

INDIAN JUDICIAL PROTECTION TO THE VICTIMS OF PERSECUTION – IS LAW BLIND? - A CRITICAL ANALYSIS

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“[G]overnments throughout the world have tried to avoid dealing with the difficult questions raised by refugee and related movements. One method is to seek to redefine the problem as one not involving obligation or responsibility.”

Guy S. Goodwin-Gill**

ABSTRACT

India neither has refugee legislation nor is a party to the Convention on the Status of Refugee, 1951, or its Protocol of 1967. It, however, has not been lacking in giving protection to those who seek protection from persecution. In the absence of any specific law and treaty obligations, Indian Government has been selective in according or refusing to accord protection to the victims of persecution. The courts, however, in India on many occasions have given liberal interpretation to the rights guaranteed in the Constitution defining minimal treatment to the refugees and thus has played a significant role in bridging the gap between the “is” and the “ought”. Against this background, in this paper an attempt is made to examine the efforts taken by the Indian judiciary in bridging the gap between India’s international obligations and domestic laws and also analyze the desirability of prescribing the ‘ought’ within which courts can authoritatively declare the ‘law’.

Keywords: *Constitution; India, Judiciary; Persecution; Protection; Refugee*

- I. Introduction**
- II. The Legal Framework of the International Refugee Protection System**
- III. India and Refugee Protection: Laws and Policies**
- IV. Indian Judiciary and Refugee Protection**
- V. Conclusion: A Way Forward**

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** Guy S. Goodwin-Gill, “Refugees and Responsibility in the Twenty-First Century: More Lessons Learned from The South Pacific”, 12 (1) *Pacific Rim Law and Policy Journal* 23, 23- 47 (2003).

I. Introduction

THROUGHOUT HISTORY, the world and communities¹ have received frightened,² tired refugees, survivors of persecution³ and violence. India is no exception; it has been receiving refugees ever since 1947.⁴ Notwithstanding the fact that India neither is a party to the Convention Relating to the Status of Refugees 1951 nor its 1967 Protocol on the Status of Refugees, it has offered asylum and humanitarian assistance⁵ to those who were persecuted in their country of origin⁶ or nationality.⁷

¹ Paul Weiss, “The International Protection of Refugees” 48(2) *The American Journal of International Law* 193-221, 193, 194 (1954). Paul argues that “the practice of individual states has done much to mitigate the disabilities of refugees.”

² See contra Kate, she argues that states that once freely received refugees have now been reluctant to receive them and thus forced to close their doors for fear of taking on long-term obligations, aiding unregulated migration and people smuggling, or risking national security. Ms Kate Jastrem and Ms Manlyn Achiron, *Refugee Protection: A Guide To International Refugee Law*, 6 (Ms Erika et al eds.), available at: <https://www.refworld.org/docid/3cd6a8444.html> (Last visited on 03 February 2023). See also Guy S. Goodwin-Gill, “Refugees and Responsibility in the Twenty-First Century: More Lessons Learned From The South Pacific,” 12(1) *Pacific Rim Law and Policy Journal* 23, 27 (2003), available at: <https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/gsgg-southpacific-200324immigrnatlitylrev323.pdf> (Last visited on Feb. 03, 2023). Goodwin on States denial to receive refugees and accord protection to them has observed that “many of the first asylum countries in Southeast Asia tried to avoid using the word “refugee” [and] those seeking refuge were “illegal migrants ... or simply “boat people”.”

³ See M. Afzal Wani, “Refugee Crisis and the Universal Human Rights Instruments: An Overview of Fifty Years Development” 41(2) *Journal of The Indian Law Institute*, 201-221, 201 (1999). Wani has identified ‘power’ as an instrument for the refugee crisis as well as refugee policies. It may be noted that ‘power’, the ability to change the legal position of another person, can be destructive if abused. According to Wani, “The Game of power and the consequent displacement of people from their own lands and their assimilation elsewhere has been an unending feature of the story of humankind.” See also, for example, Richard Falk, “The Power of Rights and the Rights of Power: What Future for Human Rights?” 1(1-2) *Ethics & Global Politics*, 81-96 (2008). In this article Falk has explored the tensions between geopolitics and human rights with reference to world politics. See also for analysis of power and its implication and control, Karl Loewenstein, *Political Power and Governmental Process* (The University of Chicago Press, Chicago, 2nd ed. 1965).

⁴ Arun Sagar and Farrah Ahmad, “The Model Law for Refugees: An Important Step Forward” 17 *Students Bar Review*, 73 – 91 (2005), available at: https://www.jstor.org/stable/pdf/44290310.pdf?refreqid=fastly-default%3Afd3b640f23a3b5f0b5db3a63e8f57db4&ab_segments=0%2Fbasic_search_gsv2%2Fcontrol&origin=search-results&acceptTC=1 (Last visited on Feb. 03, 2023).

⁵ See for example See Nair R., “Refugee Protection in South Asia” 51(1) *Journal of International Affairs* 201 – 220, 201 (1997), available at: https://www.jstor.org/stable/pdf/24357479.pdf?refreqid=fastly-default%3A55c1926038f7648019154323501d4588&ab_segments=0%2Fbasic_search_gsv2%2Fcontrol&origin=search-results (Last visited on Feb. 03, 2023). According to Nair, “India’s multiethnic, multilingual and relatively stable society has often made it an attractive destination for refugee.” See also Bimal N. Patel, “Refugee Law, Policy and Practices of India”, in *The State Practice of India and the Development of International Law 4 Brill’s Asian Law Series*, 117 – 151 (Brill NV Ledian 2016), available at: <https://brill.com/view/book/9789004321335/B9789004321335-s005.xml> (Last visited on Feb. 03, 2023). Bimal has examined questions regarding India’s policy and practices on refugee issues and on whether India is “refugee heaven.”

⁶ Available at: <http://www.unhcr.org/publ> (Last visited on Feb. 03, 2023).

⁷ See contra, H Knox Thames, “India’s failure to adequately protect refugees” 7(1) *Human Rights Brief* 20-23, 23 (1999), available at:

The Convention Relating to the Status of Refugees 1951 and its 1967 Protocol list the rights and responsibilities of refugees, as well as the obligations of States parties,⁸ and sets out the minimum standards to be applied by the contracting parties to the refugees. India stands out as an outstanding example of a safe refuge for people trying to escape persecution in the South Asian region⁹, in the absence of a law that may guarantee refugees their legitimate rights to which they are entitled under international refugee law.¹⁰ In India, the legal system that governs and regulates refugees is founded on how the Constitution is interpreted and applied.¹¹ Against this background, an attempt is made in this paper to analyze the role of the Indian judiciary in bridging the gap by reading internationally recognized principles with respect to refugees in municipal laws, and thus accordingly argue for the desirability of “ought” to be prescribed. For this purpose, the paper is divided into five parts. Part I deals with the introduction. Part II refers to the international perspective on refugee protection with a critical note with respect to its success, if any. Part III of the paper describes and critically analyzes the laws and policies in India vis-à-vis refugee protection. Part IV has analyzed the role of the Indian Judiciary in approximating the “is” to the “ought.” Part V bears reference to the conclusion with an argument about whether India needs a refugee law.

<https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1520&context=hrbrief>. (Last visited on Feb. 03, 2023). Thames in his observation on the India’s role in according protection to refugees, despite India neither being party to the 1951 Refugee Convention and 1967 Protocol, concludes that “India’s lack of clear standards for the treatment of refugee groups, however, is resulting in violation of the international norms for the treatment of refugees. Its policies are discriminatory and inequitable, even to members of the same group.”

⁸ The Convention Relating to the Status of Refugees of 1951 and 1967 Protocol on the Status of Refugees are said to cover the basic principle of a “refugee protection,” the status of refugee in the country of asylum, and the interrelation between the State parties and UNHCR. For further details on the UNHCR’s role in monitoring and securing refugee rights at the international level refer to lectures delivered by Aga Khan, “United Nation High Commissioner for Refugees on Legal Problems relating to Refugees and Displaced Persons” at *The Hague Academy of International Law* (4-6 August 1976), available at: <https://www.unhcr.org/search?page=search&skip=9&docid=&cid=49aea93a4c&scid=49aea93a2f&comid=4a00424c6&author=Khan>. (Last visited on Feb. 03, 2023). See also Guy S Goodwin-Gill, “The Movements of People between States in the 21st Century: An Agenda for Urgent Institutional Change” 28(4) *International Journal of Refugee Law* 679-694 (2016), available at: <https://zolberginstitute.org/wp-content/uploads/2018/04/Guy-Goodwin-Gill.pdf> (Last visited on Feb. 03, 2023). In this paper Goodwin has proposed some structural changes with respect to the UNHCR’s 1950 Statute to extend its mandate to migrants without protection.

⁹ Over centuries, India has experienced multiple influxes, and these people’s ability to integrate into multi-ethnic and multi-cultural society has strengthened the image of India as a nation traditionally welcoming refugees. available at: <http://www.Legalserviceindia.com/article> (Last visited on Feb. 03, 2023).

¹⁰ *Supra* note 4 at 75.

¹¹ See Bimal N. Patel, “Refugee Law, Policy and Practices of India,” in *The State Practice of India and the Development of International Law 4 Brill’s Asian Law Series*, 118 (Brill NV Ledian 2016), available at: <https://brill.com/view/book/9789004321335/B9789004321335-s005.xml>. (Last visited on Feb. 03, 2023).

II. The Legal Framework of the International Refugee Protection System

States are not only responsible but should be committed to protecting their people; however, individuals may be subjected to serious violations of their rights when governments refuse or are unable to protect their people, thus forcing them to flee their homes in search of protection in another country.¹² It is to them that the Convention Relating to the Status of Refugees has successfully provided a basis for security¹³ from persecution, whether from despotic governments, the violence triggered by rebellions, or the numerous ethnic or religious strife that have erupted in the post-cold war period.¹⁴ Although the legal meaning of the word “refugee” varies by region, the term “refugee law” usually refers to an internationally established doctrinal framework of definition and security accorded to those who flee their country of nationality or origin because of persecution.¹⁵

International refugee law is founded on the Convention Relating to the Status of Refugees¹⁶ and its Protocol of 1967. The 1951 Refugee Convention and 1967 Protocol define the term “refugee” and establish fundamental guidelines for the protection of people who are identified to be refugees¹⁷ by the contracting States.¹⁸ The Protocol to the Convention, which was adopted in 1967,

¹² *Supra* note 2 at 5.

¹³ For subsequent details refer to L Holborn *et al.*, *Refugee: A Problem of Our Times: The Work of the United Nations High Commissioner for Refugees* (Metuchen, NJ.: Scarecrow Press, 1975).

¹⁴ Feller, E. Turk, V. Nicholson, *Refugee Protection in International Law: UNHCR'S Global Consultations on International Protection* 3, 4 (Cambridge University Press, Geneva, 2003).

¹⁵ Sourav Kumar Das, *et al.*, *Why Does Refugee Generates? An Empirical Perspective in Refugee Crisis and Third World Economies: Policies and Perspectives* 3 (ed., Sourav Kumar Das and Nidhi Chowdhary) (Emerald Publishing 2020), available at: <https://books.emeraldinsight.com/resources/pdfs/chapters/9781839821912-TYPE23-NR2.pdf> (Last visited on Feb. 03, 2023). For Sourav and Nidhi, the term *refugee* covers a lot of ground.

The word ‘refugee’, like the people it explains, can cover a lot of ground. Politicians, aid workers, academics and press often approach the word from different points of view, and with varying concepts, roles and responsibilities the term implies. Such divergent views include the global debate about how best to manage and protect refugees.

See also generally P Weis, *Nationality and Statelessness in International Law* (Steven and Sons, London, 1956). In this book the author has attempted to answer certain questions relating to the conflict of nationality laws. It is a thorough treatise on the existence and nature of rules of public international law relating to nationality and statelessness.

¹⁶ Following the creation of the UNHCR and the drafting of the Statute of the United Nations High Commissions for Refugees (“Status”) and the 1951 Convention relating to the Status of Refugees, modern refugee law came into its own after WWII. David Kennedy, “International Refugee Protection” 8(1) *Human Rights Quarterly* 1, 10 (1986).

¹⁷ *Supra* note 2 at 8.

¹⁸ See for contra, Seyla Benhabib, “The End of the 1951 Refugee Convention? Dilemmas of Sovereignty, Territoriality, and Human Rights” 2 *Jus Cogens* 75 – 100 (2020), available at: <https://link.springer.com/article/10.1007/s42439-020-00022-1#citeas> (Last visited on Feb. 03, 2023). Seyla describes

encompasses new refugee crises which occurred after 1950.¹⁹ Both the 1951 Convention on the Status of Refugees and the 1967 Protocol represent the basic human principles on which there is international consensus,²⁰ and they are the first²¹ and only international instruments that govern those who are forced to flee their homes and seek refuge in another country due to persecution.

It may be noted that the 1951 Refugee Convention and 1967 Protocol does not deal with the causes of refugees' flow and ignores the state of origin as the source of refugees.²² As a result, States which were liberal to accept refugees have been driven to close their doors for fear of receiving unchecked and unrestricted migration and responsibilities and also of threatening national security.²³ The States, now, have resorted to measures to evade their obligations under the

that "as the number of displaced persons seeking refuge has reached unprecedented numbers, states have resorted to measures to circumvent their obligations under the Convention." See also Alice Edwards, "Temporary Protection, Derogation and the 1951 Refugee Convention" 13 *Melbourne Journal of International Law* 1- 41, 1 (2012), available at: https://law.unimelb.edu.au/_data/assets/pdf_file/0005/1687379/Edwards.pdf. (Last visited on Feb. 03, 2023) Alice on temporary protection and Conventions states that "*Temporary protection is generally associated with protection of limited duration and standards of treatment lower than those envisaged in the 1951 Convention relating to the Status of Refugees...* In some mass influx situations, the convention rights have been suspended pending the resolutions of the cause of such movement." See also Ryan Bubba *et al.*, "The Economics of International Refugee Law" 40(2) *The Journal of Legal Studies*, 367 – 404, 367, 368 (2011). The author describes that "faced with increasing economic migration, in recent years, states have made it more difficult for migrants to successfully apply for refugee status."

¹⁹ The Protocol Relating to the Status of refugees provides that:

CONSIDERING that the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 covers only those persons who have become refugees as a result of events occurring before 1 January 1951,

CONSIDERING that new refugee situation have arisen since the Convention was adopted and that the refugees concerned may therefore not fall within the scope of the Convention

CONSIDERING that it is desirable that equal status should be enjoyed by all refugees covered by the definition in the Convention irrespective of the dateline 1 January 1951,

The Protocol Relating to the Status of Refugees was adopted.

See Preamble, Protocol Relating to the Status of Refugees (Adopted on October 4, 1967).

²⁰ Ryan, *supra* note 20 at 368, "we model the current system of refugee protection based on the 1951 convention as a Pareto-improving contract that bound states to provide a more efficient level of the global public good of refugee protection."

²¹ It may however be noted that before the 1951 Refugee Convention was adopted, the United Nations Relief and Rehabilitation Agency (UNRRA) and International Refugee Organization (IRO) were established to deal with millions of refugees as a result of World Wars. For details refer to Dennis Gallagher, "The Evolution of the International Refugee System" 23(3) *The International Migration Review*, 579- 598 (1989). See also Frank E. Krenz, "The Refugee as a Subject of International Law" 15(1) *The International and Comparative Quarterly* 90-116, 91 (1966). Frank has argued that the origin of asylum, predominantly humanitarian character, has its roots in Mediterranean societies, and its basis was a natural human desire to protect people from oppression.

²² For details refer to Hélène Lambert (ed.) *International Refugee Law*, xiii (Routledge, London 1st Ed. 2017).

²³ See Ms Erika, Ms Kate Jastram, *et.al.* (eds.), *Refugee Protection: A Guide to International Refugee Law*, 6 (2001). See also Azfer Ali Khan, "Can International Law Manage Refugee Crises? *Oxford University Undergraduate Law Journal* 55, (NA), available at: https://www.law.ox.ac.uk/sites/files/oxlaw/field/field_document/4.pdf (Last visited

Convention.²⁴ Also, protection under the 1951 Refugee Convention is inadequate as it does not encompass new causes and sources of persecution.²⁵ Refugee producing events have radically changed with time but the international refugee law has been static, at least, since the 1967 Protocol.²⁶ It has been rightly observed by Salya that “with the global pandemic caused by the COVID-19 virus, a new kind of refugees is emerging, unlike the passengers of the Aquarius”²⁷ and thus it may be said that the 1951 Refugee Convention is only anachronistic.²⁸ The 1951 Refugee Convention reflects both European and Western implications of war and persecutions of that time.²⁹ It was irrelevant to the Indian experience³⁰ which faced a large number of forcibly

on Feb. 03, 2023). It has been observed by the author that “some countries cite a legal basis for giving protection to refugees, and others cite a political basis for turning them away.”

²⁴ Seyla Benhabib, “The End of the 1951 Refugee Convention? Dilemmas of Sovereignty, Territoriality, and Human Rights” 2 *Jus Cogens* 75, (2000), available at <https://link.springer.com/content/pdf/10.1007/s42439-020-00022-1.pdf> (Last visited on Feb. 03, 2023).

²⁵ See for example Rafiqul Islam and Md. Jahid Hossain Bhuiyan, “International Legal Protection for Refugees: Articulating Challenges and Options”, in Rafiqul Islam and Md. Jahid Hossain Bhuiyan, (eds.), *An Introduction to International Refugee Law*, 2 (Martinus Nijhoff Publishers, Lieden, 2013). According to the authors, “global climate change included human displacement has assumed and will continue to assume paramount importance as it is predicted to be one of the biggest drives of refugees, which would expose the fragility of, and ongoing disillusionment about, the 1951 Refugee Convention”. See also Cooper Jessica B. “Environmental Refugees: Meeting the Requirements of the Refugee Definition”, 6 *New York University Environmental Law Journal* 480 (1998) See also David Keane, “The Environmental Causes and Consequences of Migration: A Search for the Meaning of Environmental Refugees”, 16 *Georgetown International Environmental Law Review* 215 (2004). The authors have argued that environmental refugees, a newly generated, if any, refugees, have been posing an open challenge to the current international legal system on the status of refugee which is not encompassed in 1951 Refugee Convention and 1967 Protocol.

²⁶ See for example as noted by Rafiqul, many refugees lives in cross-border campus in legal limbo and there has been exponential increase in refugee frequency and complexity not anticipated in 1951 or 1967. Rafiqul Islam, “The Origin and Evolution of International Refugee Law, in Rafiqul Islam and Md. Jahid Hossain Bhuiyan, (eds.), *An Introduction to International Refugee Law*, 29 (Martinus Nijhoff Publishers, Lieden, 2013). See also Ormsby, Eric A. “The Refugee Crisis as Civil Liberties Crisis”, 117(5) *Columbia Law Review* 1191-1229 (2017), available at: https://www.jstor.org/stable/pdf/44288097.pdf?refreqid=fastly-default%3A2cdd47985e8356cdd5e9ed61f5fd2ef5&ab_segments=0%2Fbasic_search_gsv2%2Fcontrol&origin=search-results (Last visited on Feb. 03, 2023). The author has identified a number of obstacles to the Convention.

²⁷ Seyla Benhabib, “The End of the 1951 Refugee Convention? Dilemmas of Sovereignty, Territoriality, and Human Rights” 2 *Jus Cogens* 76, (2000), available at: <https://link.springer.com/content/pdf/10.1007/s42439-020-00022-1.pdf> (Last visited on Feb. 03, 2023).

²⁸ See for example Adrienne Millbank, “The Problem with the 1951 Refugee Convention”, 7 (2000), available at: <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22library/prspub/VSC26%22> (Last visited on Feb. 03, 2023).

²⁹ *Id.* at 8.

³⁰ It may be relevant to note that some of the scholars have argued that the Convention Relating to the Status of Refugees 1951 and 1967 Protocol is “historically Eurocentric and not responsive to the needs of developing countries.” See for example Pia Anjolie Oberoi, *Exile And Belonging: Refugees and State Policy in South Asia* (Oxford University Press, 2006). See also Bhattacharjee Saurabh “India Needs a Refugee Law” 43(9) *Economic and Political Weekly* 71 (2008), available at: https://www.jstor.org/stable/pdf/40277209.pdf?refreqid=fastly-default%3Aae34b405aaadcd4a91d668907a33f22f&ab_segments=0%2Fbasic_search_gsv2%2Fcontrol&origin=search-results (Last visited on Feb. 03, 2023); See also Sarbani Sen, “Paradoxes of the International Regime of Care: The Role of UNHCR in India” in Ranabir Samaddar (ed.), *Refugees and the State: Practices of Asylum and Care (1947-2007)* (Sage Publications, New Delhi).

uprooted people after the 1947 partition and a complex mixed flow of refugees from neighboring States since then.³¹

III. India and Refugee Protection: Laws and Policies

India is not a party to the 1951 Refugee Convention or its 1967 Protocol and has no specific legislation to deal with refugees. It is pertinent to note that those seeking shelter in India are treated as foreigners whose entry and exit are dealt with under mostly pre-constitutional laws.³² Though India is one of the few countries in the world³³ which have experienced refugee situation time and again which has increased on a gigantic scale in the last less than half-a-century,³⁴ its refugee policies have often been driven by political compulsions.³⁵ In fact, following the country's partition in 1947,³⁶ several legal, executive, and institutional arrangements were set in place to

³¹ See for example Vijayakumar has identified thirteen reasons as why South Asian region are against or at least reluctant to accede to the 1951 Refugee Convention and 1967 Protocol. For details refer to Veerabhadran Vijayakumar, "A Critical Analysis of Refugee Protection in South Asia", 19(2) *Refuge* 6 – 16 (2001), available at <https://refuge.journals.yorku.ca/article/download> (Last visited on Feb. 03, 2023).

³² The legal regime of Indian Refugee Laws includes the Foreigner's Act, 1946, the Registration of Foreigners Act, 1939, the Foreigners Order, 1948. Dr. R. Seyon, "National Refugee Law on the Lines of International Law: The Need of the Hour", 5(1), 49, 51, *Pragyaan: Journal of Law* (April, 27, 2015).

³³ While India has produced its fair share of refugees, it is more a 'refugee-receiving' country than it is 'refugee-producing'. Omar Chaudhary, "Turning Back: An Assessment of Non-Refoulement under Indian Law". 39(29) *Economic and Political Weekly*, 3257 – 3264 (2004), available at: https://www.jstor.org/stable/pdf/4415288.pdf?refreqid=fastly-default%3A8cccd9f1910df466e0b363d10d9acc013&ab_segments=0%2Fbasic_search_gsv2%2Fcontrol&origin=search-results&acceptTC=1 (Last visited on Feb. 03, 2023).

³⁴ Prof. J.N. Saxena, "Legal Status of Refugees: Indian Position", 26(3) *Indian Journal of International Law*, 501 (1986).

³⁵ See Syam Anasuya, "Patchwork of Archaic Regulations and Policies in India: A Breeding Ground for Discriminatory Practice against Refugees 14(21) *Journal of International Law and Politics* 1377- 1391 (2019), available at: <https://nyujilp.org/wp-content/uploads/2019/09/NYI411.pdf> (Last visited on Feb. 03, 2023). It is observed by Syam that "the ad hoc imposition of executive policies and the instances ... demonstrate that the legal vacuum in which Indian refugees and other migrants live renders them soft targets for the governments in power. The government uses them either as a platform to win populist election campaigns or as a bargaining chip in foreign relations with other states, depending on the prevailing geopolitical climate."

For implication of geo-politics and refugees protection see Brett Rachel and Lester Eve, "Refugee Law and International Humanitarian Law: Parallels, Lessons and Looking Ahead A Non-Governmental Organizations View," 83 (843) *International Review of the Red Cross* 713, 714 (2001), available at <https://international-review.icrc.org/sites/default/files/S1560775500119273a.pdf> (Last visited on Feb. 03, 2023). It may be relevant to note that, as observed by Brett and Lester, "geo-political dynamics since the end of the Cold War have thrown new light on root causes of refugee movements and other forced displacement, and on the responses and solutions."

³⁶ Following the partition of India in 1947, for the Tibetan influx of 1959, and the Bangladeshi mass influx of 1971, comprehensive policies were initiated to respond to refugee. Rajeev Dhawan, *Refugee Law And Policy In India* 5 (PILSARC 2004).

support, facilitate and gradually integrate the incoming migrants from Pakistan into the national mainstream.³⁷

In 1959, when the foreign influx of refugees arrived from Tibet, India established a transit camp that provided food, medical supplies, and identity papers,³⁸ and even allocated land for cultivation and occupation³⁹ to them.⁴⁰ Also, in 1960 the Government of Mysore allocated land to them and established the first Tibetan exile⁴¹ settlement in 1961.⁴² The Tibetan community's settlement process can be divided into three stages. When the 14th Dalai Lama fled Lhasa in 1959, the Chinese People's Liberation Army suppressed the Tibetan uprising against Chinese communist authorities, and the first stage began. The second stage began during the 1980 and 1990s when people left Tibet as a result of the military government⁴³ imposed in the Tibet Region in 1987.⁴⁴ Today's

³⁷ The East Punjab Evacuees (Administration of Property) Act of 1947, Patiala Refugees (Registration of Land Claims) Ordinance of 1948, East Punjab Refugees (Registration of Land Claims) Act of 1948, Refugees (Registration of Land Claims) Act of 1948, Administration of Evacuee Act of 1950, Displaced Persons (Claims) Act of 1950, Evacuee Interest (Separation) Act of 1951, Transfer of Evacuee Deposits Act of 1950, Displaced Persons (Compensation and Rehabilitation) Act of 1954, Displaced Persons (Claims) Supplementary Act of 1954 are few to mention. For details refer to <http://news.indlaw.com/> (Last visited on Feb. 03, 2023).

³⁸ It is similar to the protection provided to a refugee under Article 27 of the 1951 Refugee Convention which provides that "the Contracting States shall issue identity papers to any refugee in their territory who does not possess a valid travel document."

Convention Relating to the Status of Refugees, article 27 (Adopted on July 25, 1951).

³⁹ It is similar to the protection provided to a refugee under article 13 of the 1951 Refugee Convention which provides that "the Contracting States shall accord to a refugee treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other contracts relating to movable and immovable property."

Convention Relating to the Status of Refugees, article 13 (Adopted on July 25, 1951).

⁴⁰ It is observed by Chimni that the status of refugee in India is that of foreigners in law. B S Chimni, *International Refugee Law: A Reader* 460-62 (Sage, New Delhi, 2000).

⁴¹ The Tibetan refugees who accompanied the Dalai Lama in large exile into India have now settled for a half a generation in their new surroundings, as observed by Conway. See John S. Conway, "The Tibetan Community in Exile" 48(1) *Pacific Affairs* 74, 74- 86 (1975).

⁴² The Indian government must be given credit for accepting and even encouraging the persistence of such distinct communities. See *Id* at 76.

⁴³ It may be noted that Tibet's sovereignty is disputed. On the one hand Tibet claims that it was an independent State and has neither merged nor surrendered its sovereignty to China and is only occupied by China. Thus it may be said that any form of government in Tibet is *military government* and not *martial law*.

For distinction between military government and martial law, see William E. Birkhimer, *Military Government And Martial Law* (Franklin Hudson Publishing Company, USA, Third Edition Revised, 1914). It may be noted that according to Birkhimer, military government is exercised over enemy territory and martial law over loyal territory of the State enforcing it. The enemy territory over which military government is established may be either without the territorial boundaries of the dominant State, or comprise districts occupied by rebels treated as belligerents within those boundaries. Martial law on the other hand is purely a domestic fact, being instituted only within districts which, in contemplation of law, are friendly. (emphasis supplied).

⁴⁴ See for details John Bray, "China and Tibet: An End to Empire?" 46(12) *The World Today*, 221- 224 (1990), available at: <https://www.jstor.org/stable/pdf/40396167.pdf?refreqid=fastly->

“Tibetan New Arrival” is the third stage.⁴⁵ The Tibetans in India were settled in “refugee settlements” established by the government of India administered by the Central Tibetan Administration of India (CTA).⁴⁶ The Sri Lankan Tamil refugees in 1983 have also been relatively well received in the Southern State of Tamil Nadu and have resulted in local integration.⁴⁷ These refugees, often called boat people, fled a long-running civil war between Sri- Lankan government forces and rebels.⁴⁸ In contrast, the government’s response to the Chakma influxes of 1964 and 1968 was muted with caution⁴⁹ and has remained largely indifferent, in absence of law, to Afghan refugees.⁵⁰ In 1971, nearly 16 million refugees from former East Pakistan sought asylum in India, making it the largest mass migration in post-Partition history in Asia,⁵¹ and in recent times Rohingya refugees have also taken shelter in parts of India.⁵²

default%3A57cd75544333bafd6e3ccd7b996ab76d&ab_segments=0%2Fbasic_search_gsv2%2Fcontrol&origin=search-results (Last visited on Feb. 03, 2023).

⁴⁵ Available at: <https://www.refworld.org/pdfid/533a80ea4.pdf> (Last visited on Feb. 03, 2023).

⁴⁶ The Central Tibetan Administration of India was established in 1959 by 14th Dalia Lama to rehabilitate refugees in the subcontinent.

⁴⁷ These Tamil refugees receive some modest assistance from the government of India. Sreenivasan Akshaya, *et al*, “Connecting Homeland and Borders Using Mobile Telephony: Exploring the State of Tamil Refugees in Indian Campus” 7 *Journal of Information Policy*, 86, 89 (2017), available at: https://www.jstor.org/stable/pdf/10.5325/jinfopoli.7.2017.0086.pdf?refreqid=excelsior%3A04b99b2e03612e6674d796fa99c43642&ab_segments=&origin= (Last visited on Feb. 03, 2023).

⁴⁸ *Id* at 86.

⁴⁹ The Supreme Court in *National Human Rights Commission v State of Arunachal Pradesh* (1996) 1 SCC 742, at para 15 stated that “The danger faced by Chakma refugees was serious enough to warrant the deployment of more police. According to reports, economic blockades on refugee camps disrupted the supply of rations, medical care, and other necessities to these refugees.” (emphasis supplied)

⁵⁰ See for details, Ashish Bose, “Afghan Refugees in India” 39(43) *Economic and Political Weekly*, 4698 – 470 (2004), available at: https://www.jstor.org/stable/pdf/4415703.pdf?refreqid=fastly-default%3A93c347e5d986c8b2e4f4ec815a405e5e&ab_segments=0%2Fbasic_search_gsv2%2Fcontrol&origin=search-results&acceptTC=1 (Last visited on Feb. 03, 2023).

⁵¹ See Navine Murshid, “War of Independence: Humanitarianism or Self-Interest?” 46(52) *Economic and Political Weekly*, 53- 60, 58, 59 (2011).

⁵² See a report prepared by Snehal Dote, “Rohingyas in India: State of Rohingya Muslims in India in the Absence of Refugee Law”, available at: <https://www.ohchr.org/sites/default/files/Documents/Issues/Religion/Islamophobia-AntiMuslim/Civil%20Society%20or%20Individuals/RitumbraM1.pdf> (Last visited on Feb. 03, 2023).

India is host⁵³ several refugees⁵⁴ from many countries⁵⁵ since 1947,⁵⁶ the admission and protection of refugees continue to be regulated mostly by pre-constitutional laws⁵⁷ which give sweeping powers to the State to detain and expel them. Also, the Citizenship (Amendment) Act 2019 grants citizenship to Hindus, Christians, Sikhs, Buddhists, Jains, and Parsis from Afghanistan, Pakistan, and Bangladesh who had arrived in India before 31 December 2014.⁵⁸ It excludes Muslims from seeking any protection even though they may have a well-founded fear of persecution in their country of origin and are similarly situated. It not only contravenes India's international obligation under other human rights instruments⁵⁹ but also stands opposed to the obligation imposed as

⁵³See *Supra* note 35, at 3257 – 3264. According to Omar, on the whole, India has been a graceful host. While not formally bound by any of the major international agreements protecting the rights of refugees...India has largely followed international norms. See also Saurabh Bhattacharjee, "India Needs a Refugee Law" 43(9), *Economic and Political Weekly* 71 (2008), available at: https://www.jstor.org/stable/pdf/40277209.pdf?refreqid=fastly-default%3A4af9fdede71163d38c21ff2eaa339fb5&ab_segments=0%2Fbasic_search_gsv2%2Fcontrol&origin=search-results (Last visited on Feb. 03, 2023). India is one of the most prominent refugee receiving countries in the world.

⁵⁴ According to Nafees, in South Asia, India with its socio-cultural diversity and migration dynamics has behaved, since antiquity, as a cradle of human integration from all nook and corners of the world. Nafees Ahmad, "The Constitution-Based Approach of Indian Judiciary to the Refugee Rights and Global Standards of the UN Convention", 8(1), *The King's Student Law Review*, 31-33 (2017), available at: https://www.researchgate.net/publication/317328676_The_Constitution-Based_Approach_of_Indian_Judiciary_to_The_Refugee_Rights_and_Global_Standards_of_the_UN_Convention (Last visited on Feb. 03, 2023).

⁵⁵ Nafees has observed that "Today, India is a host to extra-regional and intra-regional refugees in the quest for safety and sanctuary from Afghanistan, Bangladesh, Iran, Iraq, Myanmar, Palestine, Somalia, Syria, Sri Lanka, Tibet". See Nafees Ahmad, "The Constitution-Based Approach of Indian Judiciary to the Refugee Rights and Global Standards of the UN Convention", 8(1), *The King's Student Law Review*, 31, 32 (2017). See also Nair, Ravi, "Refugee Protection in South Asia", 51(1) *Journal of International Affairs*, 201-20 (1997), available at: https://www.jstor.org/stable/pdf/24357479.pdf?refreqid=fastly-default%3A94e5543c430881666569b5f0a5a3b9b2&ab_segments=0%2Fbasic_search_gsv2%2Fcontrol&origin=search-results (Last visited on Feb. 03, 2023). Nair has argued that "India's multiethnic, multilingual and relatively stable society has often made it an attractive destination for these groups. This phenomenon continues today. Tamil refugees from Sri Lanka, Jumma peoples from Bangladesh and Chin and other tribal refugees from Burma, Afghanistan, Iran and even Sudan today comprise the bulk of India's refugee population".

⁵⁶ "The Declaration of Independence in 1947 resulting in the creation of India and Pakistan, caused the world's largest uprooting and movement of population in recent history in the Indian sub-continent estimated at 15 million, nearly 8.5 million immigration from India to Pakistan and 6.5 million the other way round". Prof. J.N. Saxena, "Legal Status of Refugees: Indian Position", 26(3) *Indian Journal of International Law*, 501 (1986).

⁵⁷ The Registration of Foreigners Act, 1939, the Foreigners Act, 1946 and the Foreigners Order, 1948 are the primary legislations dealing with the treatment of foreigners in India.

⁵⁸ For details, see section 2 of the Citizenship (Amendment) Act 2019.

⁵⁹ See for example the observations, by Saxena, on this principle that "other treaties to which India is a party, and which influence the treatment of refugees, are the Genocide Convention 1948, ICERD 1965, ICCPR 1966, ICESCR 1966, CEDAW 1979, CAT 1984 and CRC 1989". Prabodh Saxena, "Creating Legal Space for Refugees in India: The Milestones Crossed and the Roadmap for the Future, 19(2) *International Journal of Refugee Law* 249 (2007), available at:

http://www.mcrg.ac.in/RLS_Migration_2019/Readings_MODULE_F/Saxena_Legal%20Space%20for%20Refugees%20in%20India.pdf (Last visited on Feb. 03, 2023). Also for a detailed discussion of this principle in the context of human rights laws and refugee protection refer to Mike Sanderson, "The Role of International Law in Defining the Protection of Refugees in India" 33(1) *Wisconsin International Law Journal* 46-113 (NA), available at: [285](https://uwlaw-</p>
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fundamental in the governance of the country under article 51 (c) of the Constitution which makes it imperative for the State to follow international law and treaty obligations while dealing with organized people.

Further, section 14-A of the Indian Citizenship Act, as amended in 2003, provides that the “Central Government may compulsorily register every citizen of India and issue National Identity Card to him.” It is, as contended, an attempt to identify and expel illegal immigrants. The proposal seems legitimate, nevertheless, it may result in denying refuge to Muslims fleeing persecution in neighboring countries of India⁶⁰ because only Hindu Refugees or illegal immigrants will be accommodated under the changed laws. It is beyond any doubt that as a sovereign, India can adopt any policy prescribing who can visit and settle in India and who cannot, but “sovereignty carries with it certain responsibilities, as identified by Francis, for which government must be held accountable not only to their national constituencies but ultimately to the international community”⁶¹ Thus any policy pursued by India should be based on harmonious construction and reflexive of international standards.

IV. Indian Judiciary and Refugee Protection

omeka.s3.us-east-2.amazonaws.com/original/176182f71b1d08a6f350dda45710038e90ee37fc.pdf (Last visited on Feb. 03, 2023). See also Vincent Chetail, “Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations Between Refugee Law and Human Rights”, in Ruth Rubio-Marin (ed.), *Human Rights and Immigration* 19-72 (Oxford, Online edn, 2014), available at: <https://academic.oup.com/book/11474/chapter/160184799> (Last visited on Feb. 03, 2023).

⁶⁰ See for example the observations of Chimni that “[NRC], if implemented across the nation may leave millions of people stateless...” Jessica Field and Srinivas Burra (eds.), *The Global Compact on Refugees: Indian Perspectives and Experiences* XI (Academicians’ Working Group, UNHCR, India 2020), available at: <https://www.alnap.org/system/files/content/resource/files/main/The%20GCR-%20Indian%20Perspectives%20and%20Experiences.pdf> (Last visited on Feb. 03, 2023).

⁶¹ Francis M. Deng et al., *Sovereignty as Responsibility: Conflict Management in Africa* 1 (Brookings Institution Press, Washington, 1996); See also Peltonen while referring to the International Commission on Intervention and State Responsibility highlights that “Sovereignty means “accountability [...] internal, to one’s own population [...] and internationally, to the community of responsible states [...] in the form of compliance with human rights and humanitarian agreements.” Hannes Peltonen, “Sovereignty as Responsibility, Responsibility to Protect and International Order: On Responsibility, Communal Crime Prevention and International Law”, 7 (28) *Uluslararası İlişkiler* 69 (2011), available at: <https://dergipark.org.tr/tr/download/article-file/540097> (Last visited on Feb. 03, 2023); see also Syam Anasuya, “Patchwork of Archaic Regulations and Policies in India: A Breeding Ground for Discriminatory Practice against Refugees” 14(21) *Journal of International Law and Politics* 1389 (2019), available at: <https://nyujilp.org/wp-content/uploads/2019/09/NYI411.pdf> (Last visited on Feb. 03, 2023), Syam has concluded that “India cannot forever insulate itself from international scrutiny and accountability for the treatment of refugees on its soil and at its borders.”

The laws that deal with the treatment of outsiders/foreigners/refugees in India are the Foreigners Act, 1946, and the Foreigners Order, 1948, the Citizenship Amendment Act 1955.⁶² It may be noted that refugees are not recognized as a special category, but are treated as foreigners whose entry and exit are dealt with under these laws.⁶³ Indian courts have on many occasions evolved a broader, compassionate and humanitarian approach to protect the rights of those who seek refuge in India in the light of the applicable laws of the land without interfering with the powers of the government to regulate the conduct of foreigners in India. All this has been made possible by reading, interpreting, and applying human rights and humanitarian provisions within the context of fundamental rights enshrined in Part III of the Constitution.

It may be noted that the benefit provided by the Indian Constitution under article 32, which provides “remedies for the enforcement of rights conferred in Part III,” as a fundamental right to petition the Supreme Court for the protection and enforcement of any of their fundamental rights, in case of infringement can be availed by every person. Article 226 of the Indian Constitution also enables the High Courts to provide similar protection, with one exception that the law declared by the Supreme Court alone “shall be binding on all lower courts within the territory of India” and thus having the power of declaring the sole rule of the land.⁶⁴ It was through this provision that the desired uniformity of law was ensured for the substantive equal rights provided by articles 14 and 21 of the Indian Constitution. It may be noted that under article 14 of the Indian Constitution the time count of the power spectrum⁶⁵ is substantially addressed, which requires a

⁶² Federal Office for Migration *Focus: The Tibetan Community in India* 15 (2013), available at <https://www.refworld.org/pdfid/533a80ea4.pdf> (Last visited on Feb. 03, 2023). Citizenship Amendment Act, 2003, defines non-citizens who entered without visas as illegal migrants, with no exception for refugees or asylum seekers.

⁶³ According to Oommen, the “notion of refugee is understood and used without much ambiguity, the two terms, foreigners and outsiders, are frequently used interchangeably in India notwithstanding their clearly different legal meanings.” See T K Oommen, “Foreigners, Refugees and Outsiders in the Indian Context” 31(1) *Sociological Bulletin*, 41, 42 (1982), available at: https://www.jstor.org/stable/pdf/23619721.pdf?refreqid=fastly-default%3A58b97996d2d21b781e892c7380d5eee5&ab_segments=0%2Fbasic_search_gsv2%2Fcontrol&origin=search-results (Last visited on Feb. 03, 2023). See also Chimni B. S. (1994): “The Legal Conditions of Refugees in India” 7(4) *Journal of Refugee Studies* 379, available at: <https://academic.oup.com/jrs/article-abstract/7/4/378/1532035?redirectedFrom=PDF> (Last visited on Feb. 03, 2023). It is relevant to note the observations made by Chimni that “the terms aliens and foreigners are used interchangeably and both denote a category of people who do not legally belong within the territory of India, meaning “a person who is not a citizen of India.”

⁶⁴ See for example Article 141 of the Constitution which provides that “the law declared by the Supreme Court shall be binding on all courts within the territory of India.”

⁶⁵ See a detailed account on power spectrum and its implication on policy making, policy execution, and policy control refer to chapter 13 and 14 from Julius Stone, *Social Dimensions of Law And Justice* (Universal Law Publishing Co.: New Delhi, Second Indian Reprint 2009).

State not to allow any time gap for the approximation of the ‘is’ to the ‘ought’. Also, article 21⁶⁶ of the Constitution, requires that no person shall be deprived of his life or liberty, except according to the procedure established by law which is just, fair and reasonable.⁶⁷ The Indian judiciary has used a creative interpretation of the provisions of the Indian Constitution, which ensures that everyone is protected by the law, guaranteed equality and equal protection of laws and has a right to life and liberty and that any state action is permissible only by a procedure which is just, fair and reasonable.⁶⁸ It is in this context, the Indian judiciary’s decisions are being analyzed *vis-a-vis* protection provided to refugees.

In *Chief Settlement Commissioner, Punjab v. Om Prakash*,⁶⁹ the court was to decide whether the appellant was a “displaced person” under Para 2(e) of the notification⁷⁰ 4892/S of July 8, 1949, or a “refugee” under section 2(d) of the East Punjab Refugee (Registration of Land, Claims) Act,⁷¹ 1948 and according to whether the appellant was entitled to the allotment of land. In this case, one Nanak Chand, who had three sons, owned agricultural land in Bahawalpur state forming the part of Pakistan after 1947. As a result of the partition in 1947, the agricultural land owned by him and after his death by his sons, had to be abandoned and three sons migrated to India and filed separate claims for allotment of land in lieu of the land abandoned by them in Pakistan which was allocated to them by the Revenue department in accordance with the provisions of the law. The allotment was challenged, which according to the Managing Officer could not be substantiated

⁶⁶ Art. 21 of the Constitution reads as:

No person shall be deprived of his life or personal liberty except according to the procedure established by Law.

⁶⁷ For details, *supra* note 29 at 297 – 301; see also Saurash Bhattacharjee, “India Needs Refugee Law” 43(9) *Economic and Political Weekly* 71, 72 (2008).

⁶⁸ Read in the context of denial of power to state enumerated under article 14 and 21 of the Constitution.

⁶⁹ AIR 1969 SC.

⁷⁰ The notification under Para 2(e) issued by the government under the powers conferred by clauses (f) and (ff) of Section 22(2) of the East Punjab Evacuee (Administration of Property) Act, 1947 defined ‘displaced person’ to mean: A landholder in the territories now comprised in the Province of West Punjab or a person of Punjabi extraction who holds land in the Provinces of North-Western Frontier Province, Sind or Baluchistan or any State adjacent to any of the aforesaid Provinces and acceding to the Dominion of Pakistan, and who has since the 1st day of March 1947, abandoned or been made to abandon his land in the said territories on a account of civil disturbances, or the fear of such disturbances, or the partition of the country.

⁷¹ Section 2(d) of the East Punjab Refugees (Registration of Land Claims) Act of 1948 defined ‘refugee’ to mean: A landholder in the territories now comprised in the Province of West Punjab or a person of Punjabi extraction who holds land in the Provinces of North-Western Frontier Province, Sind or Baluchistan or any State adjacent to any of the aforesaid Provinces and acceding to the Dominion of Pakistan, and who has since the 1st day of March 1947, abandoned or been made to abandon his land in the said territories on a account of civil disturbances, or the fear of such disturbances, or the partition of the country.

and thus dismissed. It was, however, observed by the Managing Officer that Nanak Chand although he had died long before the partition in 1947, he must be considered as a ‘displaced person’ for the allotment of land. As a consequence of this, a large portion of the land allocated to the three sons was canceled which was challenged by them. In an appeal to the Supreme Court, the Court observed that:

It is manifest that the expression “displaced person” or the word “refugee” has been used in the relevant enactments with reference to a person who has migrated to India as a result of disturbance or fear of disturbance or the partition of the country. Therefore, if a person had died before the disturbances took place or he had never migrated to India as a result of the disturbances could not come within the meaning of the expression “displaced person” or the “refugee”.

It can be said that the Supreme Court in this case attempted to attribute refugee status or displaced person status to those who abandon their land on account of a civil disturbance. This observation of the court is more akin to the methods adopted by State parties under the Convention Relating to the Status of Refugees to determine the status of refugees in the light of the said Convention. A closer look at the definition of refugee,⁷² however, reveals that it could have been applied to India and Pakistan after the partition in 1947.⁷³ It is relevant to note that periods of civil unrest and persecution frequently generate dislocation and mass refugee migration across national boundaries,⁷⁴ compelling states to extend the protection of law to those who are persecuted or have a fear of being persecuted. In this context, the observation of the Supreme Court in the above case

⁷² The Convention Relation to the Status of Refugees provides that:

A refugee is a person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Convention Relating to the Status of Refugees, article 1 (Adopted on July 25, 1951).

⁷³ See for example Ghosal P., “Redefining the Partition Refugee” 75 *Proceedings Of The Indian History Congress*, 546 – 558, 546 (2014), *available at*: https://www.jstor.org/stable/pdf/44158429.pdf?refreqid=fastly-default%3Aee21ff3c9053c9146ba1bd6a45785054&ab_segments=0%2Fbasic_search_gsv2%2Fcontrol&origin=search-results (Last visited on Feb. 03, 2023).

⁷⁴ See Salehyan Idean, “The Externalities of Civil Strife: Refugees as a Source of International Conflict” 52(4) *American Journal of Political Science*, 787-801(2008), *available at*: https://www.jstor.org/stable/pdf/25193850.pdf?refreqid=fastly-default%3A1926e003a6d5818476583f3a0887ce73&ab_segments=0%2Fbasic_search_gsv2%2Fcontrol&origin=search-results (Last visited on Feb. 03, 2023).

is a rider to identify who may or who may not be a ‘refugee.’ According to Roy, “defining categories of identity such as evacuees, refugees, displaced persons, aliens, and infiltrators was a major element of the process of establishing post-partition national orders and turning colonial subjects into national citizens.”⁷⁵

In *Khudiram Chakma v. Union Territory of Arunachal Pradesh*,⁷⁶ the petitioner for himself and on behalf of his co-villagers challenged the order of the government to vacate land at two villages in Arunachal Pradesh. It was contended by the petitioner that he along with some fifty-six families migrated to India in 1964 from erstwhile East Pakistan (now Bangladesh), due to violence and fear of unrest apprehension of unrest during that period and sought shelter in camps provided by the Indian government. They also managed to negotiate with the local Raja, who had some acres of land in favor of the petitioner.⁷⁷ According to the petitioner, other families like Deori were also allocated lands adjacent to their lands that started to encroach upon their land and attempted to dislodge them from the land in many ways. No action, according to the petitioner, was taken in this regard by the authorities and they were asked to shift to vacant land⁷⁸. The petitioner, consequently, contended that fundamental rights guaranteed under article 19(1) (d) and (e) of the Constitution is violated and the action of the government is violative of principles of natural justice. The Supreme Court in this court while relying on the decision of the Louis De Raedt case held that, “it is clear that foreigners have protection of article 21 of the Constitution. It cannot, however, said that such person has an enforceable right to property or right to insist that his place of residence or movement cannot be restricted.”⁷⁹

⁷⁵ Haimanti Roy, “Partitioned Lives: Migrants, Refugees, Citizens in India and Pakistan, 1947-65” *History* 5 (2012), available at: https://ecommons.udayton.edu/cgi/viewcontent.cgi?article=1020&context=hst_fac_pub. (Last visited on Feb. 03, 2023).

⁷⁶ AIR 1994 SC 1464.

⁷⁷ See V Vijayakumar, “Judicial Responses to Refugee Protection in India” 12 *International Journal of Refugee Law* 236 (2000). Subsequently, the Chakma refugee population in Arunachal Pradesh increased to about 65,000 by 1992. See also, V. Vijayakumar, “Should India Ratify the Refugee Convention and Protocol” 2(2) *Bulletin on IHL and Refugee Law*, 325 (1997).

⁷⁸ It may be noted that in 1966, the Government of India set up a resettlement and rehabilitation program in NEFA, now Arunachal Pradesh for Chakmas. The State government later received several complaints against them on various grounds including collection of illegal arms and ammunition, encroachment of land. Consequently they were directed by the state to vacate the lands allocated to them.

⁷⁹ Emphasis supplied.

In this regard, the earlier observations made by the High Court are also significant. The court had observed that the State should give adequate compensation for the money and hard labour invested by them in the land in the event of they are evicted from the place. The court observed that they should be provided with housing and other structures to settle them elsewhere. The approach adopted by the High Court speaks volumes about the provisions safeguarding the rights of refugees under the Convention. It may be relevant to note that this observation of the High Court conforms to article 5 of the Convention which provides that “State parties may grant any rights to refugees other than those mentioned in the Convention.”⁸⁰

Also in the light of these observations made by the Supreme Court, it can be safely said that refugees are entitled to certain fundamental rights which apply to citizens and non-citizens alike. Allowing the petition itself is an acknowledgement of refugee rights under article 16 of the Convention⁸¹ which provide that a refugee shall have free access to the courts of law on the territory of all contracting States.

In *National Human Rights Commission v. State of Arunachal Pradesh*,⁸² public interest litigation was filed by the National Human Rights Commission to seek to enforce rights, under article 21 of the Constitution of about 6500 Chakmas. It was contended that Chakmas, settled mainly in parts of Arunachal Pradesh were persecuted by a section of people from the State. A large number of Chamkas who were displaced from Bangladesh had taken shelter in Assam and had become citizens in due course of time. However, Assam was unable to rehabilitate all and thus requested the erstwhile North East Frontier Agency (NEFA) for assistance, and accordingly, some four thousands of them were settled in parts of NEFA and were also allocated land in consultation with

⁸⁰ See for example Article 5 of the 1951 Convention provides that “nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention.”

⁸¹ See for example Article 16 of the 1951 Convention which provides that:

1. A refugee shall have free access to the courts on the territory of all Contracting States;
2. A refugee shall enjoy in the Contracting State 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*; and
3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has habitual residence the treatment granted to a national of the country of his habitual residence.

Article 16, Convention Relating to the Status of Refugees (Adopted on July 25, 1951).

⁸² AIR 1996 SC 1234.

local tribes. The Indian Government also sanctioned rehabilitation financial assistance for them.⁸³ It is also brought to the notice of the Court that a group of Chamkas has made several representations before the Government for the grant of citizenship under section 5 (1) (a) of the Citizenship Act of 1955, but in vain. Also in recent times, relations between citizens and Chamkas have been distorted. The Supreme Court found that there is *prima facie* evidence to show that life and liberty of Chamkas is under threat and observed that:

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 the equal protection of the law. So also, no person can be deprived of his life and personal liberty except according to the 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 to threaten the Chamkas to leave the State.

It may be noted that the observations of the Supreme Court, in this case, is similar to the protection guaranteed to the refugees under the Refugee Convention, like the principle of non-refoulement, the safety of life and liberty, providing means for securing jobs, etc.

The Indian judiciary in a number of other cases has stayed the deportation order of refugees. In *Syed Ata Mohammadi v. Union of India*,⁸⁴ the court directed that “there is no question of deporting an Iranian who has been recognized as a refugee by the UNHCR.” The court allowed him to travel to any country whichever he wished and desired. The observation of the court in the said case is similar to the principle of *non-refoulement* which prohibits the contracting parties to expel or return a refugee in any manner whatsoever to the frontiers where his life or freedom would be threatened.⁸⁵ Also, it may be relevant to note that the observation by the court allowing him to travel to any State whichever he desired conforms with article 32 of the Convention.

⁸³ The assistance by the government is in conformity with Article 23 of the Convention which provides as: The Contracting States shall accord to refugees lawfully staying in their territories the same treatment with respect to public relief and assistance as is accorded to their nationals.

⁸⁴ Cr. W. P. 7504, 1994.

⁸⁵ See for example Article 32, Convention Relating to the Status of Refugees (Adopted on July 25, 1951).

The Supreme Court in the case of *Malavika Karlekar v. Union of India*⁸⁶ prohibited the expulsion orders of 21 persons from Andaman and also allowed them to approach the UNHCR for the determination of their legal status as refugees. The Gujarat High Court in the case of *Kfaer Abbas All Outaiji v. Union of India*⁸⁷ observed that the State's power to expel a foreigner is absolute; with respect to international treaties and conventions, though non-enforceable, the state has an obligation to respect them; the provisions of international treaties and conventions which resemble fundamental right of the Constitution, can be relied upon by the courts and thus enforced; the courts may apply international law, not inconsistent with domestic law, in the interpretation of the law in the light of the directive under article 51(c) and 253 of the Constitution; right to life and personal liberty is applicable also to non-citizens; any person accorded refugee status by UNHCR is to be accorded protection by India as per international law; article 21 of the Constitution encompasses the principle of *non-refoulement*; and courts may harmoniously give effect to the international law, where two constructions of domestic law are possible.⁸⁸ It can be thus said that the decision of the court which qualified the power of the state to expel a foreigner from the state was based on humanitarian grounds, similar to the philosophy and idea designed behind the Convention Relating to the Status of Refugees. For example, under article 32 of the Convention, the State may expel a refugee save on grounds of national security, however, also not without following due process of law, while under article 5 the contracting party may grant any right to a refugee other than those mentioned in the said Convention.

Also, the Court in *State v. Mohd Yashin*, in which an Afghan national was charged under section 471 of the Indian Penal Code, observed the following:

The accused, an Afghan National cheated the immigration authorities of India in gaining entry on the basis of a visa and a passport which subsequently were detected to be forged. The act of the convict is very serious and grave in nature. Still keeping in view the submissions made by the accused and the fact that the ongoing civil war in Afghanistan and the consequent migration of its residents to neighboring countries is a matter of common knowledge.

⁸⁶ Cr. W. P. 243, 1998.

⁸⁷ 1999 Cr. L J 919.

⁸⁸ Emphasis supplied.

The Court in this case while taking note of the ongoing armed conflict in Afghanistan took a lenient view and accordingly pronounced the sentence. This humanitarian approach of the Court sinks with the objectives laid down in the preamble of the Convention which provides that “all State, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem” implying thus to also accord protection to those who fled their country of nationality or origin on the ground of conflict which may result in their persecution.

The court in *Bogvi v. Union of India*,⁸⁹ stayed deportation orders and allowed the persons to seek refugee status from UNHCR. In *P. Nedumaran & Dr. S. Ramadoss v. Union of India*,⁹⁰ the court appreciated the role played by the UNHCR and restrained the involuntary repatriation of refugees, and in *Digviyay v. Government of India*,⁹¹ through court, some 150 children from Sri Lanka were assisted on humanitarian grounds.⁹² The Supreme Court in *Mohammad Salimullah* case was called upon to decide on the release of detained Rohingya refugees and direction to the government not to deport them. The Court declared that they shall not be deported unless the procedure prescribed for such deportation is not followed and observed that:⁹³

There is no denial of the fact that India is not a signatory to the Refugee Convention. Therefore, serious objections are raised, whether article 51(c) of the Constitution can be pressed into service unless India is a party to or ratified a convention. But there is no doubt that the National Courts can draw inspiration from International Conventions/Treaties, so long as they are not in conflict with the municipal law.

⁸⁹ Civil Rule No. 1843 of 1989.

⁹⁰ WP No. 12343/92.

⁹¹ WA No. 354/1994.

⁹² See for example V. Vijayakumar, “Children in Humanitarian Emergencies and the Quest for Humanitarian Response: A Study” 54(2) *Journal of the Indian Law Institute*, 160 – 195 (2012), available at: https://www.jstor.org/stable/pdf/43953536.pdf?refreqid=fastly-default%3A09c2a809218c85737cbaf8edce689d7e&ab_segments=0%2Fbasic_search_gsv2%2Fcontrol&origin=search-results (Last visited on Feb. 03, 2023). Vijayakumar has argued that there is a dearth of research done on the status of children during any of the humanitarian emergencies and highlights the plight of child soldiers, refugee children and displaced children).

⁹³ AIR 2021 SC (CIVIL) 1751.

In *N.D. Pancholi v. State of Punjab*,⁹⁴ the Supreme Court stayed the deportation order of an Iranian national. This approach adopted by the court, despite the absence of specific refugee legislation in India is in conformity with the internationally accepted principles of ‘*non-refoulement*’.

In *Khy-Htoon v. State of Manipur*,⁹⁵ the Guwahati High Court directed the release of eight Burmese on interim bail for a period of three months to enable them to go to the Office of the United Nations High Commission for Refugees in Delhi for determination of refugee status. The approach adopted by the court, in this case, is similar to the protection accorded under 27 of the Convention on Refugee Protection and article II of the Protocol.

*Ktaer Abbas Habib Al Qutaifi v. Union of India*⁹⁶ involved detention and deportation orders of Mr. Ktaer Abbas Habib Al Qutaifi and Taer Al Mansoori, two refugees of Iraq origin aged 16 and 17 years respectively. In this case, the Gujarat High Court observed that:

...principle of *non-refoulement* prevents expulsion of a refugee where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. Its application protects life and liberty of a human being irrespective of his nationality. It is encompassed in article 21 of the Constitution, so long as the presence of refugee is not prejudicial to the law and order and security of India. All member nations of the United Nation including our country are expected to respect for international treaties and conventions concerning Humanitarian law. In fact, article 51(c) of the constitution also cast a duty on the State to endeavour to "foster respect for international law and treaty obligations in the dealing of organized people with one another". The Court also observed that "in view of directives under article 51(c) and article 253, international law and treaty obligations are to be respected. The courts may apply those principles in domestic law, provided such principles are not inconsistent with domestic law.

⁹⁴ Available at: https://www.refworld.org/cases,IND_SC,3f4b8e224.html (Last visited on Feb. 03, 2023).

⁹⁵ Available at: https://www.refworld.org/cases,IND_HC,3ae6b6f31c.html (Last visited on Feb. 03, 2023).

⁹⁶ Available at: https://www.refworld.org/cases,IND_HC,3f4b8cbd4.html (Last visited on Feb. 03, 2023).

The court held that the petitioners shall not be deported. The rights herein guaranteed to refugees from Iraq are similar to the protection accorded in articles 3, 16, 32, 33, and 35 of the Refugee Convention and article II of the 1967 Protocol on Refugee Protection.

In *State v. Farid Ali Khan*,⁹⁷ the accused was a foreigner who had been given refugee status by the UNHCR and a residential permit to stay in India by the Government of India. The accused, however, could not produce the documents at the time of the arrest and no opportunity was provided to him to produce the documents. The court observed that as per citizenship, foreigners, and passport rules every foreigner shall be given 24 hours to produce the papers of stay, which was denied in the present case. The court took cognizance of the fact and accordingly discharged the accused. It is pertinent to mention that this finding of the court not only affirms similar protection provided under article 5⁹⁸ but also to article 16,⁹⁹ article 27¹⁰⁰ of the Refugee Convention, and article II of its 1967 Protocol.¹⁰¹

All these developments highlight the positive approach of the judiciary toward addressing the refugee crisis.¹⁰² Thus from the above decisions, it can be safely concluded that the courts, in the absence of international obligation and domestic law, have attempted and largely succeeded in approximating the 'is' to the 'ought' for the status of refugees in India.

⁹⁷ *State v. Ranjeet Singh*, In the Court of Nivedita Anil Sharma (Special Fast Track Court), Tis Hazari Courts, Delhi, India: Magistrate Courts, November 11, 2013, available at: http://www.refworld.org/cases,IND_MMM,528e03bb4.html (Last visited on Feb. 03, 2023)

⁹⁸ Art. 5 of the Refugee Convention reads as:

Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention.

⁹⁹ Art. 16 of the Refugee Convention reads as:

A refugee shall have free access to the courts of law on the territory of all Contracting States.

A refugee shall enjoy in the Contracting State 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*.

¹⁰⁰ Art. 27 of the Refugee Convention reads as:

The Contracting States shall issue identity papers to any refugee in their territory who does not possess a valid travel document.

¹⁰¹ Art. II of the Protocol reads as:

The States Parties to the present Protocol undertake to cooperate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the present Protocol.

¹⁰² *Supra* note 80, at 333.

V. Conclusion

Millions of people are fleeing their country of origin for fear of being persecuted. The core instruments which secure them seeking ‘refuge’ and ‘protection’, if any, are the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, which are the embodiment of the ancient and universal tradition of providing sanctuary to those at risk and in danger. Refugees have existed as long as human history and India is no exception. In India, refugee matters are handled administratively, in the absence of treaty obligation or municipal law and it has, since 1947, received an unprecedented number of refugees. Despite this India has maintained a deeply ambiguous position with respect to the status of refugees. It has no specific legislation nor has it acceded to either the 1951 Refugee Convention or its 1967 Protocol. The entry and exit of refugees continue to be controlled mostly by pre-constitutional laws and remain wholly discretionary. Indian judiciary, nevertheless, has offered asylum and humanitarian assistance to refugees in India, which it is bound to follow being part of other human rights treaties, by reading them into the Indian Constitution.

The judicial process is required to deliver the fundamental guarantee of a law, which often necessitates declaring what the law is and stating authoritatively the ‘ought’ prescribed by the law. The Government in India, however, has not only been inconsistent in dealing with refugees but also changing its policies based on the origin and number of refugees to be received, thus falling short of international standards, which creates a gap in the approximation of the ‘is’ to the ‘ought’, forcing them to struggle¹⁰³. In the absence of any specific law, the methods adopted to provide distorted and incomplete protection to refugees¹⁰⁴. However, where no “ought” has been formulated or prescribed, such as in the case of refugee protection, and victims of persecution, the judicial institutions have a duty to fill in the void by interpreting and applying international laws, with due regard to the security – national, economic, social, and cultural within the municipal laws of the land. This is because, under article 51 (c) of the Constitution, the State which includes the judiciary also is under an obligation to foster respect for international law and

¹⁰³ *Supra* note 5 at 20.

¹⁰⁴ *Supra* note 70 at 74.

treaty obligations. In the absence of domestic legislation or binding treaty agreements,¹⁰⁵ the Indian judiciary has played a crucial role in protecting the rights and interests of refugees through novel interpretations of the Constitution's provisions and ensured them the right to life and liberty, the right to equality, right against *refoulement*, right to seek refuge, right to seek assistance from UNHCR and right to fiscal assistance, right to work and non-discrimination.¹⁰⁶

Having said this, it is to be noted also that courts in India have found it difficult to accord or refuse to accord protection to refugees due to the absence of any specific law or treaty obligations, and thus an inconsistency can be found in court's approach while interpreting and applying Part III read with other laws to refugees. Thus it can be safely concluded that for courts to "*declare the law*" and to authoritatively state *what the law 'is'*, the '*ought*' requires it to be authoritatively stated by the Parliament.

¹⁰⁵ Refer to *supra* note 80. Dr. Vijayakumar has discussed the need for a national legislation to add a uniformity and consistency to the treatment of refugees.

¹⁰⁶ For contra see Prabodh who argues that a number unreported cases show that the judiciary has dealt with the issues of refugees on strictly technical grounds, with no legal pronouncements or general guidance. The majority of judicial rationale has been humanitarian rather than legal, dispensing compassion rather than justice, and the courts have no authority over refugee rights. Prabodh Saxena, "Creating Legal Space for Refugee in India: The Milestone Crossed and the Roadmap for the Future" 19(2) *International Journal of Refugee Law*, 246, 255 (2007); see also Bhattacharjee Saurabh "India Needs a Refugee Law" 43(9) *Economic and Political Weekly* 73 (2008), available at: https://www.jstor.org/stable/pdf/40277209.pdf?refreqid=fastly-default%3Aee34b405aaadcd4a91d668907a33f22f&ab_segments=0%2Fbasic_search_gsv2%2Fcontrol&origin=search-results (Last visited on Feb. 03, 2023); "Judicial interventions are case specific and as a result, every case of innovation has been matched by parallel tales of indifference and non-interference."