and personal liberty. These are the two main constitutional provisions which can be used to safeguard the rights of refugees. The refugees are also entitled to Constitutional protection under Article 20 which deals with freedom from ex-post facto law, protection against convicting a person more than once for the same offence and protection against self-incrimination. Article 22 which provides for the rights in cases of arrest and detention, Articles, 25,26, 27 and 28 mainly dealing with religious freedom and right to move to the Supreme Court for the enforcement of fundamental rights under Article 32 of the Constitution of India.

The exact picture of constitutional provisions such as Article 21 would be clear only if there arise more cases laws on the point. At the moment, it can be seen that various authors have come to different conclusions with regard to the protection of the principle of non-refoulement under Article 21 of the Constitution of India. B.S.Chimni argues that Article 21 can be interpreted to encompass the principle of non-refoulement. According to Omar Choudhary though the scope of Article 21 of the Indian Constitution has been widened by the judiciary,
it fails to guarantee non-refoulement to each and every refugee primarily because Article 21 of the Constitution of India provides less protection when it is applied to aliens as different from citizen of India. The non-applicability of Article 21 of the Constitution to non-state actors also creates an apprehension in regard to cases of torture caused by private individuals towards refugees in India.

The observance of ‘procedure established by law’ to be ‘just, fair and reasonable’ as mandated by the Supreme Court in Maneka Gandhi v. Union of India.\textsuperscript{23} Over ruling the decision of same Court in the case of A. K. Gopalan V. State of Madras\textsuperscript{24} can be used to check the validity of the executive action expelling foreigners under the Foreigners Act 1946. In a way, as refugees are dealt under the very same legislation, the above mentioned test of ‘just’ fair and reasonable’ procedure can be applied to check the reasonableness of the procedure employed in cases of refugee status determination.

Apart from Articles 14, 25 and 21 of the Constitution of India, Articles 32 and 226 of Constitution of India also play a major role in the protection of refugees. The right to approach the Court freely is assured under Article 32 and 226 of the Constitution of India especially when the right of the refugees granted under Article 14, 21 and 25, which deals with right to equality, right to life, to personal liberty and right to practice one’s own religion respectively are violated. It should be noted that Article 16 of the 1951 Refugee Convention\textsuperscript{25} provides for free access to the Courts by the refugee and in this regard it can be stated that the Indian domestic law as well as the Constitution takes care of this

\textsuperscript{23} AIR 1978 SC 597
\textsuperscript{24} AIR 1950 SC 27
\textsuperscript{25} Article 16- Access to courts: 1.A. refugee shall have free access to the courts of law on the territory of all contracting States 2. A refugee shall enjoy in the contracting States in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from cautio judicatum solvi 3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.
right explicitly. Though there are no express provisions with regard to the right to social security, the refugees in India also enjoy security in the same way as the citizen of India basically under Part-IV of the Constitution of India dealing with Directive Principles of State Policy.

It is true that India is not a Party to the 1951 Convention Relating to the Status of Refugees as well as 1967 Protocol. The main reason for not becoming a Party of 1951 Convention and 1967 Protocol is that India claims it to be a Eurocentric Convention. Another version is that India is not ready to bear the financial responsibilities once they accept the obligations of the 1951 Convention. One other probable reason for not being a Party to the 1951 Convention is the fact that a broader definition of refugees by including ‘international refugees’ was not accepted by the international community. Still another reason may be that India amongst other South Asian countries favors ‘bilateral approach’ rather than ‘ Unilateral approach’ and by internationalizing any issue including refugee issues, India and other countries feel that they are allowing more international criticism that may have the effect of diluting their national sovereignty.

Clearly, while India is not a signatory to either the 1951 Convention on the Status of Refugees or the 1967 Protocol, the principle of international law relating to refugees must be taken as incorporated directly into Indian Constitutional law via Article 21. This is no particularly in the view of the fact that India has acceded to the 1966 International Covenant on civil and Political Rights, the 1989 Convention on the Rights of the Child, and the 1979 Convention on the Elimination of All Forms of Discrimination against women. None of the

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26 Chimini, B.S. The Legal conditions of Refugees in India,(1994), 7 Journal of Refugees Studies P.394.
28 Vijay Kumar, Veerabhadran, A Critical analysis of Refugees Protection in South Asia, 19 Refugees 6 (2001)
29 Ibid.
provisions of the Foreigners Act, 1946, the Registration of Foreigners Act 1939, the Passport (Entry into India) Act, 1920 or the Passport Act, 1967, deals in any manner with refugee law.

There is, therefore, no current domestic law in conflict with international conventions, treaties and resolutions relating to refugees. Section 3 (1) of the Foreigners Act does not grant an absolute right to the Indian Government to expel foreigners from Indian Territory. It is not the right but the exercise of this right that is in question. The right has to be exercised in a reasonable manner. In the context of refugees, reasonableness is to be determined by international refugee law. That is how the various courts have granted relief to refugees in certain circumstances. It is in this spirit that the Guwahati High Court in the case of Boghy vs. Union of India (Civil Rule No. 1847 of 1989) ordered the temporary release of a Burmese so that the petitioner could apply for refugee status to the UNHCR office in Delhi.

Indian courts have thus achieved via case law what successive governments were unable or unwilling to do. Today, international refugee law stands somewhat integrated into Indian law via Article 21 of the Constitution, irrespective of the government’s decision whether or not to accede to the 1951 Convention and the 1967 Protocol.

Provisions of the Indian Constitution that have a bearing on refugees are found in Article 5 to 11, 14, 20, 21, 22, 25 (1), 27, 28(3), 51(c) and 253, List I entries 14, 18 and 19, and List III, entry 27. These provisions deal with citizenship, Naturalization, aliens (excluding enemy aliens); extradition, displaced persons, fundamental rights of all people within the territory of India (including refugees), the rights of persons in criminal proceedings, and the power of Parliament to recognize international treaties. Different levels of assistance and facilities- e.g., pertaining to educational opportunities- can conditions, employment opportunities, voluntary repatriation- have been extended to special
groups of refugees like Tibetans, Chakmas, Sri Lankans and Afghans. The right to life under Article 21 has been given an expansive meaning by the courts\(^30\) to cover the due process of law, i.e. the right not merely to an animal existence but a “right to live with human dignity.” This right as applied to refugees in detention includes the right to the bare necessities of life, including medical aid and food.

These provisions of the Indian Constitution indicate that the acknowledged rules of Natural Justice in the common law systems applicable to all civilized societies also apply in India, even to refugees.

**Reasons for not ratifying the 1951 Convention:**

India’s Policy towards the UNHCR and joining the refugee convention of 1951 has been ambivalent due to a succession of historical reasons. At first, it found the Convention too Eurocentric. Later, it saw it as part of the cold war between Russia and America and others, since refugee concerns were over focused on those who had ‘fled’ from the communist regimes. Since 1994, India has been a member of Executive Committee of the UNHCR. However, in the absence of specific legal mechanism to protect refugees, India’s Policies remain inchoate- as half empty as they are half full.

There are range of discomfitures, discontents and concerns that militate against India adopting a comprehensive refugee law and policy, which include the following (Dhawan 2004:15-14)

I. India’s confidence in its “success” in tackling enormous refugee crisis, without subscribing to or enacting a specific legally binding international framework towards refugee, reinforces its belief that such a framework is unnecessary.

\(^{30}\) See Luis de Readt V. Union of India 1991 (3) SCC 554, Khudiram V. Union of India, 1994 Supp (1) SCC 614.
II. India’s real or imagined discomfiture about security suggests that India should hold on to a tough regime towards foreigners generally, so that their operational day-to-day options are not foreclosed.

III. India feels that its positive attitude of care and concern in the treatment, absorption and integration of foreigners obviates the need for a defining legal regime in a society otherwise kindly disposed to those who cross into its borders.

IV. India also feels that its track record in relation to, as well as kindly disposition towards, foreigners should not result in in-equitability increasing its global responsibility towards refugees. This could further result in a global refugee policy being based more on geographical contiguity than on general burden-sharing. This is, and could be, seen as perpetuating an invidious responsibility based on shielding ‘developed’ nations from assuming their share of global responsibility, and encouraging inchoate but not intangible discrimination on grounds of race, colour, religion or regional contiguity.

V. India’s alleged record towards foreigners has also created angst, anguish and protests against undeserved priority given to ‘local integration’ solutions that are considered by refugees to be imperfect, incomplete and inadequate, not just for the primary refugees but especially for women and children.

VI. In addition, there is an alleged covert intemperance in India’s immigration policy towards some classes of foreigners, resulting in the targeting of certain communities of particular faith.
The SAARC Framework:

In recent years, there have been disturbing developments at the level of South Asian Association for Regional Cooperation (SAARC), of which India is an important member. This is also one of the few international frameworks, India has acceded to, which acknowledge refugees as a separate class of people deserving special treatment. This special treatment may work in a manner prejudicial to the rights of refugees, as another story.

India has recently signed the Additional Protocol to the SAARC Regional Convention on Suppression of Terrorism, 1987 which has ramifications for the refugee law and policy in India. The Additional Protocol was signed by all the SAARC members on 6 January 2004, in Islamabad. The Convention mainly defined terrorist offences and imposed the obligation on members- states either to prosecute or extradite persons accused of such offences. The focus of the Additional Protocol is to criminalize the funding of terrorism and, towards this end, it seeks to promote regional cooperation and coordination between customs, immigration, law enforcement and intelligence agencies. However, the Additional Protocol may also dilute and diminish refugee protection and the defences available to refugees even under extradition law.

This emerges from a careful reading of the following provisions (Dhavan Rajeev, 2004:74-75).

(I) Article 13 of the Additional Protocol makes offences under the convention and the Additional Protocol extra-ditable.

(II) Article 15 of the Additional Protocol clarifies that the offences established in the international instruments enumerated in Article 4 of the Additional Protocol read with the Annex cannot be considered as political offences and thus
the ‘Political Offence’ exception would be inapplicable in so far as these offences are concerned.

(III) Article 16 of the Additional Protocol makes it clear that countries should ensure that ‘refugee status is not granted to any person in respect of whom there are serious reasons for considering that he or she has committed an offence as defined under Article 4 of the Protocol’.

(IV) Under Article 17 of the Additional Protocol, extradition or legal assistance can be denied by a State when it has substantial grounds to believe that the extradition is for purposes of persecuting the person on the grounds of race, religion, nationality, ethnic origin or political opinion.

The effects of these provisions could be wide-ranging for refugee protection.

(I) By deeming certain offences as non-political (even where a person is simply accused of a terrorist offence), a valuable defence available to a person sought to be extradited or removed from a signatory state is taken away. For example, Article 14(2) of the UDHR denies the ‘right’ to seek and enjoy asylum only ‘in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the ‘United Nations’ Similarly, Article 1F (b) of the Refugee Convention, 1951 denies the protection of the Convention inter alia, to a person who ‘has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee”’. This is a dilution of existing regime of defences.

(II) This ‘political offence’ defence is also incorporated as a defence to extradition proceedings in Section 7(2) of the Indian Extradition Act, 1963. Therefore, by defining it to ex-
clude the crimes covered by the Protocol, it no longer allows a state to afford protection to a person who has committed an offence under it by designating the act as a ‘political’ offence.

(III) Under Article 17 of the Additional Protocol, a state party can deny extradition or legal assistance when it has substantial grounds to believe that the extradition is for purposes of persecuting the person sought to be extradited on the grounds of race, religion, nationality, ethnic origin or political opinion. However, given Article 15’s exclusion of the ‘political offence’ defence, a person suspected of terrorist acts may be in some difficulty in defending his right to a political opinion if the defence itself has become defeasible as a consequence of Article 16. Further, since mere suspicion is enough to exclude the ‘political offence’ defence, this provision is clearly prejudicial to the interests of persons accused of a crime enlisted in the Convention or the Additional Protocol.

(IV) Under Article 16 of the Additional Protocol, countries should ensure that ‘refugee status is not granted to any person in respect of whom there are serious reasons for considering that he or she has committed an offence as defined under Article 4 of the Protocol’. In India, executive fiat determines refugee status. Such a determination should only be done judicially, which is not possible under the current refugee law regime in India.

Therefore, the convention leaves scope for arbitrary determination of such status by the executive, opening possibilities of the violation of the principle of non-refoulement by using the provision as an excuse to deny refugee status even in deserving cases. This also
conflicts with Article 19 of the Additional Protocol, which gives primacy to international standards, including the 1951 convention.

Principally, the Additional Protocol may bolster views that characterize refugees and other foreigners as potential terrorists. It may become an excuse for India to deport Sri Lankan Tamils who are refugees in Tamil Nadu on the ground that they may have been involved in activities of raising funds for the LTTE (Liberation of Tamil Tigers Ealam), which is a terrorist organization. While the steps taken by these nations to root out terrorism from the region are understood, there is possibility of misuse of the provisions which may end up adversely affecting refugees and their right to non-refoulement.

A national model refugee law for granting statutory protection to refugees has long been considered in India but is yet to be implemented. The model law aims to harmonize norms and standards on refugee law, established as procedure for granting refugee status and guaranting them their rights and fair treatment.

**Conclusion and Recommendations:**

The status of refugees in India, although measured by humanitarian relief and political recognition, has very little to do with these two factors. Minority politics is an important factor that can be used to explain the reluctance of India’s lawmakers to move towards resolving the issue. It is a fact that illegal immigrants have been used by vote-seeking parties to secure a majority in the Central and the State legislatures. Opportunist sections of political parties in refugee-populated areas have tried to use these illegal immigrants as captive vote-banks by trying to regularize their stay.\(^\text{31}\) In the case of illegal immigrants from Bangladesh in Assam, the repeal of the Illegal Migrants (Determination by Tribunals) Act of 1993 has been continuously vetoed by the ruling Congress Party to secure the steadily growing ‘Vote-Bank’

\(^{31}\) Sumbul Rizvi, “Managing Refugees: Role of the UNHCR in South Asia”, in Chari at all, ibid, PP.195-96
of immigrants they are obtaining although they are not registered as citizens of India. It has been suggested that the presence of immigrants in India is beneficial for its interests, as long as they remain illegal immigrants, and the government does not have to answer international agencies regarding their treatment.

The role of political motives cannot be ignored in the development of this stalemate pertaining to the refugee population residing in India. However, since refugee protection is an international issue, concerns like these political motives are considered less important than the threat posed by refugees to national security and economic stability, perhaps to negate the role of political parties in this dismal refugee situation. In fact, clauses have been inserted in the proposed Indian refugee law ensuring that, “the decision to grant asylum is a humanitarian act that should be made without political considerations”.

Although India’s past effort in dealing with mass influxes has been commendable, its geopolitical position in the subcontinent makes it a preferred destination for asylum seekers and migrant workers. Moreover, India’s economic resurgence and status as the only stable democracy in the region makes it an attractive destination for asylum seekers. This, more than anything else, explains the cross-border movement into India, which should be an incentive to frame a national refugee law, the need for which increases with every escalation in conflict in the South Asian Region.

Asylum seekers from Sri Lanka, Tibet and Myanmar will continue to seek refuge as the political strife in these countries has not ceased and with no viable plans to usher peace in the foreseeable future, the possibility of repatriation also remains bleak. In addition to a population of 4,35,000 refugees and asylum seekers, there are approximately 600,000 internally displaced persons, the majority of whom are the

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Hindu Pandit community, formerly resident in the Kashmir Valley.

The need for a refugee law is immediate. The Uniform treatment of refugee is a must as long as India continues to accept asylum seekers across its porous borders. The restrictions and unequal treatment imposed on the refugee population by the Indian government are discriminatory and tarnish its human rights record, which is not outstanding in any case. Article 3, Sub Section 2, Clause (e) of the Foreigner’s Act (1946), contains a list of nine Orders embodying government regulations on rights and freedoms that the convention guarantees. For example, India can require foreigners to reside in mandate areas, thereby barring their right of movement across the country, and providing India the ability to confine foreigners to refugee camps and conduct periodic camp inspections.\textsuperscript{33} Clauses must be inserted in bilateral agreements regarding the treatment and role of refugees to prevent any conflict between the two countries in question. Without any law or protocol, the Indian government has full autonomy to decide which rights and freedoms should be conferred upon which groups. Even ‘favoured’ communities like the Tibetan refugees have suffered due to lack of firm policy. In 1991, for example, when Chinese Premier Li Peng visited New Delhi, certain Tibetan refugee camp leaders and activists were arrested, and most Tibetan settlements and community organizations were put under surveillance.\textsuperscript{34} That fact that members of Tibetan community are among the most well-treated refugee populations in the country provides an illustration of the drawbacks of ad hoc administration in this area.

As important as the need for a law directly dealing with the treatment and rehabilitation of refugees and asylum seekers is the need for a firm structure and authority dealing with refugee issues, which most proposals have allowed. For example, in the Refugees and Asylum

\textsuperscript{33} Thames, n.11
\textsuperscript{34} Ibid.
seekers (Protection) Bill, the fourth chapter deals with the constitution, functions and powers of authorities. It caters for a Commissioner for Refugees along with a Refugee Appellate Board, with minimum judicial representation and a maximum term of office. The duties of official are carefully outlined and the right to determine an asylum seekers’ refugee status vests with them, besides all administrative functions dealing with refugees. According to the UNHCR officials, there is no dearth of manpower to meet this objective and such an organization could function effectively within the guidelines provided to it.

India has so far dealt with situations of mass influx without a refugee law but with a continuously enlarging population of refugees and asylum seekers, a large section of whom may not be repatriated in the near future, a uniform law would allow the government to maintain its huge non-citizen population with more accountability and order, apart from allowing them to enjoy uniform rights and principles. A regional treaty can be beneficial in improving ties with its neighbors, but, India will be better placed by having its own law owing to the large number of different communities that it hosts and the unstable relation that it shares with several of its neighbours.

Broad Trends in the Policies towards Refugees:

Discussed below are the broad trends that emerge from a study of the policies towards refugees in the areas of concern to them.

Entry into India:

The Indian government has followed a fairly liberal policy of granting refuge to various groups of refugees. Past experience indicates that entry into India for most refugee groups is somewhat in line with the international principles of protection and non-refoulement. Such entry is generally not determined by reasons of religion, race, nationality, gender or other similar grounds. India has granted refuge to Buddhists; Tibetans,

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35 “The Refugees and Asylum Seekers (Protection) Bill” n. 25
Hindus and Christian Sri Lankan Tamils; Muslims, Sikhs and Hindu Afghans, among other refugees in recent years.

Afghan refugees of Indian and ethnic origin, who entered in India via Pakistan without any travel documents, were allowed entry at the India-Pakistan border until 1993. Most of the refugees had entered India at the Attari border near Amritsar in Punjab. Subsequently, the government altered its policy of permitting Afghan refugees to freely enter India via Pakistan. Sri Lankan Tamil refugees have regularly been crossing the sea to enter the South Indian State of Tamil Nadu. The Government of India has a specific policy regarding these refugees. They are permitted entry even if the refugees have no travel documents. Thus, the Coast Guards all along the Southern coastline are attentive to fishing travelers, ships and boats containing refugees fleeing the conflict in Sri Lanka.

**Work Permits:**

Refugees are generally not allowed to work in India. Some do find employment in the informal sector without facing any objection from the administration. Many refugees are self-employed and work from their homes. Some of them are supported by their community. Tibetan refugees as a special case have been granted loans and other facilities for self-employment. Sri Lankan Tamils are granted freedom of movement within the camp areas, enabling them to find casual labour. Chakma and Afghan refugees also engage in minor forms of gainful employment.

**Fundamental Freedom:**

Refugees normally have the freedom to move around the country with the restrictions applicable to any other foreigners. They are also allowed to practise their religion and follow their culture. In the case of refugees whose entry into India is either legal or is subsequently legalized, there is limited interference by the administration regarding these basic freedoms. Refugees have access to the health and education
facilities in India, and no discrimination is made against them on the basis of their refugee status. However, refugees who enter India illegally or overstay the permitted period have strict restrictions on their movement in accordance with the legislation relating to foreigners, such as the Foreigners Act, 1946, the Foreigners Order, 1948 and Passport Act, 1967. Provisions of the Foreigners Act apply to all—no distinction is made in law between asylum-seekers and other aliens. However courts have been lenient with regard to the imprisonment terms and fine amount imposed in view of the special situation of refugees.

The principle of non-refoulement has arguably acquired the status of jus cogens—a peremptory norm of general international law accepted as such by the international community as a whole. However, many refugees have been deported because they do not possess valid travel documents. The non-observance of this principle is, therefore, considered a violation of customary international law. This act of omission is due to the lack of a refugee-specific statute. As a result, the concerned authorities are constrained to enforce upon refugees laws that are applicable to foreigners in general, thereby consciously or subconsciously ignoring the unique predicament peculiar to refugees. Judicial decisions have however tempered this position. Courts at all levels have stayed deportation orders in several cases, pending a decision on refugee status and citizenship application.36

Bodies dealing with the refugees Protection in India:

The entry, stay and exit of refugees to and from Indian Territory may be fraught with legalities, particularly in the case of those who are not officially recognized as refugees by the Indian governments.37 They may encounter different administrative authorities depending on the

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37 Tibetan refugees, Sri Lankan Tamil refugees and Chakma refugees are recognized as refugees by the Government of India and the special arrangements have been made for them.
place from which they enter India, where they are detained and which law they have violated.

I. Border Control Authorities:

Border authorities in the country consist of the Border Security Force, the Indo-Tibetan Border Police, the Indo-Nepal Border Police and the Assam Rifles. They are usually the first representatives of the Indian system that refugees encounter when they enter or exit the country by land routes. Vast tracts of terrain in the Border States are treacherous, making it difficult to physically guard the entire international border of India. These gaps in the border are used by refugees to illegally enter and exit territory.

If a refugee is caught while entering illegally, the authorities usually return or deport her across the border. Alternatively, the refugee may be interrogated and detained at the border.

If caught while illegally exiting India, the refugee may be detained for investigation and subsequently handed over to local police for further action. In cases where the refugee is found in possession of invalid or fake travel document or in cases of violation of any other law of the country, the border authorities may detain the refugee. After initial investigation, the matter may be referred to the area police for further investigation, detention of the refugee and the registration of a first information report (FIR). The police lodge the accused refugee in the area prison and produce her in the local District Court for trial. Two examples given below illustrate the procedures followed.

An Indian refugee registered with UNHCR, was detained while illegally existing India for Nepal via the Sonauli border in District Maharajganj, Gorakhpur, Uttar Pradesh. The refugee was travelling on forged and fabricated travel documents. He was detained by the border authorities who discovered that his travel documents were forged. They handed the refugee over to the area Police Station at Sonauli for
investigation and registration of F.I.R. He was subsequently interned at the Gorakhpur District Jail.\(^{38}\)

In another case two Afghan refugees, were apprehended by the authorities at the Attari border at Amritsar, Punjab while attempting to exit India illegally for Afghanistan via Pakistan. They were handed over to the area police in Gharinda, District Amritsar for investigation and registration of FIR and were subsequently interned at the Amritsar Central Jail.\(^{39}\)

In the case of refugee groups that are recognized by the Government of India a specific policy of such recognition is followed. Instructions to this effect are dispatched by the government to the concerned border authorities.

A refugee may be detained without the registration of an F.I.R. This situation may arise when she has come from a country that does not share a peaceful border with India. In such a case, the refugee may be suspected of being a spy or a terrorist entering Indian borders with the deliberate and mala-fide intent to cause harm to the stability and integrity of the country. Her detention will consequently not be recorded until the authorities realize their mistake or intervention is sought by the concerned refugee or human rights groups in India. Often, such processes take a long time. Meanwhile, the refugee continues to languish in illegal detention, she may also suffer torture. Fortunately, such cases are few and far between.

II. Immigration/Custom Authorities:

In cases where the refugee is detected entering or exiting the country via established seaports and airports without valid travel documents, she is immediately detained by the immigration or

\(^{38}\) State V. MehmudGhazaleh, FIR No. 50 of 1993 was filed under Sections 419, 420, 468 and 471 of the Indian Penal Code, read with Sections 3 and 6 of the Passport Act and Section 14 of the Foreigners Act.

\(^{39}\) Shah Ghazai V. State, Criminal Writ Petition No. 499 of 1996, Punjab and Haryana High Court, Chandigarh, FIR No. 42 of 1994 under Section 3, 34 and 20 of the Indian Passport Act.
authorized custom officers and an investigation is conducted.

In cases of illegal entry, the immigration authorities often seek to immediately deport the refugee to the country where she last came from. This is in violation of the principle of non-refoulement. Pending deportation, the refugee is kept in a detention cell in the immigration section of the airport or seaport where the basic conditions of living are usually unsatisfactory. She has to buy her own meals. When deported, the cost of the transport ticket is borne by the refugee, often rendering her completely destitute. The plight of such refugees is illustrated by the example given below.

An Iranian refugee, recognized by UNHCR, was apprehended at the Bombay International Airport in route to Canada. He was detained at the immigration lounge of the airport for travelling under an assumed name, on a false passport. His detention lasted over a month. He was released only on the intervention of the Bombay High Court.40

If a refugee violates any law, she is treated like any other criminal in India. The authorities hand over the accused refugee to the area police who register an F.I.R. against her. She is then taken into police custody and is subsequently produced in the local session’s court, where she is committed to the local prison to await trial. An example is given below.

A 17- year old Sri Lankan Tamil refugee was separated from his family in Madras and came to Delhi, where he received information that his father was in London. In an attempt to reach London, a travel agent who fabricated a Passport for him duped him. The forgery was detected at New Delhi International Airport, and the refugee was handed over by the custom authorities to the area police for investigation of a F.I.R. The refugee was produced before the concerned Metropolitan Magistrate who remanded him in judicial custody in Tihar Jail.41

40 Syed Ata Mohamadi V. State Criminal Writ Petition No. 7504 of 1994, Bombay High Court.
41 State V. Winston Venojan, FIR No. 438 of 1993 under Section 419, 420, 468 and 471 of the Indian Penal Code.
In instances where the immigration or custom authorities suspect discrepancies in the travel documents of a refugee when she enters the Country, they may send the documents for further investigation to the local Foreigners Regional Registration office (FRRO). The refugee is directed to a tender local appearance at the FRRO. An FIR is lodged against the refugee, which can also lead to her arrest.

III. The Police:

There are instances where refugees initially enter India with valid travel documents that subsequently expire or where discrepancies in the travel documents are not detected by the border control or immigration authorities but by the police. The refugees may be arrested on expiry of the documents or when the said discrepancy is detected. Often, refugees fail to renew their visas or residential permits with the local FRRO. Consequently, random checks are routinely conducted by the local police at places commonly frequented by foreigners and refugees, such as hotels, restaurants, religious places and markets. Given that refugees are usually fleeing a volatile situation, they often do not have valid travel documents with them as required by the Foreigners Act. Refugees taken care of by the government are normally not required to hold valid passports and related documents. However, the government has become strict with some mandate refugees, like ethnic Afghans, Somalians and Sudanese, requiring them to maintain a valid passport and residential permit.

Those refugees who do not comply with the mandatory requirement to obtain and renew residential permits are sometimes arrested and produced before the local Sessions Court. The Court may order them to be detained in the local prison trial as in the following case:

A Sudanese refugee registered with UNHCR was arrested by the Kotala Mubarakpur Police in New Delhi because her passport had
expired. An FIR under Section 14 of the Foreigners Act 1946 was filed. She was produced before the Court of the concerned Metropolitan Magistrate who remanded her in judicial custody. She was eventually released on pleading guilty.\textsuperscript{42}

The police normally do not consider any claims of refugee status made by the refugee. Moreover, under Section 3 of the Foreigners Act, 1946, the administrative authorities may issue Leave India Notices to those refugees who have failed to extend their travel permits or who are ordered to be deported by the court. In such cases, the refugee may even be forcibly deported if she fails to comply with the notice. However, a writ petition can be filed at the concerned court to stay the notice, as was done in the following case:

Two Afghan Sikhs of Indian origin had fled persecution in Afghanistan and were registered as refugee with UNHCR. They were issued Leave India Notices by the FRRO to leave India within 7 days of receipt of the notice. A Criminal Writ Petition was filed in Punjab & Haryana High Court at Chandigarh and interim stay of the Leave India Notice was obtained.\textsuperscript{43}

**Foreigners Regional Registration Office (FRRO):**

Under the Foreigners Act, all foreigners in India are required to register themselves with FRRO in their area of residence. The office registers the name of the foreigner in its records and issues the person a residential permit. Since the country has no refugee-specific legislation or a refugee policy, the authorities often follow an ad hoc policy. Some groups of refugees use residential permits, while these have been denied to others. Afghan and Burmese refugees are issued permits allowing them to stay in India. However, refugee groups like the Iranians, Iraqis and Sudanese have not been granted such documents.

\textsuperscript{42} In Re Eva Masar Musa Ahmad FIR No. 278 of 1995, MM New Delhi.
\textsuperscript{43} Gurinder Singh and Karamjit Singh V. State, Criminal Writ Petition No. 871 of 1994, Punjab and Haryana High Court, Chandigarh.
Where the Government of India has recognized the claim of refugee status to a particular group of refugees, there is subsequently minimum interference in the lives of the refugees. This is the case even though there may be no official declaration or grant of refugee status to that group. However, there are instances where refugees recognized by the Indian government, and who have been issued valid refugee identity documents, are later prosecuted for illegal entry or overstay.\textsuperscript{44}

\textsuperscript{44} The National Human Rights Commission has taken up the cause of a number of Sri Lankan Tamil refugees who have likewise been persecuted. The government subsequently had them discharged.
(B) ROLE OF JUDICIARY IN THE PROTECTION OF REFUGEES IN INDIA

The concept of ‘Refugee Law’ in the Indian judicial system has evolved over a period of time. India has neither signed the 1951 Refugee Convention and its 1967 Protocol nor adopted any refugee specific legislation. The Courts are therefore constrained to enforce upon refugees, laws which are applicable to foreigners in general. Many times this results in a grave breach of natural justice to refugees. Because refugees are forced to leave their country, their home, lifestyle, livelihood, relation and many more things. Grave apprehension of danger to life and liberty, lead them to flee and take refuge in neighboring country, which is easily accessible, where they can at least breathe. India is a country performing elder brothers’ role for all the other South Asian Countries. Refugees from the neighboring countries can cross the Indian border easily and come to seek asylum in India. India has hosted many refugee situations successfully throughout the years according to the administrative Policy and in the absence of any refugee specific legislation to deal with the numerous refugee groups.

It is true that refugees are not received with open arms. A general misconception is also prevalent that refugees are an undesirable lot, who have fled in search of the conditions favorable to economically better their lives and that fear of persecution is a main excuse on their part. The concept of refugee hood is confused with economic migrants who do not fall within the definition of the term ‘refugee’ and secondly the economic condition of the country does not permit to welcome refugees with open arms. In a poor country like India, where more than 40 per cent of people are below poverty line, it is almost difficult to tackle such refugee influxes. However, India’s obligation under International Law

and her humanitarian tradition have developed a comprehensive strategy to receive refugees. Still a broader understanding of the concept of refugee is essential to deal with refugee problems. Hon’ble Justice V.R. Krishna Iyer, in his speech on the Role of the Judiciary in Providing Refugee Protection observed.\(^\text{46}\)

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\ldots \text{Any person who inhabits the earth has a right to seek shelter anywhere on the earth because he has a right to stay somewhere. Do we concede that right to stay somewhere? A person may under various circumstances be driven out but in such situation you should have sympathies with them.}
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He further said,

\[
\ldots \text{therefore, I have to stay that , the beginning of any discussion on refugee law is the acceptance of compassion and humanism as also is the acceptance of the right of your neighbor to come and share with you. You cannot keep him out here.}
\]

In the absence of concrete legislative structure also the Indian Courts have come to the rescue of refugees and performed a wonderful job in protection of their rights. Although the Indian Courts cannot direct the making of any legislation to give effect to an international treaty, they generally interpret statutes so as to maintain harmony with rules of International Law. In that case the Municipal Law has to be respected.\(^\text{47}\)

This is done under the protective umbrella of Article 14 and Article 21. There has been a complete transformation of what was originally conceived under two basic articles. It is very worthwhile here to go through the stages of such change because it has deeply affected the law relating to refugees.

The Constitution in its Bill of Rights contains two kinds of rights as started earlier. A foreigner does not have the right to move freely

\(^{46}\) See Report on Judicial Symposium on Refugee Protection, P.104.

\(^{47}\) See, Gramophone Company Case, Supra note 9.
throughout the country and to reside and stay in any part of the territory of India as conferred under Article 19(1) (d) and (e). Such rights are available only to citizens and thus not to aliens including refugees. The Indian Supreme Court has also held that the Governments right to deport is absolute. The Court held:

……the power of Government of India to expel foreigners is absolute and unlimited and there is no provision in the Constitution fettering this discretion……………the executive Government has unrestricted right to expel a foreigner.\(^\text{48}\)

But while on the one hand, the Indian Government has apparently absolute right to expel any foreigner from its territory applying the provisions of Foreigners Act, 1946, on the other hand non-refoulement has acquired the status of jus cogens\(^\text{49}\) and this international norm is respected by expanding of scope of Articles 14 and 21 of the Constitution. In Hans Muller of Nuremberg V. Superintendent, Presidency Jail, Calcutta\(^\text{50}\), the SC observed that the Foreigners Act confers the power to expel foreigners from India. It vests the Central Government with absolute unfettered discretion and as there is no provision fettering this discretion in the Constitution, an unrestricted right to expel remains………It gives an unfettered right to the Union Government to expel. In respect of deportation orders and/or violation of Article 21 there are some judicial decisions where in some of the cases of deportation orders have been stayed.

For, example, in Bogyi vs. Union of India\(^\text{51}\) even in the absence of a pending application for refugee status, the Guwahati High Court allowed a Burmese man, two months temporary release in order that he might approach the office of the United Nations High Commissioner for

\(^{48}\) Louis de Raedt V. Union of India, AIR 1991 SC 1886 at P. 1890.

\(^{49}\) A peremptory norm of general international law accepted as such by the international community as a whole.

\(^{50}\) AIR 1955 SC 367.

\(^{51}\) Civil Petition No. 1847/89 Guwahati High Court.
Refugees (UNHCR) for refugee status. So also in Malvika Karlekar Vs. Union of India\textsuperscript{52}, 21 Burmese facing deportation orders from the Andaman Islands when pleading violation of Article 21 was granted a stay of their deportation orders to allow the asylum seekers to approach the UNHCR for refugees status. In the matters of Gurunathan and others Vs. Government of India and others\textsuperscript{53} and in the matter of A.C. Mohd, Siddique V. Government of India and others\textsuperscript{54}, the High Court of Madras expressed its unwillingness to let any Sri Lankan refugee to be forced to return to Sri Lanka against his will. In the case of P. Neduraman V. Union of India\textsuperscript{55} before the Madras High Court, Sri Lankan refugees had prayed for a writ of mandamus directing the Union of India and the State of Tamil Nadu to permit UNHCR officials to check the voluntariness of the refugees in going back to Sri Lanka and to permit those refugees who did not want to return to continue to stay in camps in India. The Hon’ble Court was pleased to hold that “since the UNHCR was involved in ascertaining the voluntariness of the refugee’ return to Sri Lanka, being a World Agency, it was not for the Court to consider whether the consent was voluntary or not. Further the Court acknowledged the competence and impartiality of the representatives of UNHCR.

In Yogeshwari vs. State of Tamil Nadu,\textsuperscript{56} where a detention order passed under Foreigners Act 1946 was challenged by the mother of the detenue Anandh, who was detained in special camp for Sri Lankan refugees at Chengalpattu, it was held by the Madras High Court that the order impugned in this case was illegal, unconstitutional and liable to be set aside because the detenue was deprived of his to be heard and also of his liberty under Article 21 of the Constitution. In a similar type of case before the Madras High Court, which was also in the nature of Habeas

\textsuperscript{52} Cr. Petition N. 583/92, Supreme Court of India.
\textsuperscript{53} WP 6708 and 7916 of 1992 (unreported)
\textsuperscript{54} 1998 (47) DRJ (DB) P.74.
\textsuperscript{56} 2003 (I)-L-W (Cri) 352.
Corpus\textsuperscript{57}, the crucial questions before the Court were whether the continued placement of the petitioners in special camp amounted to preventive detention and would attract the strict safeguards of Article 22 of the Constitution, whether the treatment offered to the petitioners was of subhuman nature and whether the measures adopted by the respondents amount to denial of human rights to the petitioners. The petitioners, who were the Sri Lankan refugees, were lodged in special camp in Chengalpattu which was a subjail earlier. Some of them were facing trial for offences under Sections 465 and 425 of the Indian Penal Code and also under the Foreigners Act and Passport Act. The order passed by the respondent state putting them in special camp was challenged. Giving effect to Article 13 of the Universal Declaration of Human Rights and Articles 9 and 12 of the International Covenant on Civil and Political Rights, the Court held that, the orders passed were arbitrary and the procedure adopted could not stand to the test of reasonableness as contemplated in Article 14 of the Constitution of India. The Court directed the government and public prosecutors in the criminal cases pending against these persons to be more vigilant and their criminal cases should be disposed of with top priority. The Madras High Court also stressed the need for treating the detenue humanely. They should not be denied any of the basic human rights. They should be provided with medical facilities, facility to meet family, right to work, pay for work. Their children must be given education. They should also be given vocational training and might be encouraged to play indoor as well as outdoor games. The court further added that, government should take a corrective attitude instead of retributive against them. While dealing with this case the Court also referred Var\textael\textsuperscript{58}dh\textael\textsuperscript{58}haraj vs. State of Tamil Nadu,\textsuperscript{58} in which the Supreme Court of India held that placing of the application for bail and the order therein are not always mandatory.

\textsuperscript{57} Premvathy vs. State of Tamil Nadu, HCP No. 1038 of 2003.

\textsuperscript{58} AIR 2002 SC 2953.
and such requirement would depend upon the facts of each case. In this case it was held that the failure to note the stand of the public prosecutor that he had no objection for the grant of bail is vital material which the detaining authority ought to have taken note of and that non-consideration of this fact vitiates the order of detention.

In Sarabnanda Sonowal vs. Union of India and other Respondents, Writ Petition (C) of 2000, which was decided on 7th December 2005, the Supreme Court of India held that the Illegal Migrants (Determination by Tribunal) Act, 1983 (IMDT, Act) and the Rules were violative of Articles 14 and were liable to be declared as ultra vires the Constitution and to be struck down. In this case also the Court took a liberal view and held that the procedure under Foreigners Act and also under Foreigners (Tribunal) Order, 1964 was far more effective in identification and deportation of foreigners as compared to procedure of IMDT Act and Rules made there under. The Court further held that there was no nexus between basis of classification and object of IMDT Act. Hence it was violative of Article 14. It also negated the Constitutional mandate contained in Article 355 where a duty had been cast upon Union of India to protect any state against external aggression and internal disturbance.

The Bombay High Court in the matter of Syed Ata Mohammadi vs. Union of India59, was pleased to direct that “there is no question of deporting the Iranian refugee to Iran, since he has been recognized as a refugee by the UNHCR. The Hon’ble Court further permitted the refugee to travel to whichever country is desired. Such an order is definitely in line with internationally accepted principles of non-refoulement of refugee to their country of origin. The two rights, which are given under Article 14 and 21 were far more narrowly interpreted than today. The Article 14, which is essentially the right to equality prevents the state from discriminating between classes of people

whereas Article 21 states that no person shall be deprived of his life or liberty without the procedure established by law. The 5\textsuperscript{th} and 14\textsuperscript{th} Amendment of the American Constitution lay down inter alia that “no person shall be deprived of his life, liberty or property without due process of law.” This clause has been the most significant single source of judicial review in the U.S.A. The word ‘due’ is interpreted as ‘just’ ‘proper’ or ‘reasonable’ according to the judicial view. Therefore, the Court can pronounce whether the law affecting a person’s life, liberty, or property is reasonable or not. The Court may declare a law invalid if it does not accord with its notions of what is just and fair in the circumstances. Due process has two aspects: substantive due process envisages that the substantive provision of law should be reasonable and not arbitrary. Procedural due process envisages a reasonable procedure i.e., the persons affected four elements; notice, opportunity to be heard, impartial tribunal and an orderly procedure. The question of interpretation of the word ‘procedure established by law’ arose in India in the famous Gopalan case\textsuperscript{60} where the validity of the Preventive Detention Act, 1950 was challenged. The main question was whether Article 21 envisaged any procedure laid down by a law enacted by a legislature or whether the procedure should be fair and reasonable. On behalf of Gopalan, an attempt was made to persuade the Supreme Court to hold that the Court could adjudicate upon the reasonableness of the Preventive Detention Act or for that matter any law depriving a person of his personal liberty. An attempt was made to win for a detenu better procedural safeguards than were available to him under the relevant law and Article 22 of the Constitution of India. But the attempt failed as the Supreme Court rejected the arguments and held that the procedure established by law only permitted judges to ascertain what the law was and whether its procedure had been followed. This was the very narrow

\textsuperscript{60} A.K.Gopalan V. State of Madras AIR 1950 SC 27.
view taken by the judges in 1950. But later on in series of cases including Maneka Gandhi\(^{61}\) and others, the Supreme Court stated that procedure established by law, must be procedure established by a fair and just law. The decision in Maneka completely overrides the Gopalan view which had held the field for nearly three decades. Since Maneka, the Supreme Court has again and again underlined the theme that Article 14, 19 and 21 are not mutually exclusive but they sustain, strengthen and nourish each other. The Court went further and said that procedure established by law should not only be for procedural due process but must mean substantive due process. These decisions have expanded the scope of Article 21 in a significant way.

In other words, while in 1955 the Court only had to consider whether an action taken complied with the procedure laid down in the Foreigners Act, it has now to consider whether the same was fair, just and reasonable. Therefore, the Court was wrong in concluding that there was no provision in the Constitution, which fettered the ‘absolute’ and ‘unlimited’ discretion of the government. Indeed, it should have proceeded to test the validity of the Foreigners Act as against Article 21\(^{62}\). In the context of refugee rights it can be argued that Article 21 encompasses the principle of non-refoulement which requires that a State shall not expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.\(^{63}\) That is to say any procedure, which

\(^{61}\)Maneka Gandhi V. Union of India (1978) 1 SCC 248.
\(^{62}\) Article 21 containing the right to life and personal liberty is contained in Part III of the Indian Constitution entitled ‘Fundamental Rights’. Article 13 of this Part makes it clear that all laws inconsistent with Part III will be void to the extent of the contravention.
\(^{63}\) Article 33 Para (1) of the 1951 Convention on the Status of Refugee. It is to be emphasized that even the principle of non-refoulement is not an absolute principle Para (2) of Article 33 States: The benefit of the present provision may not, however, be claimed by a refugee for whom there are reasonable grounds for regarding as a danger to the security of the country in which he is or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.
disregards the principle of non-refoulement, cannot be deemed fair, just and reasonable. This interpretation is consistent with the international obligations. India has assumed thorough ratifying of the two 1966 Covenants and the Convention on the Right of the child. In the light of the Highest Court’s reading of Article 21, the reservation, India appended to Article 13 of the Civil and Political Rights Covenant would also appear to have lost much of its rationale. In practice Indian Courts have been generally helpful when approached with respect to individual cases, albeit they have done so without discussing in any manner the content of international refugee law. Courts have stayed the deportation of individuals when an application or the determination of refugee status was pending with the UNHCR. In some instances leave has been sought and granted by Courts to detainees to travel to New Delhi, where the office of the UNHCR is located, in order to seek determination of refugee status.

As discussed earlier, Article 21 of the Indian Constitution, which applies to all persons also applies to the refugees. In one of the earlier cases of the Supreme Court where a few Chakma refugees came and claimed rights to settle and to move around, the Court took the view that these were rights, which were only available under Article 19, which were limited to citizens. The Supreme Court in fact went a little further and said, under Article 14 and 21 also rights not be claimed because if you do not have a right under Article 19, you can not indirectly claim that right under Article 14 or 21.

This is clearly a narrower view. The Khudiram Chakma case\textsuperscript{64} was distinguished from the latter case about the Chakma refugees. The latter case\textsuperscript{65} decided in 1996 is very significant because in that case the party which brought the action was the National Human Rights Commission. In view of grave danger posed to the life and liberty of Chakmas, the

\textsuperscript{64} (1994) Supp (1) SCC 615.
\textsuperscript{65} National Human Rights Commission V. State of Arunachal Pradesh, AIR 1996 SC 1234.
National Human Rights Commission\textsuperscript{66} had to approach the Supreme Court under Section 18 of the Protection of Human Rights Act\textsuperscript{67} to save the lives of Chakma refugee in the State of Arunachal Pradesh. In this case it was found that there was serious threat to the Chakma by a group of persons forcing them to leave the State. In an independent inquiry conducted by NHRC it was found that the Chakmas were dying on account of the blockade for want to medicine. Blockade had also adversely affected the supply of ration, medical and essential facility etc. The Supreme Court referred to earlier cases, namely, State of Arunachal Pradesh Vs. Khudiram Chakma\textsuperscript{68} and Louis De Raedtvs. U.O.I.\textsuperscript{69}, to come to the conclusion that though Chakmas were foreigners, still they were entitled to the protection of Article 23 of the Constitution. This is how very forcefully the Supreme Court of India came forward for protecting the rights of Chakmas. The Court held:

We are a country governed by the Rule of Law. Our Constitution confers certain rights on every human being and certain other rights on citizens. Every person is entitled to equality before the law and equal protection of the laws. So also, no person can be deprived of his life or personal liberty except according to procedure established by law. Thus the State is bound to protect the life and liberty of every human being, be he a citizen or otherwise, and it cannot permit anybody or group of persons e.g. the AAPSU, to threaten the Chakmas to leave the State, failing which they would be forced to do so, it will fail to perform its constitutional as well as statutory obligations. Those giving such threats would be liable to be dealt with in accordance with law. The State

\textsuperscript{66} The Commission was constituted by an Act of Parliament. The Act is divided into eight chapters consisting of 43 Articles. Special power conferred to NHRC under Article 10(C) which says, “The Commission shall regulate its own procedure. There are 19 Articles under Procedural Regulations.

\textsuperscript{67} The National Human Rights Commission is the first of its kind among the South Asian countries. The NHRC came into effect on 12 October, 1993 by virtue of the Protection of Human Rights Act 1993.

\textsuperscript{68} See for details, the Protection of Human Rights Act 1993 with procedural regulations.

\textsuperscript{69} (1194) Supp. 1 SCC 651

\textsuperscript{69} (1991) 3 SCC 554
Governments must act impartially and carry out their legal obligations to safeguard the life, health and well-being of Chakmas residing in the State without being inhabited by local politics……

While the protection of Article 21 can be availed by the refugees and it is the duty of the state to act in consonance with Article 21, the Supreme Court in earlier cases of Khudiram Chakma\(^7\) as well as in Louis De Raedt\(^7\) also held that the refugees were not entitled to the protection of Articles 19(1) (d) and (e) of the Constitution. It was said that Article 21 was confined to life and liberty and “does not include the rights to reside and settle in this country” as Article 19(1) (e) was applicable only to the citizen of this country and that “the machinery of Article 14 can not be invoked to obtain the fundamental right”

In the case of Khudiram Chakma the refugee families, instead of residing in the allotted lands, had negotiated private lands and had settled there. When they were sought to be evicted, they challenged the eviction notice in the Court. The Supreme Court held that the principles of natural justice were satisfied in that case on the ground realities. There were allegations against refugees that they indulged in criminal activity and associated with anti-social elements. Denying the compensation awarded by the High Court on humanitarian grounds, the Supreme Court left it on the State’s policy to decide where they should be settled and whether they should be granted any compensation.

If one looks at both the judgments, it cannot be denied that the subsequent judgment in the NHRC vs. State of Arunachal Pradesh\(^7\) has considered the problems of refugees in a more liberal and humanitarian manner than the earlier judgment in Khudiram Chakma.

A recent judgment of the Supreme Court in Chairman, Railway

70 (1994) sup. 1 ssc 651.
71 (1991) 3 scc 554.
72 National Human Rights Commission V. State of Arunachal Pradesh, AIR 1996 SC 1234
Board vs. Chandrima Das & others\textsuperscript{73} decided on 29\textsuperscript{th} January 2000 has set up a right precedent in enforcement of human rights of the aliens. In this case, one Hauffa Khatoon, a Bangladeshi national was gang-raped in the Rail Yatri Nivas of Howrah Railway Station Chandrima Das, a practising lay Advocate of Calcutta High Court, filed a Writ Petition before the High Court claiming compensation against the Railway Department. The High Court awarded a sum of Rs. 10 Lakhs as compensation on the basis that the rape was committed in Rail Yatri Nivas belonging to the Railways and was perpetrated by the railway employees. This judgment of the High Court was challenged before the Supreme Court on various grounds including the question of locus-standi as well as the right of compensation not being enforceable under Article 226 of the Constitution. The Supreme Court repelled these contentions by referring to various judgments, which had settled the law with regard to locus standi as well as about grant of compensation for violation of Article 21 of the Constitution.

The Supreme Court relied upon an earlier judgment in Bodhisattwa Gautam\textsuperscript{74} where it was held that rape is crime against the entire society; it is the crime against basic human rights to live with human dignity. The argument raised by the State that the victim was foreign national and, was therefore, not entitled to any relief under the public law domain for the violation of fundamental rights, which were available only to the citizens of this country was rejected by the Supreme Court for two reasons: Firstly, on the ground of domestic jurisprudence based on constitutional provisions and secondly on the ground of human dignity.

\textsuperscript{73} 2000(2) SCC 465.

\textsuperscript{74} The Supreme Court of India in Bodhisattwa Vs. Ms. Subhdara Chakraborty, (1996) 1 SCC 490 has held “rape” as an offence which is violative of the Fundamental Rights of a person guaranteed under Article 21 of the Constitution.
rights jurisprudence founded on the UDHR. The Court referred to the Preamble and various Articles of the UDHR, the provisions from CEDAW\(^{75}\) and then observed that, “Our Constitution guarantees all the basic and fundamental human rights set out in the UDHR to its citizens and other persons. The Chapter dealing with the fundamental rights is contained in Part III of the Constitution.\(^{76}\) The purpose of this part is to safeguard the basic human rights from the vicissitudes of political controversies and to place them beyond the reach of political parties, who by virtue of their majority, may come to form their Government at the Center or in the State.

It was held that wherever in Chapter III of the Constitution, the term “person” is mentioned like in Articles 14 and 21; it will apply to all persons including citizens and non-citizens. Similarly Article 20\(^{77}\) and 22\(^{78}\) are also available to non-citizens. As against these provisions, Article 15, 16 and 19 uses the term citizen and therefore they do not apply to a foreigner. The Supreme Court, on the basis of above discussion, held that commission of offence of rape amounts to violation of the fundamental right guaranteed to a woman under Article 21 of the Constitution and the victim, though a national of another country, was entitled to be treated with dignity. The Court upheld the judgment of the Calcutta High Court compensating the victim for violation of Article 21 of the Constitution. This case may be categorized as a landmark judgment as it shows the sensitivity of the Court in taking


\(^{76}\) Article 12 to 35 of the Indian Constitution deal with Fundamental Rights. The Indian Constitution groups the Fundamental Rights under several Sub-Heads (a) right to equality (Articles 14-18); (b) right to freedom (Articles 19-22); (c) right to against exploitation (Article 23-24); (d) right to freedom of religion (Articles 25-28); (e) cultural and educational rights (Articles 29-30); (f) right to Constitutional remedies (Article 32);

\(^{77}\) Providing Protection in respect of conviction for offences.

\(^{78}\) Providing Safeguards against arbitrary arrest and detention.
the jurisprudence of human rights on the highest level by placing its decision on protection of human dignity. The importance of the judgment also lies in the fact that the doors of Public Interest Litigation\textsuperscript{79}, were made available in the case of a foreign national.

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