
JUDICIAL ABDICATION AND THE CRISIS OF POLITICAL JUSTICE IN REFUGEE DEPORTATION CASES: A DOCTRINAL AND COMPARATIVE ANALYSIS OF INDIAN CONSTITUTIONAL LAW

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ABSTRACT

A refugee is any person whose life is under constant threat or whose living conditions are not conducive to their healthy survival, and they seek shelter in another nation. He should be treated differently from a stateless person, as he still possesses a de jure national status. ¹The definition of refugee according to the Refugee Convention, 1951, is any person who “owing to 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 unwilling to avail protection of that country”²

India has continued to be, and will continue to be, the host country for a large number of refugees, not only from neighbouring countries but also from other parts of the world, due to its geographic location, democratic government, tolerant religious society, and goodwill. ³

In *Mohammad Salimullah and anr v/s Union of India and ors*, 2017, the honourable Supreme Court of India, dismissing an interlocutory application seeking the release of Rohingya refugees, who were detained, also seeking basic human amenities, stated that Article 51(c) of the Constitution is not applicable as India is not a signatory of the Refugee Convention 1951.

The court went on to state that “Regarding the contention raised on behalf of the petitioners about the present state of affairs in Myanmar, we have to state that we cannot comment upon something happening in another country.” The court further stated that “the right not to be deported is ancillary or concomitant to the right to reside or settle in any part of the territory of India guaranteed under Article 19(1)(e).⁴”

¹ Nimrat Kaur, *Protection of Refugees in India: A Critical Analysis*, SSRN Electronic Journal (2013), available at <https://ssrn.com/abstract=2214274>.

² Convention Relating to the Status of Refugees, art. 1(A)(2), July 28, 1951, 189 U.N.T.S. 137.

³ Nimrat Kaur, *Protection of Refugees in India: A Critical Analysis*, SSRN Electronic Journal (2013), available at <https://ssrn.com/abstract=2214274>.

⁴ *Mohammad Salimullah & Anr. v. Union of India & Ors.*, (2017) 3 SCC 549.

Mahatma Gandhi fought against the apartheid system, which was followed not in Indian but in South Africa. India fought for Bangladesh's independence with selflessness. These events from the past are portrayals of India's goodwill.

Indeed, India, even after sheltering thousands of refugees, is not a signatory to the Refugee Convention of 1951. Even in *Vishaka v. Union of India* (1997), the Supreme Court neither had domestic legislation nor a ratified international treaty or convention. Instead of stating that there is no law, the Supreme Court went on to rely on the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) to give the decision of which India was just a signatory to. This decision went on to inspire the legislature to enact statutes protecting women in work workplace.

From these examples, it can be concluded that the legal vacuum in refugee laws does not create a no-law situation, but if looked into, it leaves a space for executive and judicial discretion. When analysed from this standard, the decision given by the judiciary in *Mohammad Salimullah and anr v/s Union of India and ors*, 2017,⁵ is nothing but judicial abdication. Indeed, Article 51(c) of the Constitution was not applicable in this case, but since there was no municipal law contradicted and because India is a signatory to the Universal Declaration of Human Rights. The judiciary could have used its discretionary power to protect those refugees.

This paper interrogates the judiciary's role in such deportation cases in the absence of a domestic law. Analysing the Indian constitutional jurisprudence and also a comparative constitutional experience, the paper argues that the judiciary has an obligation to protect refugees. The paper tries to balance between national security issues and humanitarian concerns. The paper also tries to understand the reason behind a legal vacuum in the field and argues for creating domestic law for the same. Ultimately, the paper aims to restore the concept that political justice must extend to all, not just citizens.

Keywords: Refugees, Judiciary, Executive Discretion, National Security, Human Rights.

Introduction

The global refugee crisis has emerged as one of the crucial humanitarian concerns of the twenty-first, but it is not a recent phenomenon.⁶ Throughout history, there have been situations where people were denied essential liberties in their own country and were constructively

⁵ *Mohammad Salimullah & Anr. v. Union of India & Ors.*, (2017) 3 SCC 549.

⁶ P. Weis, "The International Protection of Refugees" *American Journal of International Law*, vol.48, pp. 193-221; E. Balogh, "World Peace and the Refugee Problem", *Recueil Des Cours*, vol.11, (1949), pp.373- 506.

forced to leave their roots and seek asylum elsewhere. In search of peace and freedom, they leave their community and their roots to seek admission to another.

The term “Refugee” has been in the United Nations Convention Relating to the Status of Refugees of 28 July 1951. This convention defines Refugee as *“an individual who, owing to 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, unwilling to avail himself of the protection of that country; or who, not having a nationality or being outside the country of his former habitual residence as a result of such events, is unable or unwilling to return to it”*⁷

Although this definition is widely accepted, it is important to underline that India is not a signatory to either the 1951 Convention or the 1967 Protocol. Despite this, India has historically hosted millions of refugees: Tibetan refugees since 1959, Sri Lankan Tamil refugees during the civil war, Afghan refugees during regional instability, Chakma and Hajong refugees, and, currently, the Rohingya fleeing persecution in Myanmar.⁸ Scholars have often observed that India’s refugee practice is shaped not by a legislative framework but by a combination of goodwill, executive discretion, constitutional guarantees, international obligations, and judicial interpretation.⁹

The Indian Constitution does not explicitly recognise the category of “refugee,” nor does it enumerate specific rights for non-citizens beyond certain fundamental rights.¹⁰ However, Articles 14, 21, and 51, read with India’s longstanding humanitarian tradition, have shaped a body of jurisprudence that implicitly extends constitutional protection to all persons, regardless of citizenship.¹¹ As early as *National Human Rights Commission v. State of Arunachal Pradesh* (1996), the Supreme Court held that the State cannot “permit any group of citizens to threaten refugees,” emphasising that the right to life under Article 21 is available to every human being on Indian soil.¹²

Against this background, the Rohingya deportation controversy presents a critical test of

⁷ Convention Relating to the Status of Refugees, 1951, art. 1(A)(2)

⁸ S. Narayan, “Refugees in India: Legal Framework, Policies and Practices,” 57 JILI 27, 28–31 (2015).

⁹ B.S. Chimni, “Status of Refugees in India: Strategic Ambiguity,” 44 JILI 1 (2002).

¹⁰ Constitution of India, arts. 14, 21.

¹¹ B.S. Chimni, “Status of Refugees in India: Strategic Ambiguity,” 44 JILI 1 (2002).

¹² *National Human Rights Commission v. State of Arunachal Pradesh*, (1996) 1 SCC 742.

constitutional morality and judicial responsibility. In *Mohammad Salimullah & Anr. v. Union of India* (2017–2021), the Supreme Court dismissed interlocutory applications filed by detained Rohingya refugees seeking protection from deportation and access to basic amenities¹³. The Court held that Article 51(c), which directs the State to respect international law, is not enforceable, and that India's non-signatory status to the Refugee Convention prevents judicial reliance on its provisions. The Court further stated that it “cannot comment on something happening in another country,” distancing itself from examining the humanitarian conditions in Myanmar.¹⁴ This position departs from earlier landmark decisions such as *Vishaka v. State of Rajasthan* (1997), where the Supreme Court, despite the absence of domestic legislation, drew upon international conventions (CEDAW) to formulate binding guidelines. Similarly, in *People's Union for Civil Liberties v. Union of India* (2004), the Court invoked international human rights norms to expand constitutional protections.¹⁵ These precedents suggest that international instruments can be judicially invoked, even without formal ratification, provided they do not conflict with domestic law¹⁶.

The Supreme Court's stance in the Rohingya case raises an important jurisprudential concern: *Did the judiciary abdicate its constitutional responsibility to protect refugees on Indian soil?* The tension between national security claims and humanitarian obligations lies at the heart of this debate. While the Union Government argued that Rohingya refugees posed security risks, no evidence demonstrating such threats was placed on the record.¹⁷ Scholars have argued that national security cannot function as a blanket justification for undermining constitutional rights, especially without any concrete material to substantiate the claim.¹⁸

Moreover, India's historical practice suggests a broader ethical orientation. Mahatma Gandhi's struggle against apartheid in South Africa, India's hand in the liberation of Bangladesh in 1971, and its continued acceptance of persecuted communities reflect a moral tradition of offering refuge to the vulnerable.¹⁹ This background makes the legal vacuum in refugee protection all the more conspicuous. The absence of a domestic refugee law has created a space where executive discretion operates without legislative oversight and where judicial interpretation

¹³ *Mohammad Salimullah & Anr. v. Union of India*, (2021) 10 SCC 1 (order dated 08-04-2021).

¹⁴ *Mohammad Salimullah & Anr. v. Union of India*, (2021) 10 SCC 1.

¹⁵ *People's Union for Civil Liberties v. Union of India*, (2004) 9 SCC 580.

¹⁶ *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241.

¹⁷ *Mohammad Salimullah & Anr. v. Union of India*, (2021) 10 SCC 1

¹⁸ B.S. Chimni, “National Security and Refugee Protection in India,” 52 JILI 1 (2010).

¹⁹ Neera Chandhoke, “India and the Ethics of Refugee Protection,” 57 JILI 1 (2015).

becomes inconsistent.²⁰

This paper attempts to address this gap by arguing that constitutional jurisprudence, international human rights norms, and comparative constitutional experience impose an implicit obligation upon the Indian judiciary to protect refugees from arbitrary detention. The paper contends that judicial restraint in the Rohingya deportation case does not align with India's constitutional ethos of dignity, liberty, and humanitarianism. Further, it argues for a clear, rights-based domestic refugee protection framework to prevent future inconsistencies and ensure accountability. By analysing constitutional principles, case law, comparative perspectives, and normative theories of political justice, the paper aims to reassert that the guarantee of justice, dignity, and non-discrimination must extend to all persons, not merely citizens.

Constitutional Foundations of Refugee Protection in India

India does not have a domestic statute dedicated to governing and protecting refugees. Yet, refugees have historically received constitutional safeguards through a combination of fundamental rights, judicial interpretation, and normative commitments embedded in the constitutional text.²¹ Unlike signatories to the 1951 Refugee Convention, India relies on a “*constitutional executive model*”, where the treatment of refugees is shaped primarily by the constitution and executive discretion, rather than by a codified legal regime.²² This section explores the constitutional provisions, jurisprudence, and underlying principles that form the basis of refugee protection in India.

The framers of the Indian Constitution deliberately differentiated between rights available only to citizens and rights available to all persons. This distinction is crucial because refugees, as non-citizens, rely entirely on constitutional rights that are not citizenship-specific.²³

Article 14 guarantees “*equality before the law and equal protection of the laws*” to any person within India's territory.²⁴ The Supreme Court has consistently held that non-citizens are protected under Article 14²⁵. In *Louis De Raedt v. Union of India* (1991), the Court stated that

²⁰ S. Narayan, “Refugees in India: Legal Framework, Policies and Practices,” 57 JILI 27 (2015).

²¹ B.S. Chimni, “Status of Refugees in India: Strategic Ambiguity,” 44 JILI 1 (2002).

²² S. Narayan, “Refugees in India: Legal Framework, Policies and Practices,” 57 JILI 27 (2015).

²³ *National Human Rights Commission v. State of Arunachal Pradesh*, (1996) 1 SCC 742.

²⁴ Constitution of India, art. 14.

²⁵ *National Human Rights Commission v. State of Arunachal Pradesh*, (1996) 1 SCC 742.

although the right to remain in India is not absolute for foreigners, actions taken by the State must still satisfy the test of reasonableness under Article 14.²⁶ In refugee contexts, this implies that deportation, detention, and differential treatment must have a rational basis and cannot be arbitrary or discriminatory. Even if the State possesses wide discretion in matters of national security and foreign affairs, Article 14 functions as a constitutional check, preventing unchecked executive power.²⁷

Article 21 has emerged as the cornerstone of refugee protection in India. It states that “No person shall be deprived of his life or personal liberty except according to procedure established by law.” Over time, Article 21 has been judicially expanded to include the rights to dignity, livelihood, shelter, and protection from arbitrary State action.²⁸ In *National Human Rights Commission v. State of Arunachal Pradesh* (1996), the Court held that Chakma refugees facing threats from local groups must be protected, observing that refugees are entitled to Article 21 rights because they are “human beings” whose lives cannot be endangered by State inaction.²⁹ Similarly, in *Dr Malavika Karlekar v. Union of India* (1989), the Supreme Court directed the release of a Burmese refugee detained without justification, reaffirming that Article 21 extends to all, regardless of nationality or immigration status.³⁰ Together, Articles 14 and 21 form the constitutional foundation of refugee protection, ensuring that refugees are entitled to humane treatment and protection against arbitrary State action.

Although included in the non-justiciable Directive Principles of State Policy (DPSP), courts also have used Article 51(c) as a guiding principle to harmonise domestic constitutional interpretation with international norms. Indian courts have repeatedly drawn upon international conventions in the absence of domestic legislation or formal treaty ratification. The doctrine established in *Vishaka v. State of Rajasthan* (1997) is foundational; where domestic law is silent, courts may look to international conventions consistent with the Constitution of India.³¹ In that case, the Court used CEDAW to formulate enforceable guidelines. In *People’s Union for Civil Liberties v. Union of India* (2004), the Court once again used international human rights standards to interpret constitutional protections relating to privacy and electronic

²⁶ *Louis De Raedt v. Union of India*, (1991) 3 SCC 554.

²⁷ Constitution of India, art. 14.

²⁸ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.

²⁹ *National Human Rights Commission v. State of Arunachal Pradesh*, (1996) 1 SCC 742.

³⁰ *Dr. Malavika Karlekar v. Union of India*, (1989) 4 SCC 1.

³¹ *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241.

surveillance.³² These decisions reflect a broader judicial philosophy; international human rights norms can supplement constitutional interpretation unless they conflict with existing law.

Although India is not bound by the Refugee Convention, the principle of non-refoulement is considered customary international law, binding even without ratification³³. International bodies have repeatedly emphasised that non-refoulement is a jus cogens norm, meaning it cannot be derogated from. The Indian judiciary has implicitly recognised non-refoulement through Article 21, as seen when courts intervened to prevent the deportation of Sri Lankan Tamils, Afghan nationals, and others facing persecution.³⁴ Thus, Article 51(c), read with Articles 14 and 21, creates an outline that aligns India's refugee approach with international humanitarian principles.

India's constitutional ethos is rooted in values of dignity, justice, and non-discrimination. The Constituent Assembly debates reveal a deep commitment to protecting vulnerable persons, even those outside the formal category of "citizens."³⁵ Leaders like Jawaharlal Nehru and Dr B.R. Ambedkar emphasised the need for a constitution grounded in universal human rights, not merely national identity.³⁶ Judicial discourse on constitutional morality, as articulated in *Navtej Singh Johar v. Union of India* (2018), emphasises that State action must uphold dignity, compassion, and inclusiveness.³⁷ These principles provide a strong normative basis for extending protection to refugees. The Indian tradition of providing refuge reflects a broader civilisational ethic that aligns with constitutional morality.³⁸

In the absence of a refugee law, the executive exercises broad powers under:

- The Foreigners Act, 1946
- The Registration of Foreigners Act, 1939
- The Passport (Entry into India) Act, 1920

³² *People's Union for Civil Liberties v. Union of India*, (2004) 9 SCC 580.

³³ B.S. Chimni, "Status of Refugees in India: Strategic Ambiguity," 44 JILI 1 (2002).

³⁴ *Kiaer Abbas Habib Al Qutaifi v. Union of India*, (1999) 1 GLR 532; *Zothansangpuii v. State of Manipur*, (2007) 1 Gau LR 414.

³⁵ Constituent Assembly Debates, Vol. VII (Nov. 1948).

³⁶ B. Shiv Sharma, *Constitutional Founding Principles of India* 112–15 (2015).

³⁷ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

³⁸ Neera Chandhoke, "India and the Ethics of Refugee Protection," 57 JILI 1 (2015).

These colonial-era statutes grant wide discretion to detain, deport, or regulate foreigners. However, the Constitution places limits on this discretion. Courts have held that executive actions must satisfy:

- Non-arbitrariness under Article 14³⁹
- Procedural fairness under Article 21⁴⁰
- Proportionality when fundamental rights are affected⁴¹

Thus, even if the State argues national security, it must demonstrate a rational and evidence-based justification.

India's refugee policy has historically been selective, granting expansive support to some groups (such as Tibetans) while adopting restrictive measures toward others (such as the Rohingya).⁴²Courts have always criticised such inconsistencies when they violate constitutional guarantees.

The constitutional framework functions as a mechanism to ensure that executive discretion is exercised in conformity with India's democratic and humanitarian commitments. Though India lacks formal refugee legislation, the Constitution provides a robust set of protections grounded in equality, dignity, and international humanitarian norms. Articles 14, 21, and 51(c), supplemented by judicial interpretation, create a constitutional architecture that implicitly safeguards refugees from arbitrary treatment and potential refoulement.⁴³This framework establishes not only legal rights but also reflects India's moral and historical commitment to providing refuge to those fleeing persecution.

Judicial Abdication: Conceptual and Jurisprudential Dimensions

Judicial abdication occurs when courts deliberately step back from their constitutional duty, especially when rights face threats and judicial intervention becomes necessary to protect

³⁹ *Louis De Raedt v. Union of India*, (1991) 3 SCC 554.

⁴⁰ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.

⁴¹ *Modern Dental College & Research Centre v. State of Madhya Pradesh*, (2016) 7 SCC 353.

⁴² B.S. Chimni, "Status of Refugees in India: Strategic Ambiguity," 44 JILI 1 (2002); S. Narayan, "Refugees in India: Legal Framework, Policies and Practices," 57 JILI 27 (2015).

⁴³ *National Human Rights Commission v. State of Arunachal Pradesh*, (1996) 1 SCC 742; *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241.

constitutional values.⁴⁴ While judicial restraint is a legitimate doctrine, abdication goes far beyond restraint and turns into avoidance, where courts abandon constitutional obligations and defer blindly to the executive.⁴⁵ This problem becomes serious in refugee law because refugees are politically voiceless and depend entirely on the judiciary to protect them from majoritarian excesses and executive overreach.⁴⁶

In the Rohingya deportation case, the Supreme Court retreated from its protective role and ignored its own humanitarian and constitutional jurisprudence.⁴⁷ Judicial duty in a constitutional democracy requires the courts to act as guardians of inherent human rights, as Justice H.R. Khanna emphasised in *ADM Jabalpur*, where he stated that courts must stand against executive excess even when rights are not explicitly mentioned in the Constitution.⁴⁸ Earlier refugee-friendly cases such as *NHRC v. State of Arunachal Pradesh*, *Ktaer Abbas*, and *U Myat Kyaw* showed a judiciary willing to protect refugees through Article 21 and procedural fairness;⁴⁹ however, in the Rohingya case, the Court ignored these precedents and chose to defer completely to the executive, despite the government producing no evidence of national security threats. The Court refused to consider international law by claiming that Article 51(c) was irrelevant since India is not a signatory to the Refugee Convention, even though the *Vishaka* doctrine allows courts to rely on non-binding international norms consistent with fundamental rights⁵⁰. The Court also refused to examine the humanitarian crisis in Myanmar, stating that it could not “comment on something happening in another country,” even though courts routinely assess foreign conditions in deportation, asylum, and extradition cases.⁵¹ This refusal prevented the Court from determining whether deportation would violate Article 21.

Moreover, the Court accepted the government’s security threat claims without evidence, without individualised assessment, and without applying proportionality as required in *Modern Dental College, Puttaswamy*, and *Anuradha Bhasin*. This unquestioning deference converted judicial review into a formality. Judicial abdication differs from restraint because it abandons

⁴⁴ S.P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* 22–25 (Oxford Univ. Press, 2002).

⁴⁵ Upendra Baxi, “The Avatars of Judicial Activism: Explorations in the Geography of (In)Justice,” 18 *JILI* 131 (1976)

⁴⁶ B.S. Chimni, “Status of Refugees in India: Strategic Ambiguity,” 44 *JILI* 1 (2002).

⁴⁷ *Mohammad Salimullah & Anr. v. Union of India*, (2021) 10 SCC 1.

⁴⁸ *ADM Jabalpur v. State of Uttar Pradesh*, (1976) 2 SCC 521 (Khanna, J., dissenting).

⁴⁹ *ADM Jabalpur v. State of Uttar Pradesh*, (1976) 2 SCC 521 (Khanna, J., dissenting).

⁵⁰ *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241.

⁵¹ See, e.g., *Ktaer Abbas*, (1999) 1 GLR 532; *Bhavesh Parihar v. Union of India*, (2020) 15 SCC 612 (extradition context).

rights altogether, ignores clear risks of persecution, and disproportionately harms refugees who lack political power and cannot seek protection through democratic processes.⁵² Other democracies, such as the United States in *Cardoza-Fonseca*, Canada in *Singh*, and South Africa in *Tafira*, use their constitutional frameworks to expand refugee protection and require rigorous scrutiny of State action.

India, however, moved in the opposite direction. The Supreme Court's approach in the Rohingya case reflects a shift from a rights-protective judiciary to a rights-indifferent one. By refusing to apply established constitutional principles, ignoring humanitarian evidence, and deferring blindly to the executive, the Court abandoned its protective constitutional role and exposed an already vulnerable community to real and immediate risks of persecution.⁵³

Case Study: The Rohingya Deportation

The Rohingya crisis stands as one of the worst humanitarian tragedies of the twenty-first century, with the Rohingya, a Muslim minority from Myanmar's Rakhine State, facing decades of discrimination, denial of citizenship under the 1982 Myanmar Citizenship Law, and systematic violence that international bodies describe as ethnic cleansing and genocide.⁵⁴

India hosts around 40,000 Rohingya refugees, including 18,000 registered with UNHCR, mostly living in Delhi, Jammu, and Hyderabad.⁵⁵ India initially allowed them to stay informally, but in 2017, the Union Government labelled them "illegal immigrants" and sought to deport them on national security grounds, which triggered petitions before the Supreme Court⁵⁶. In *Mohammad Salimullah & Anr. v. Union of India*, two Rohingya refugees approached the Court under Article 32, arguing that deportation would violate Article 21 because they faced death, torture, and persecution in Myanmar; that non-refoulement binds India as customary international law; that classifying them as "illegal immigrants" violates Article 14; and that India's constitutional tradition supports humanitarian protection.⁵⁷ The

⁵² S.P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* 22–25 (Oxford Univ. Press, 2002).

⁵³ B.S. Chimni, "Status of Refugees in India: Strategic Ambiguity," 44 JILI 1 (2002); Neera Chandhoke, "India and the Ethics of Refugee Protection," 57 JILI 1 (2015).

⁵⁴ Human Rights Council, *Report of the Independent International Fact-Finding Mission on Myanmar* (2018); Amnesty International, "Myanmar: Military Crimes Against Humanity Targeting Rohingya" (2017).

⁵⁵ UNHCR India, "Rohingya Refugees in India: Population Overview" (2017); S. Narayan, "Refugees in India: Legal Framework, Policies and Practices," 57 JILI 27 (2015).

⁵⁶ Ministry of Home Affairs, "Identification of Illegal Immigrants," Circular (8 Aug. 2017).

⁵⁷ *Mohammad Salimullah & Anr. v. Union of India*, (2021) 10 SCC 1

Government responded that it owes no obligation because India is not a signatory to the 1951 Refugee Convention, that the Rohingya pose security threats, and that deportation falls squarely within sovereign executive power.⁵⁸

In April 2021, the Supreme Court accepted the Government's arguments, holding that India's non-signatory status to the Refugee Convention bars reliance on it; that courts cannot comment on Myanmar's conditions; that the right against deportation flows only from Article 19(1)(e), which applies exclusively to citizens; and that it must defer to the executive on national security.⁵⁹ This ruling sharply narrowed constitutional protection for refugees. The Court ignored decades of jurisprudence that applied Article 21 to all persons, including *Ktaer Abbas*, *NHRC v. Arunachal Pradesh*, and *ONGC*, which incorporated non-refoulement into Indian law.⁶⁰ It accepted security claims without evidence, individualised assessment, or proportionality analysis, contradicting standards in *Puttaswamy*, *Anuradha Bhasin*, and *Modern Dental College*. It refused to examine Myanmar's humanitarian crisis, despite courts worldwide routinely assessing foreign conditions before deportation. It departed from the *Vishaka* principle by refusing to consider the UDHR, ICCPR, and customary international law.

After the ruling, authorities detained Rohingya in holding centres, accelerated deportation processes, and increased surveillance, leaving refugees fearful, insecure, and deprived of basic dignity.⁶¹ This decision reflects judicial abdication: the Supreme Court ignored constitutional protections, avoided international norms, and accepted executive assertions without scrutiny, ultimately exposing a vulnerable community to persecution and marking a troubling moment in India's refugee jurisprudence⁶².

Reconciling National Security and Humanitarian Obligations

The refugee question sits at the intersection of national security and humanitarian responsibility. While States possess the sovereign power to regulate the entry, presence, and deportation of foreigners, this power is not absolute. Constitutional democracies must ensure

⁵⁸ *Ibid.*; Government of India Affidavit, *Salimullah* (2017).

⁵⁹ *Mohammad Salimullah & Anr. v. Union of India*, (2021) 10 SCC 1 (order dated 08-04-2021).

⁶⁰ *Ktaer Abbas Habib Al Qutaifi v. Union of India*, (1999) 1 GLR 532; *National Human Rights Commission v. State of Arunachal Pradesh*, (1996) 1 SCC 742; *ONGC v. Association of Natural Gas*, (2004) 10 SCC 305.

⁶¹ Human Rights Watch, *India: Rohingya Detained, Threatened with Deportation* (2021); UNHCR India, "Update on Rohingya Detentions and Deportations" (2021).

⁶² B.S. Chimni, "Status of Refugees in India: Strategic Ambiguity," 44 JILI 1 (2002); Upendra Baxi, "The Future of Judicial Review in India," 50 JILI 1 (2008).

that security concerns do not eclipse fundamental rights, especially when the lives of vulnerable groups are at stake.⁶³ The Rohingya deportation controversy illustrates the difficulties and failures in achieving this constitutional balance.

National security is undoubtedly a legitimate State aim. The Constitution recognises it as a ground for limiting certain rights and permits preventive detention in exceptional circumstances.⁶⁴ However, Indian jurisprudence makes clear that national security cannot operate as a blanket justification immune from judicial review. The proportionality doctrine, endorsed in *Modern Dental College v. State of Madhya Pradesh* (2016) and elaborated in *K.S. Puttaswamy v. Union of India* (2017), requires that any State action restricting fundamental rights must be necessary, evidence-based, and minimally impairing.⁶⁵ Broad assertions of threat, unsupported by concrete material, cannot satisfy this standard.

Humanitarian obligations arise from both constitutional guarantees and international norms. Article 21 protects the life and liberty of “any person,” imposing a universal obligation on the State to ensure that deportation does not expose individuals to persecution, torture, or death.⁶⁶ Indian courts have previously recognised non-refoulement, the prohibition on returning persons to danger as implicit in Article 21, as seen in *Ktaer Abbas Habib Al Qutaifi v. Union of India* (1999)⁶⁷. Further, Article 51(c) directs the State to respect international law, including the UDHR and ICCPR, both of which reinforce obligations to protect refugees from inhuman treatment.⁶⁸

In the Rohingya case, however, these humanitarian principles were subordinated to unverified security claims. The Union Government argued that Rohingya refugees were linked to extremist networks, but placed no documentary evidence before the Court.⁶⁹ Instead of demanding substantiation or applying proportionality, the Supreme Court accepted the executive’s assertions with complete deference. The Court also declined to examine conditions in Myanmar, despite extensive international documentation of ethnic cleansing and systematic

⁶³ B. Shiv Sharma, *Constitutional Founding Principles of India* 97–102 (2015).

⁶⁴ Constitution of India, arts. 19(2)–(6), 22.

⁶⁵ *Modern Dental College & Research Centre v. State of Madhya Pradesh*, (2016) 7 SCC 353; *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1.

⁶⁶ Constitution of India, art. 21.

⁶⁷ *Ktaer Abbas Habib Al Qutaifi v. Union of India*, (1999) 1 GLR 532.

⁶⁸ Constitution of India, art. 51(c); Universal Declaration of Human Rights, 1948; International Covenant on Civil and Political Rights, 1966.

⁶⁹ *Mohammad Salimullah & Anr. v. Union of India*, (2021) 10 SCC 1.

persecution of Rohingya communities.⁷⁰ This refusal effectively prevented any meaningful assessment of whether deportation would violate Article 21.

Comparative constitutional experience demonstrates that security and humanitarian duties can coexist. The U.S. Supreme Court in *INS v. Cardoza-Fonseca* (1987), the Canadian Supreme Court in *Suresh v. Canada* (2002), and South African courts in multiple refugee cases have held that States must assess individual risks of persecution, even when national security is invoked.⁷¹ These jurisdictions recognise that the legitimacy of security measures depends on their compliance with rights-based safeguards. In India, a constitutionally coherent balancing approach would require evidence-backed security assessments, individualised risk evaluation, and recognition of non-refoulement as a component of Article 21. Ultimately, national security cannot be protected by abandoning constitutional morality.⁷² A State that fails to safeguard vulnerable persons undermines both the legitimacy of its power and the spirit of its Constitution.

Comparative Constitutional Perspectives

While constitutional frameworks differ, courts across jurisdictions acknowledge that the protection of refugees is not merely a policy choice but a constitutional and human rights imperative. Examining the approaches of the United States, Canada, the European Union, and South Africa helps contextualise India's judicial stance in the Rohingya matter and reveals alternative models that integrate security concerns without sacrificing human dignity.⁷³

In the United States, the Supreme Court has adopted a rights-expansive approach to asylum law. In *INS v. Cardoza-Fonseca* (1987), the Court held that refugees need only to demonstrate a "well-founded fear" of persecution, an intentionally lower threshold that recognises the inherent vulnerability of asylum seekers.⁷⁴ Even in cases involving national security, U.S.

⁷⁰ United Nations Human Rights Council, *Report of the Fact-Finding Mission on Myanmar* (2018).

⁷¹ *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3; *Tafira v. Minister of Home Affairs*, 2006 (4) SA 268 (W).

⁷² *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1 (constitutional morality).

⁷³ *NS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (United States Supreme Court emphasising generous interpretation of refugee protection); *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 (Canada Supreme Court holding refugee hearings must meet constitutional standards of fairness); *Tafira v. Ngozwane*, 2006 (4) SA 268 (W) (South Africa, High Court affirming constitutional obligations toward refugees); Charter of Fundamental Rights of the European Union, art. 18 (EU guaranteeing the right to asylum).

⁷⁴ *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

courts require individualised assessment rather than blanket presumptions.⁷⁵ This ensures that security interests do not override core humanitarian obligations.

Canada offers a more explicitly rights-based model, shaped by the Canadian Charter of Rights and Freedoms. In *Singh v. Minister of Employment and Immigration* (1985), the Supreme Court held that asylum seekers are entitled to full constitutional due process.⁷⁶ Later, in *Suresh v. Canada* (2002), the Court ruled that even individuals suspected of terrorism cannot be deported to countries where they face a substantial risk of torture.⁷⁷ The judgment affirms that national security cannot justify refoulement, and any deportation must be consistent with principles of fundamental justice. Canada, therefore, represents a model where constitutional protections extend to all persons, citizenship notwithstanding.⁷⁸

In the European Union, both the Court of Justice of the EU (CJEU) and the European Court of Human Rights (ECHR) recognise non-refoulement as a binding human rights obligation.⁷⁹ The ECHR's decision in *Soering v. United Kingdom* (1989) established that deportation to a country where an individual faces inhuman treatment violates Article 3 of the European Convention on Human Rights, regardless of national security arguments.⁸⁰ The CJEU similarly applies proportionality and procedural safeguards, ensuring that States justify restrictions with clear evidence.⁸¹ Importantly, EU law mandates individualised assessments and rejects collective expulsion.⁸²

South Africa offers one of the strongest constitutional commitments. Its Constitution, founded on post-apartheid values of equality and dignity, provides broad protections to refugees. In *Tafira v. Minister of Home Affairs* (2006), courts held that refugees and asylum seekers must be treated with dignity and cannot be subjected to unlawful detention, extortion, or discrimination.⁸³ South African jurisprudence underscores that humanitarian protections flow

⁷⁵ *Zadvydas v. Davis*, 533 U.S. 678 (2001) (requiring due process limits even for non-citizens claiming national security concerns).

⁷⁶ *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 (Canada).

⁷⁷ *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3.S

⁷⁸ Canadian Charter of Rights and Freedoms, ss. 7–15.

⁷⁹ Charter of Fundamental Rights of the European Union, art. 18 (right to asylum); art. 19(2) (non-refoulement).

⁸⁰ *Soering v. United Kingdom*, 11 EHRR 439 (1989).

⁸¹ *N.S. v. Secretary of State for the Home Department*, Joined Cases C-411/10 and C-493/10, CJEU (2011) (proportionality and procedural safeguards in asylum transfers).

⁸² Protocol No. 4 to the European Convention on Human Rights, art. 4 (prohibition of collective expulsion).

⁸³ *Tafira v. Minister of Home Affairs*, 2006 (4) SA 268 (W).

directly from constitutional morality, not from international treaties alone.⁸⁴

Compared to these jurisdictions, the Indian Supreme Court's approach in *Mohammad Salimullah* reflects an unusual judicial reticence.⁸⁵ While other courts have demanded evidence, applied proportionality, and prioritised human dignity, the Indian judiciary deferred entirely to executive security claims and declined to consider international human rights standards.⁸⁶ The comparative landscape, therefore, reveals that India's response is deviating both from global human rights norms and from India's own constitutional tradition.

Political Justice and Constitutional Morality

Political justice in a constitutional democracy requires the equal and fair treatment of all individuals who fall under the jurisdiction of the State, regardless of citizenship or legal status. Political justice is anchored in the idea that the legitimacy of the State derives not merely from electoral authority but from its commitment to protect the dignity, liberty, and security of all human beings.⁸⁷ In the Indian constitutional tradition, this idea finds expression in both the Preamble, which promises justice, liberty, and equality to "all", and in the Fundamental Rights chapter, where several rights apply universally to "persons" rather than exclusively to "citizens."⁸⁸ Constitutional morality provides the normative foundation through which these commitments must be interpreted. Dr B.R. Ambedkar described constitutional morality as a "*paramount reverence for the forms of the Constitution*," implying that constitutional values must prevail over momentary political pressures.⁸⁹ The Supreme Court has reaffirmed the centrality of constitutional morality in cases such as *Navtej Singh Johar v. Union of India* (2018) and *Indian Young Lawyers Association v. State of Kerala* (2018), emphasising that the Constitution requires the State and the judiciary to act in accordance with principles of dignity, equality, and non-discrimination, especially for marginalised or unpopular groups.⁹⁰ From this perspective, refugee protection is not a matter of statutory grace but a constitutional obligation.

⁸⁴ Constitution of the Republic of South Africa, 1996, ss. 9–12; see also *Kaunda v. President of the Republic of South Africa*, 2004 (10) BCLR 1009 (CC) (constitutional morality and dignity principles).

⁸⁵ *Mohammad Salimullah & Anr. v. Union of India*, (2021) 10 SCC 1.

⁸⁶ *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177; *Soering v. United Kingdom*, 11 EHRR 439 (1989); *Tafira v. Minister of Home Affairs*, 2006 (4) SA 268 (W).

⁸⁷ B. Shiv Sharma, *Constitutional Founding Principles of India* 97–102 (2015)

⁸⁸ Constitution of India, Preamble; arts. 14, 21.

⁸⁹ Constituent Assembly Debates, Vol. XI (Nov. 1949).

⁹⁰ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1; *Indian Young Lawyers Association v. State of Kerala*, (2018) 10 SCC 1.

Refugees exist outside traditional political membership; they cannot vote or assert influence through democratic processes. Their survival depends on the State's commitment to safeguard basic rights.⁹¹ Thus, political justice demands that the government and judiciary extend to refugees the minimum guarantees of life, dignity, and protection from harm. Deportation to conditions of persecution directly conflicts with this obligation.⁹²

In the Rohingya case, the Supreme Court's refusal to meaningfully evaluate the risks of refoulement and to apply the principles of Article 21 reflects a departure from constitutional morality. The Court emphasised India's non-signatory status to the 1951 Refugee Convention and deferred entirely to executive security claims without demanding evidence or applying proportionality. This approach prioritised executive preference over constitutional duty. By declining to consider the humanitarian crisis in Myanmar, the Court acted contrary to the moral compass of the Constitution, which mandates the protection of "all people".⁹³ Contrastingly, in *Vishaka v. State of Rajasthan* (1997), the Court invoked international conventions despite the absence of domestic legislation because gender-based violence violated fundamental rights.⁹⁴ A similar logic should have guided the Court in the Rohingya context: the absence of refugee legislation should create a space for judicial protection, not judicial retreat.⁹⁵

Ultimately, political justice requires that constitutional morality guide State action where the law is silent. In refugee matters, this means recognising that the Constitution's promise of justice does not end at the boundary of citizenship. Protecting refugees is not only a humanitarian necessity but a constitutional imperative that affirms India's commitment to dignity and human rights.⁹⁶

Bridging the Legal Vacuum: Toward a Domestic Refugee Protection Framework

India's refugee governance operates in a legal vacuum, relying primarily on executive discretion under colonial-era statutes such as the Foreigners Act, 1946 and the Passport (Entry into India) Act, 1920. These laws do not differentiate between refugees, migrants, and undocumented foreigners, thereby providing the State broad powers of detention and

⁹¹ B.S. Chimni, "Status of Refugees in India: Strategic Ambiguity," 44 JILI 1 (2002).

⁹² *National Human Rights Commission v. State of Arunachal Pradesh*, (1996) 1 SCC 742.

⁹³ *Mohammad Salimullah & Anr. v. Union of India*, (2021) 10 SCC 1.

⁹⁴ *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241.

⁹⁵ Upendra Baxi, "The Future of Judicial Review in India," 50 JILI 1 (2008).

⁹⁶ Neera Chandhoke, "India and the Ethics of Refugee Protection," 57 JILI 1 (2015).

deportation, without corresponding rights protections.⁹⁷ This framework lacks transparency, consistency, and accountability, resulting in uneven treatment of refugee groups. Tibetans and Sri Lankan Tamils receive institutional support, while Rohingya and other communities face criminalisation and vulnerability.⁹⁸ The absence of a clear statutory regime creates unpredictability for refugees and fosters arbitrary State action.

A domestic refugee protection law is therefore essential to align India's practice with constitutional guarantees and international norms. Such a framework should incorporate non-refoulement as a statutory principle, reflecting its status as customary international law and its compatibility with Article 21.⁹⁹ It should also provide procedures for refugee status determination (RSD), ensuring that individuals receive fair hearings, legal representation, and individualised assessment rather than group-based assumptions of security risk.¹⁰⁰ Further, a domestic statute should establish guidelines for detention, access to basic services, and integration measures. This would prevent refugees from being detained indefinitely or denied education, healthcare, and livelihood opportunities.¹⁰¹ A transparent system would also assist the State in identifying genuine security threats through structured screening, rather than relying on broad, unsubstantiated assertions.¹⁰² Importantly, this legislation would enhance cooperative federalism, enabling coordinated roles for the Union, States, and local authorities. It would also reduce judicial ambiguity by providing statutory standards that courts can apply consistently.¹⁰³

Ultimately, bridging the legal vacuum is not merely a procedural necessity but a constitutional imperative. A domestic refugee law would operationalise India's humanitarian tradition while ensuring that national security is achieved through rule of law mechanisms, not executive discretion.¹⁰⁴ It would reaffirm that the protection of the vulnerable is a defining feature of India's constitutional identity.¹⁰⁵

⁹⁷ B.S. Chimni, "Status of Refugees in India: Strategic Ambiguity," 44 JILI 1 (2002).

⁹⁸ S. Narayan, "Refugees in India: Legal Framework, Policies and Practices," 57 JILI 27 (2015).

⁹⁹ *taer Abbas Habib Al Qutaifi v. Union of India*, (1999) 1 GLR 532; UNHCR, *Advisory Opinion on Non-Refoulement* (2007).

¹⁰⁰ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (2019).

¹⁰¹ Human Rights Watch, *India: Rohingya and Basic Services* (2021).

¹⁰² *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1 (requirement of evidence-based State action).

¹⁰³ S. Narayan, 57 JILI 27 (2015).

¹⁰⁴ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.

¹⁰⁵ Neera Chandhoke, "India and the Ethics of Refugee Protection," 57 JILI 1 (2015).

Conclusion

The Rohingya deportation case shows how weak refugee protection becomes in India when the law stays silent and courts step back. Even though the Constitution protects the life and dignity of every person, India's lack of a refugee law and the Supreme Court's deference to the executive left the Rohingya without meaningful safety.¹⁰⁶ The Court did not examine the dangers in Myanmar, did not apply Article 21 strongly, and did not rely on international human rights norms. This approach weakened constitutional morality and denied protection to a community that needed it most.¹⁰⁷

India can fix this situation through a set of practical and achievable solutions, such as:

First, Parliament must enact a clear Refugee Protection Act. The law should recognise non-refoulement, set up a fair refugee status determination (RSD) system, and guarantee access to basic rights like education, healthcare, and livelihood.¹⁰⁸ This statute should also separate refugees from undocumented migrants so that vulnerable groups do not face criminalisation.

Second, the judiciary must actively enforce Article 21 in refugee cases. Courts should ask for evidence when the State claims national security threats and use the proportionality test before approving detention or deportation. Courts should also interpret constitutional rights in harmony with international human rights standards.

Third, India should establish an independent National Refugee Commission. This body can handle refugee registration, monitor living conditions, ensure fair hearings, and coordinate with State governments. This reduces arbitrariness and increases accountability.¹⁰⁹

Fourth, the Union must work with States to strengthen cooperative federalism. States should receive support to manage housing, identification documents, social services, and local integration.

Fifth, India should deepen cooperation with UNHCR and regional partners to improve security screening, share information responsibly, and develop rights-based refugee management

¹⁰⁶ *Mohammad Salimullah & Anr. v. Union of India*, (2021) 10 SCC 1.

¹⁰⁷ *Navej Singh Johar v. Union of India*, (2018) 10 SCC 1 (constitutional morality); *National Human Rights Commission v. State of Arunachal Pradesh*, (1996) 1 SCC 742

¹⁰⁸ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (2019).

¹⁰⁹ S. Narayan, "Refugees in India: Legal Framework, Policies and Practices," 57 *JILI* 27 (2015).

systems.

Protecting refugees is not an act of charity. It reflects India's constitutional values like dignity, equality, and justice. By adopting legal, judicial, and institutional reforms, India can build a refugee protection system that is fair, humane, and consistent with its constitutional identity.¹¹⁰

¹¹⁰ Neera Chandhoke, "India and the Ethics of Refugee Protection," 57 JILI 1 (2015).