

CONSTITUTIONALITY ANALYSIS OF THE CITIZENSHIP (AMENDMENT) BILL, 2019 AND ALLIED SUBORDINATE LEGISLATIONS

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Abstract

The Citizenship (Amendment) Bill, 2019 (hereinafter 'the Bill') that seeks to amend The Citizenship Act, 1955 (hereinafter 'the Act') by introducing a proviso to the extant section 2 (1)(b) of the Act thereby making Hindus, Sikhs, Buddhists, Jains, Parsis and Christians from Afghanistan, Bangladesh and Pakistan eligible for Indian citizenship, is under controversy for allegedly undermining the secular foundations of the Indian Constitution by making a classification based on religion and thereby violating the principle of equality enshrined in article 14 of the Constitution of India.

It is submitted that the proposed enactment has the potential to withstand the challenge based on unreasonable classification on a textbook application of the equality analysis under article 14 for the classification of illegal migrants on the basis of religion ostensibly meeting the twin requirements of the time-honoured test of 'reasonable classification' under article 14. Although the rationale for such classification does not appear to be explicitly stated in the Bill. A reading of complementary and subordinate legislations [Passport (Entry into India) Amendment Rules, 2015 and Foreigners (Amendment) Order, 2015] makes it clear that the underlying basis for the exemption is 'religious persecution' or fear of 'religious persecution' which by itself may form an adequate and valid ground for classification if understood in isolation from the international refugee law. Additionally, invocation of religion as a basis of classification under article 14 is neither impermissible nor unprecedented.¹ As far as the charge of being anti-secular is concerned, it is further submitted that the Bill arguably does not have to contend with that challenge at all and is immune from constitutional scrutiny on that count since ordinary legislations (as against constitutional amendments) are not subject to the 'basic structure' (the basic structure being 'secularism' in this case) test in constitutional adjudication.² However, a deeper analysis would reveal that the classification

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¹ See, e.g., Transfer of Property Act, 1882, ss. 2(d) and 129 (pre-Constitutional enactment) and Special Marriage Act, 1954, s. 21A (post-Constitutional enactment).

² See *Indira Gandhi v. Raj Narain* (1975) Supp SCC 1; *State of Karnataka v. Union of India*, (1977) 4 SCC 608 (Per Untwalia J. speaking for himself and Shinghal and Singh JJ. concurring with the majority in a seven-judge Bench decision); *Maharao Sahib Shri Bhim Singhji v. Union of India*, (1981) 1 SCC 166; *Kuldip Nayar v. Union of India* (2006) 7 SCC 1; *Ashoka Kumar Thakur v. Union of India*, (2008) 6 SCC 1; *Union of India v. R. Gandhi* (2010) 11 SCC 1. Cf. *S.P. Sampath Kumar v. Union of India* (1987) 1 SCC 124; *M. Ismail Faruqui v. Union of India* (1994) 6 SCC 360; *G.C. Kanungo v. State of Orissa* (1995) 5 SCC 96 (instances of application of

in question is bad in law for having a discriminatory object. This is quite apparent in the way that the Bill conflates the categories of 'illegal migrants' and 'refugees' and uses a subterfuge device to conveniently steer clear of the principle of non-discrimination that has arguably come to become one of the cornerstones of customary international law.

In any case, from the vantage point of article 21 of the Constitution, a constitutional challenge may still be available in respect of the allied subordinate legislations inasmuch as deportation and imprisonment may be potential penal actions directed at the non-exempted category of refugees. In respect of article 21, it is also now well-established that 'substantive due process' is now the standard to be applied in cases involving life and personal liberty.

Closely related to the above, a case may also be made out for the application of the test of 'strict scrutiny' and the consequent reversal of the presumption of constitutionality (and invocation of a heightened standard of review) in respect of the negative rights under article 21.

The paper seeks to elaborate on the aforementioned concerns in a bid to arrive at the right test for the constitutional review of the Bill and the supplementary subordinate legislations in an effort to predict the constitutionality or otherwise of the same. The paper, however, does not seek to deal with the issue of internal inconsistency likely to arise in the Act on account of section 6A that is currently under challenge on a number of grounds.³

I. Introduction

II. Challenge based on article 14

III. Challenge based on article 21

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V. Conclusion

the basic structure doctrine to invalidate inconsistent ordinary legislations) and *Madras Bar Association v. Union of India* (2014) 10 SCC 1 (while the majority seems to have endorsed the idea of application of basic structure test to ordinary legislative enactments, the separate concurring opinion of Nariman J. concludes otherwise. In any event, being a Bench of co-equal strength, it did not have the authority to overrule precedents laid down by higher or co-ordinate Benches, whether by implication or otherwise); *Supreme Court Advocates-on-Record Assn. v. Union of India* (2016) 5 SCC 1 (While seemingly affirming the examination of ordinary legislations on the touchstone of basic structure in a rather ingenious way, even Khehar J. does seem to acknowledge that it would be a "technical flaw". However, the majority does not appear to have shared his view as Lokur J. in his separate concurring opinion expressly disapproved of this position while Joseph and Goel JJ. did not express their views on this aspect at all. It is submitted that this leads to the conclusion that the earlier position of *law vi-a-vis* ordinary legislation and basic structure is far from overruled. Additionally, the Bench strength was insufficient to overrule the existing position of law on the point).

³ See *Assam Sanmilita Mahasangha v. Union of India* (2015) 3 SCC 1.⁴ Passport (Entry into India) Rules, 1950, rule 4(1)(ha) and The Foreigners Order, para. 3A.

I. Introduction

It is a matter of common knowledge that there exists no Parliamentary legislation that specifically provides for the recognition and enforcement of the rights of refugees in India. In the absence of any specific legislative entry pertaining to 'refugees' in the Seventh Schedule to the Constitution of India, the extant legislative regimes touching upon the rights of 'refugees' in India are predominantly referable to entries 17 (citizenship, naturalisation and aliens), 18 (extradition) and 19 (admission into, and emigration and expulsion from, India; passports and visas) of the Union List. This has led to the 'refugees' being governed under the provisions of disparate Parliamentary enactments, namely, the Passport (Entry into India) Act, 1920, the Passports Act, 1967, the Registration of Foreigners Act, 1939, the Foreigners Act, 1946, the Citizenship Act, 1955 and the Extradition Act, 1962.

Of late, within this existing legislative framework, there have been quite a few notable developments that impinge upon the rights of 'refugees' in a rather direct and confrontational manner although not purporting to do so. The latest in the series appears to be the Bill. Among other things, the Bill seeks to amend the definition of 'illegal migrant' provided in section 2(1)(b) of the Act by means of a proviso. It creates an exception in favour of exempted categories⁴ of Hindus, Sikhs, Buddhists, Jains, Parsis and Christians from Afghanistan, Bangladesh and Pakistan, thereby making them eligible for applying for Indian citizenship.⁵ A second proviso proposed to be appended to the section provides for the abatement of proceedings pending against the exempted minority communities before the commencement of the Bill.⁶ The Bill further seeks to expedite the naturalisation of the said class of persons by relaxing the qualification for the same.⁷

It is now well-settled that certain fundamental rights enshrined in the Constitution of India are available to foreigners (including refugees)⁸ and citizens alike and can therefore, provide the relevant touchstone for examining the validity of the impugned pieces of legislative

⁴ Passport (Entry into India) Rules, 1950, rule 4(1)(ha) and The Foreigners Order, para. 3A.

⁵ Citizenship (Amendment) Bill, 2019, cl. 2.

⁶ *Id.*, cl. 2, second proviso. As noted by the Joint Parliamentary Committee, the purpose of this second proviso is to reconcile the stipulations of the notifications dated Sep. 7, 2015 and July 18, 2016 (issued by the Ministry of Home Affairs) with the Assam Accord. Since the Assam Accord provides for the detection, deletion or expulsion of foreigners who entered Assam on or after March 25, 1971, it was at odds with the three notifications mentioned earlier that had extended the cut-off date to December 31, 2014 in respect of the persons covered by the notifications. See Report of The Joint Committee on The Citizenship (Amendment) Bill, 2016 (January 2019), para. 5.47 at 78.

⁷ *Id.*, cl. 4.

⁸ See The Constitution of India, arts. 14, 20, 21, 21A, 22, 25-28 and 32. See also *State Trading Corporation of India Ltd. v. Commercial Tax Officer*, AIR 1963 SC 1811; *Anwar v. State of Jammu & Kashmir* (1971) 3 SCC 104; *Kubic Dariusz v. Union of India*, (1990) 1 SCC 568; *Louis De Raedt v. Union of India* (1991) 3 SCC 554 and *NHRC v. State of Arunachal Pradesh* (1996) 1 SCC 742.

enactments. Of particular relevance to the instant analysis are articles 14 and 21 contained in Part III of the Constitution of India. The constitutionality of the Bill and allied pieces of subordinate legislation will therefore, need to be examined against the constitutional guarantees provided for in articles 14 and 21 and an attempt has been to do so in the sections that follow.

II Challenge based on article 14⁹

Article 14 of the Constitution of India embodies the constitutional guarantee as to the right to equality conferred upon all the persons in the territory of India. Over the years, the Apex Court has developed several doctrinal tools for determining the negation or otherwise of the right to equality within the meaning of article 14. The dominant test for equality analysis under article 14 has long been described as the ‘classification’ or ‘nexus’ test and it continues to hold its relevance and appeal in contemporary constitutional discourse.¹⁰ The essence of the test lies in the fact that it circumscribes the scope of permissible differentiation so as not to amount to discrimination or class legislation. In order to pass the test of ‘reasonable classification’, the following twin requirement must be fulfilled by the enactment in question: (i) the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others left out of the group, and (ii) the differentia must have a rational relation to the objects sought to be achieved by the Act.¹¹ Later decisions have clarified that the object of classification must itself be lawful and not discriminatory in order to withstand the equality scrutiny under article 14.¹² It is also clear that the differentia forming the basis of classification and the object of the legislation are distinct and separate from each other, meaning thereby that the differentiation cannot be an end in itself. In other words, the object of an enactment cannot simply be to differentiate between one class (of persons, things, circumstances, etc.) and another or to create two or more distinct classes (of persons, things, circumstances, etc.) from a given group.

⁹ The validity of the impugned enactments is sought to be examined on the parameters of the ‘reasonable classification’ test as against the ‘arbitrariness’ test due the availability of avenue for comparative evaluation [See Tarunabh Khaitan, ‘Equality: Legislative Review under art 14’ in Sujit Chudhry *et.al.* (eds.) *The Oxford Handbook of Indian Constitution* 699, 702 (Oxford University Press, Oxford, 2016)]. See also *Shayara Bano v. Union of India* (2017) 9 SCC 1 (arbitrariness is a doctrine distinct from discrimination).

¹⁰ For some instances of recent application, see *State of Maharashtra v. Indian Hotel and Restaurants*, AIR 2013 SC 2582; *Subramanian Swamy v. Director, CBI* (2014) 8 SCC 682; *Rajbala v. State of Haryana* (2016) 1 SCC 463; *Hiral Harsora v. Kusum Harsora* (2016) 10 SCC 165 and *State of Punjab v. Senior Vocational Staff Masters Association*, AIR 2017 SC 4072.

¹¹ *State of West Bengal v. Anwar Ali Sarkar*, AIR 1952 SC 75.

¹² *Bidi Supply Co. v. State of Gujarat*, AIR 1956 SC 479; *Nagpur Improvement Trust v. Vithal Rao* (1973) 1 SCC 500; *Deepak Sibal v. Punjab University* (1989) 2 SCC 145 and *Subramanian Swamy v. Director, CBI* (2014) 8 SCC 682.

Applying the above test to clause (2) of the Bill, we find that it seeks to create two classes of ‘migrants’ (legal and illegal), one of which is distinguishable from the other on account of markers based on nationality and religion analysed cumulatively. However, the real challenge is to identify the object underlying the classification. Inasmuch as ‘reference to the Statement of Objects and Reasons (*hereinafter* ‘SOR’) is permissible for understanding the background, the antecedent state of affairs, the surrounding circumstances in relation to the statute and the evil which the statute sought to remedy’,¹³ resort to the same may be had in order to gain an understanding of the object of the classification. However, a perusal of the SOR appended to the Bill makes it clear that it is too general¹⁴ and inaccurate¹⁵ to provide a justifiable explanation for the impugned classification. Thus, if the object of the classification is to be gleaned from the SOR alone, it is clearly discriminatory and does not meet the test of ‘reasonable classification’ inasmuch as it does not provide a cogent explanation for privileging one class of ‘illegal migrants’ over another and differentiation *per se* cannot be a valid basis of classification.

However, there are at least three reasons for not relying upon the SOR exclusively as the final word on the object of an enactment. The first and foremost among them is the presumption of constitutionality. The presumption of constitutionality in favour of an enactment is a time-honoured tradition of constitutional adjudication. It enjoins upon the judiciary to recognise the fundamental nature and importance of the legislative process.¹⁶ It has been authoritatively held that the scope of the presumption is not confined to the enacting or substantive provisions of an enactment but is much wider and in fact, it informs the inquiry into the object and purpose of an enactment as well.¹⁷ The other two reasons pertain to the inadmissibility of the SOR as a permissible aid to construction¹⁸ and the rule requiring

¹³ See *State of West Bengal v. Subodh Gopal Bose*, AIR 1954 SC 92; *K.K. Kochuni v. State of Madras*, AIR 1960 SC 1080; *State of West Bengal v. Union of India*, AIR 1963 SC 1241; *S.C. Parashar, I.T.O. v. Vasantsen Dwarkadas*, AIR 1963 SC 1356; *P. Vajravelu Mudaliar v. Special Deputy Collector, Madras*, AIR 1965 SC 1017; *K.S. Paripoornan v. State of Kerala* (1994) 5 SCC 593.

¹⁴ The SOR refers to a hardship that is common across all the categories of ‘illegal migrants’, viz. ineligibility to apply for Indian citizenship.

¹⁵ As against cl. (2) of the Bill, the SOR refers to the entire class of Hindus, Sikhs, Buddhists, Jains, Parsis and Christians from Afghanistan, Bangladesh and Pakistan rather than those exempted by or under S. 3(2)(c) of the Passport (Entry into India) Act, 1920 or from the application of the Foreigners Act, 1946.

¹⁶ *Subramanian Swamy v. Director, CBI* (2014) 8 SCC 682.

¹⁷ See *State of Bihar v. Bihar Distillery Ltd.*, (1997) 2 SCC 453 (The Court should not approach the enactment with a view to pick holes or to search for defects of drafting, much less in exactitude of language employed... The same approach holds good while ascertaining the intent and purpose of an enactment or its scope and application).

¹⁸ See *Aswini Kumar Ghose v. Arabinda Bose*, AIR 1952 SC 369 ([T]hose objects and reasons may or may not correspond to the objective which the majority of members had in view when they passed it into law... We, therefore, consider that the statement of objects and reasons appended to the Bill should be, ruled out as an aid to the construction of a statute).

consideration of material provisions of the statute in a bid to arrive at the object underlying an impugned legislation.¹⁹

Viewed from a different perspective, it has been pointed out that in every classification, while a statute must necessarily specify the differential or special treatment ('what' element), the remaining two elements, namely, the description of the persons or classes to be subjected to special treatment ('whom' element) and the object sought to be achieved by the classification ('why' element) may not be specifically provided for.²⁰ While the former may be left to be determined by the executive acting within the parameters and upon the guidelines set by the legislature, the latter may have to be identified with reference to the 'what' and 'whom' elements and the Court may assign any plausible purpose to the classification in that light.²¹

Thus, it becomes necessary to examine the material provisions on their own terms without reference to the SOR. A careful perusal of clause (2) of the Bill requires us to enlist the assistance of two other key pieces of subordinate legislation in order to appreciate the true import of the classification in question. Inasmuch as clause (2) makes explicit reference to the exemptions recognised by or under the relevant provisions of the Passport (Entry into India) Act, 1920 and the Foreigners Act, 1946, it becomes necessary to look into the provisions of the Passport (Entry into India) Amendment Rules, 2015; the Passport (Entry into India) Amendment Rules, 2016; the Foreigners (Amendment) Order, 2015 and finally, the Foreigners (Amendment) Order, 2016. A cumulative reading of the scheme of classification running through these allied pieces of legislation reveals that the Bill although purporting to create two distinct classes of 'migrants', in fact creates two distinct classes of 'refugees'. It is useful to emphasize here that there exists a discernible distinction between 'migrants' and 'refugees' in the international legal literature.²² While the former are characterised predominantly by the voluntary nature of their movement across borders, the latter are compelled to leave their country of origin to avoid persecution. Interestingly, the language adopted by the Passport (Entry into India) Amendment Rules, 2015 and the Foreigners

¹⁹*Kangari Haldar v. State of West Bengal*, AIR 1960 SC 457 (In considering the validity of the impugned statute on the ground that it violates art. 14 it would first be necessary to ascertain the policy underlying the statute and the object intended to be achieved by it. In this process the preamble to the Act and its material provisions can and must be considered).

²⁰ P.K. Tripathi, *Some Insights into Fundamental Rights* 59 (University of Bombay, Mumbai, 1972).

²¹ Udai Raj Rai, *Fundamental Rights and their Enforcement* 461 (PHI Learning, New Delhi, 2011).

²² UNHCR viewpoint: 'Refugee' or 'migrant' – Which is right?, available at: <http://www.unhcr.org/news/latest/2016/7/55df0e556/unhcr-viewpoint-refugee-migrant-right.html> (last visited on Jan. 13, 2018). See also Remarks made by Secretary (West) at Symposium on World Humanitarian Summit on May 4, 2016, available at: http://www.mea.gov.in/Speeches-Statements.htm?dtl/26756/Remarks_by_Secretary_West_at_Symposium_on_World_Humanitarian_Summit (stating that the blurring of the distinction between migrants and refugees was a "worrying trend") (Visited on January 13, 2018).

(Amendment) Order, 2015 leaves no room for doubt that the exempted categories of persons are in fact ‘refugees’ as distinguished from mere ‘asylum seekers’ or ‘migrants’.

Understood in light of the above, the real object of the Bill appears to be to provide a selected class of refugees the opportunity of local integration via expedited naturalization. However, the object of the Bill then becomes invidious from the point of view of international law. Since the Bill seeks to confer privileges upon one sub-class of refugees over another based on their religions and nationalities, it can be said to violate the non-discrimination norm of international refugee law that proscribes religion and nationality based discrimination between and among refugees.²³

Though India is not a party to the Convention Relating to the Status of Refugee Convention, 1951 or its 1967 protocol, it has nevertheless accepted the duty of non-discrimination in respect of different sub-classes of refugees through the adoption of the Bangkok Principles on the Status and Treatment of Refugees, 1966.²⁴ Further, the norm of non-discrimination is recognised as a principle of international human rights law in various human rights instruments to which India is a party or at least a signatory.²⁵ Additionally, the principle of non-discrimination has arguably attained the status of customary international law so from the point of view of international law, it remains immaterial if India has ratified the relevant conventions in this regard or not.²⁶ As far as binding international commitments go, of particular relevance is article 26 of the ICCPR that is couched in language almost identical to article 14 of the Constitution of India.²⁷ According to the General Comment issued by the Human Rights Committee on the right to non-discrimination under article 26 of the ICCPR in 1989:²⁸

²³ Convention Relating to the Status of Refugees, 1951, art. III. See also OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969, art. IV.

²⁴ AALCO’s 1966 Bangkok Principles on Status and Treatment of Refugees (‘Bangkok Principles’), art. IV.5.

²⁵ UDHR, arts. 2 and 7; ICCPR, art. 2.1; ICESCR, art. 2.2; CERD, arts. 2 and 5, CRC, art. 2; and Additional Protocol to the SAARC Regional Convention on Suppression of Terrorism, 2004, art. 17. This is further reinforced by the VCLT, 1969, arts. 18, 26 and 27 and 31. See *Ram Jethmalani v. Union of India*, (2011) 8 SCC 1 (While India is not a party to the Vienna Convention, it contains many principles of customary international law and the principle of interpretation, of art 31 of the Vienna Convention, provides a broad guideline as to what could be an appropriate manner of interpreting a treaty in the Indian context also). See also *Jeeja Ghosh v. Union of India*, (2016) 7 SCC 761.

²⁶ David Keane, “Discrimination”, available at: <http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0103.xml> (Last Modified July 30, 2014).

²⁷ ICCPR, art. 26 reads: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. See art 25 as an exception (applicable only to ‘citizens’).

²⁸ UN Human Rights Committee (CCPR), “General Comment No. 18: Non-discrimination” (1989), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 146, para. 12. 9 (The term “discrimination” as used in the Covenant should

Article 26 is... concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant.

Further, a leading commentator on the international refugee law has stated that “article 26 [of the ICCPR] has considerable value as a complementary prohibition of discrimination between classes of refugees in the allocation of a wide-ranging set of rights, and on the basis of any type of actual or imputed group identity.”²⁹ It may be recalled here that at the time of ratification of the ICCPR, India had made a reservation to article 13 that expressly dealt with the right of aliens. However, insofar as the scope of article 13 is confined to procedural safeguards against expulsion of aliens lawfully present in the territory of the State party, it cannot be relied upon as a valid ground for derogating from the more general obligation contained in article 26. Thus, the object of the classification provided for in the Bill may be assailed as discriminatory according to the relevant norms of international law.

III Challenge based on article 21

It has been now well-settled through a series of judicial decisions that fundamental rights contained in Part III of the Constitution of India do not form ‘self-contained codes’³⁰ or isolated silos³¹ but are rather parts of an integrated scheme.³² The theory of interrelationship between different fundamental rights requires the Court to examine the ‘direct and inevitable consequence’ as opposed to the ‘form and object’ of State action. It is quite possible that in a given case the ‘form and object’ (pith and substance) of the impugned State action deals with a particular fundamental right but its ‘direct and inevitable effect’ is on another fundamental right. In such an eventuality, it stands to reason that the impugned State action pass the test of the latter fundamental right as well. For the purposes of the current analysis, the offending statutes are rule 4(1)(ha) of the Passport (Entry into India) Rules, 1950 and paragraph 3A of the Foreigners Order, 1948 that enact the scheme of

be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms). See also CCPR, “General Comment No. 15: The Position of Aliens Under the Covenant” (1986), *available at*: <http://www.refworld.org/docid/45139acfc.html> (last visited on Jan. 13, 2018).

²⁹ James C. Hathaway, *The Rights of Refugees Under International Law* 160 (Cambridge University Press, New York, 2005).

³⁰ *R.C. Cooper v. Union of India*, AIR 1970 SC 564.

³¹ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, Writ Petition (Civil) No. 494 of 2012.

³² *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.

classification in favour of a particular class of refugees. *Ex facie*, the impugned provisions may be seen to deal with article 14 but the direct and inevitable effect of the impugned rule and order is to abridge the fundamental rights of refugees guaranteed in article 21 of the Constitution of India. Hence, they cannot survive constitutional scrutiny unless they satisfy the test of 'substantive due process' meaning thereby that it is not only the procedure established by law that has to be just, fair and reasonable but the law itself has to be reasonable.³³

While it is true that the protection of article 21 extends to citizens and foreigners (including refugees) alike, it has not been accorded such an expansive interpretation as to require admitting them to the privileges of citizenship³⁴ or residing and settling in any part of the territory of India.³⁵ In fact, it has also been clarified that the power of the Union Government to expel foreigners is absolute and unlimited and there is no provision in the Constitution fettering this discretion.³⁶ However, insofar as imprisonment³⁷ is a potential penal consequence directed at non-exempted categories of refugees, it is submitted that deprivation of personal liberty is immediately in issue and article 21 is squarely attracted.

In any case, at a minimum, the content of the protection may be said to comprise the fundamental norm of *non-refoulement*³⁸ under the refugee law for without it the guarantee of 21 would be meaningless in respect of refugees. Hence, the impugned classification read with the related provisions on deportation³⁹ clearly lie in the teeth of India's national and international commitments.

It has been judicially recognised that "the quality of reasonableness does not attach only to the content of the procedure which the law prescribes with reference to article 21 but to the

³³ *Mithu v. State of Punjab* (1983) 2 SCC 277; *Selvi v. State of Karnataka* (2010) 7 SCC 263; *Mohd. Arif @ Ashfaq v. The Reg. Supreme Court of India* (2014) 9 SCC 737 and *Justice K.S. Puttaswamy (Retd.) v. Union of India*, Writ Petition (Civil) No. 494 of 2012.

³⁴ *Gnanaprakasam v. Government of Tamil Nadu*, W.P.No.18373 of 2008 (Mad).

³⁵ *Louis De Raedt v. Union of India* (1991) 3 SCC 554.

³⁶ *Hans Muller of Nuremburg v. Superintendent, Presidency Jail, Calcutta*, AIR 1955 SC 367.

³⁷ Passport (Entry into India) Rules, 1950, rule 6 and The Foreigners Act, 1946 (Act 31 of 1946), s. 14.

³⁸ See UDHR, art. 14; Convention Relating to the Status of Refugees, 1951, art. 33.2; Bangkok Principles 1966, art. III.1, UN Declaration on Territorial Asylum, 1967, art. 3.1; CERD, art. 5 read with "General Recommendation 22: Refugees and displaced persons (1996), U.N. Doc. A/51/18; ICCPR, art. 7; CAT, art. 3; CED, art. 16; *NHRC v. State of Arunachal Pradesh* (1996) 1 SCC 742; *Dongh Lian Kham v. Union of India*, 226 (2016) DLT 208; *Ktaer Abbas Habib Al Qutaifi and Anr. v. Union of India*, 1999 CriLJ 919. See also New York Declaration for Refugees and Migrants (2016), A/RES/71/1 Sep. 19, 2016, para. 67; and Statement by Mr. Anil Kumar Rai, (Counsellor Humanitarian Affairs) on 1st Thematic Discussion towards a Global Compact on Refugees delivered on 10 July 2017, available at: <http://pmindiaun.org/pages.php?id=1509> (Visited on Jan. 13, 2018).

³⁹ Passport (Entry into India) Act, 1920 (Act 34 of 1920), s. 5 and The Foreigners Act, 1946 (Act 31 of 1946), s. 3(2)(c).

content of the law itself.’⁴⁰ The ‘reasonableness’ of the law under article 21 is generally examined with reference to articles 14 and 19 of the Constitution of India.⁴¹ However, since article 19 is available only to citizens and reference to article 14 analysis would obviously be tautological; the necessity of giving meaning to the guarantee of ‘substantive due process’ would require the application of article 21 on its own terms. This, in turn, would arguably lead to the invocation of another exacting standard of constitutional review. It is submitted that there is considerable authority for adoption of the ‘strict scrutiny’ test in respect of at least the ‘negative rights under article 21’.⁴² The ‘strict scrutiny’ test has the effect of reversal of the presumption in favour of the constitutionality of an enactment and the burden is on the State to justify the impugned State action.⁴³ Additionally, it requires a more searching judicial scrutiny into ‘compelling State ends’; (most pressing circumstances); ‘narrow tailoring’ (the law must not overreach the compelling ends) and if the same corresponds with least restrictive alternative available to pursue those ends’.⁴⁴ Thus, in a ‘strict scrutiny’ analysis, the Government [or the State] must be asked to provide a rigorous, detailed explanation in respect of this classification.⁴⁵

Applying the above tests to the impugned provisions identified above, we find that there was neither any compelling State interest justifying discrimination between and among refugee sub-populations and even if that requirement is somehow satisfied, the ‘law’ in question is most certainly not narrowly tailored or least restrictive in its evidently omnibus and indiscriminate criminalisation of non-exempted subsets of refugees.

IV Interface between Municipal and International Law in India

Notwithstanding the relative merit or soundness of scholarly approaches in locating refugee law protection elements within the existing legal and constitutional framework, the fundamental roadblock against application of the international refugee law principles in domestic constitutional adjudication remains as pertinent as ever. The original position since

⁴⁰ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, Writ Petition (Civil) No. 494 of 2012.

⁴¹ *Mohd. Arif @ Ashfaq v. The Reg. Supreme Court of India* (2014) 9 SCC 737 (Several judgments were delivered, and the upshot of all of them was that art 21 was to be read along with other fundamental rights, and so read not only has the procedure established by law to be just, fair and reasonable, but also the law itself has to be reasonable as arts 14 and 19 have now to be read into art 21).

⁴² Tarunabh Khaitan, ‘Beyond Reasonableness – A Rigorous Standard of Review for art 15 Infringement’, 50 (2) *JILI* 179 (2008).

⁴³ *Anuj Garg v. Hotel Association of India* (2008) 3 SCC 1 [...it is trite that when the validity of a legislation is tested on the anvil of equality clauses contained in arts 14 and 15, the burden therefore would be on the State].

⁴⁴ *Subhash Chandra v. Delhi Subordinate Services Selection Board* (2009) 15 SCC 448 (Notwithstanding the lack of doctrinal clarity, the two-judge Bench did seek to put the ratio of *Saurabh Chaudri v. Union of India* (2003) 11 SCC 146 in perspective by holding that the ‘strict scrutiny’ test was not foreclosed for good in the Constitution Bench decision).

⁴⁵ *Kerala Bar Hotels Association v. State of Kerala* (2015) 16 SCC 421.

the enactment of the Constitution was that inasmuch as the Constitution did not render the treaties to which India was a party the law of the land,⁴⁶ the corresponding treaty obligations could not be enforced by the Courts in the absence of express legislative sanction.⁴⁷ Thus, the Indian judiciary has traditionally upheld the dualist nature of India's international legal commitments by insisting upon the requirement of specific incorporation of international law provisions in municipal law.⁴⁸ However, as early as 1969,⁴⁹ the Supreme Court of India had shown the inclination to interpret statutes, insofar as their language permits, in accordance with the established principles of international law. This approach was based on the presumption that the Parliament does not assert or assume jurisdiction which goes beyond the limits established by the common consent of nations. However, it was also pointed out in the same case that '[i]f statutory enactments are clear in meaning, they must be construed according to their meaning even though they are contrary to the comity of nations or International Law'.⁵⁰ In the later cases, the apex Court seems to have fully embraced the principle of monism especially in the context of rights-enhancing treaties subject to the limitations imposed by inconsistent Acts of Parliament.⁵¹

In *Chairman, Railway Board v. Chandrima Das*,⁵² the Court clarified that articles 3 (protection of life, liberty and security), 7 (equality before law and equal protection of law and freedom from discrimination) and 9 (protection against arbitrary arrest, detention and exile) of the UDHR were in consonance with articles 20, 21 and 22 of the Constitution of India and further emphasized the need to read UDHR and the principles thereof into the domestic jurisprudence. It is relevant to mention here that this development is quite heartening especially in the context of article 21 given that the constitutional jurisprudence on article 21 has undergone sea change post the constitutional catharsis attributable to the decision in *Maneka Gandhi v. Union of India*⁵³ whereby the scope of article 21 was expanded in a significant way as it was now held to include the guarantee of 'substantive due process'

⁴⁶ *State of Gujarat v. Vora Fiddali Badruddin Mithibarwala*, AIR 1964 SC 1043.

⁴⁷ *State of West Bengal v. Jugal Kishore More* (1969) 1 SCC 440.

⁴⁸ *Maganbhai Ishwarbhai Patel v. Union of India*, AIR 1969 SC 783; *Jolly George Varghese v. Bank of Cochin*, AIR 1980 SC 470; *State of West Bengal v. Kesoram Industries Ltd.* (2004) 10 SCC 201.

⁴⁹ *V.O. Tractor Export, Moscow v. Tarapore & Company* (1969) 3 SCC 562.

⁵⁰ *Ibid.*

⁵¹ *Gramophone Co. of India Ltd. v. Birendra Bahadur Pandey* (1984) 2 SCC 534; *Nilabati Behera v. State of Orissa* (1993) 2 SCC 746; *Vishaka v. State of Rajasthan* (1997) 6 SCC 241; *People's Union for Civil Liberties v. Union of India* (1997) 3 SCC 433; *People's Union for Civil Liberties v. Union of India* (1997) 1 SCC 301; *Apparel Export Promotion Council v. A.K. Chopra*, (1999) 1 SCC 759; *Githa Hariharan v. Reserve Bank of India* (1999) 2 SCC 228; *Chairman, Railway Board v. Chandrima Das* (2000) 2 SCC 465; *Aban Loyd Chiles Offshore v. Union of India* (2008) 11 SCC 439; *T.N. Godavarman Thirumulpad v. Union of India* (2012) 4 SCC 362; *NALSA v. Union of India* (2014) 5 SCC 438; *Justice K.S. Puttaswamy (Retd.) v. Union of India*, Writ Petition (Civil) No. 494 of 2012.

⁵² (2002) 2 SCC 465.

⁵³ (1978) 1 SCC 248.

along with fairness, justness and reasonableness of the procedure providing for deprivation of personal liberty. It is submitted that the new and expansive interpretation placed by the Court on the content of article 21 provides considerable scope for examination of the validity of impugned State action on the touchstone of the limitations set forth by the norms of customary international law or treaty law for that matter.

V Conclusion

The current refugee crisis is undoubtedly one of the worst humanitarian crises that have hit the world in the past decade and given its geopolitical location and porous borders, India is host to a sizeable refugee population in the world. Even though mass scale refugee influx in India dates back to 1959, India is yet to come up with a comprehensive legislative framework dealing with the issue of refugee protection. Additionally, India continues to refuse to be a signatory to the Convention on the Status of Refugees, 1951 or its 1967 Protocol. Paradoxically, it also continues to be a member of the Executive Committee of the UNHCR since 1995 without being a signatory to the Convention under which it was constituted. Furthermore, it has affirmatively participated in a few policies and programmes pertaining to the status and right refugees initiated at the regional level. Within the constitutional framework, however, articles 14 and 21 as interpreted through judicial decisions provide some basic guarantees in respect of refugee protection. Further, article 51(c) of the Constitution of India a Directive Principle of State Policy casts a duty on the State to endeavour to foster respect for international law. Given this ambivalent stance of the Indian State towards refugees, it becomes highly suspect when it comes out with a rather generous and benevolent legislative policy in respect of a certain class of refugees providing for their expedited naturalisation. Although the legislation in question uses the standard device of using deceptive nomenclature to facilitate removal and expulsion of seemingly undesirable classes of refugee population, its discriminatory character nevertheless becomes apparent upon deeper scrutiny and despite its claim to unprecedented munificence; it fails to measure up to the standard of equality envisaged under the Constitution of India. It is rather disappointing to note that the Joint Committee of the Parliament that was set up to examine these issues *vis-a-vis* The Citizenship (Amendment) Bill, 2016 (an earlier draft of the proposed amendments) has failed to appreciate this point. To its credit, it did examine the issues of under/over inclusion and differential bases of classification, its analysis was undone by its undue focus on faulty premises, *viz.* religion as a proscribed basis of classification and secularism as a tenable challenge to the constitutionality of the Bill. The Committee also failed to appreciate that the Bill while purporting to create two different classes of migrants

was in fact creating two different classes of refugees hence its preoccupation with article 14 on a standalone basis and not in conjunction with article 21 of the Constitution. Given the lack of nuanced and layered analysis of the Bill by the Joint Parliamentary Committee, its passage by both the Houses of the Parliament with relative ease would appear to be but natural. At this stage, one can only hope that the Constitutional Courts of the country would be more sensitive and discerning in their analyses should the constitutionality of the Bill and the allied subordinate legislations ever comes up in question. It is hoped that shrewd political/legalistic justifications premised on dualist interpretation of international law will also prove to be anachronistic in the light of the progressive interpretations placed on the constitutional rights contained in Part III of the Constitution and the Bill will be called out for what it is – an invidious device aimed at realising political ends – instead of a palliative for the wretched.