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Selective Protection and the Principle of Non-Refoulement: A Critical Study of the Citizenship (Amendment) Act, 2019

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ABSTRACT

The principle of non-refoulement is an important part of international refugee protection. In simple terms, it means that a State should not send a person back to a country where that person may be persecuted or face a serious threat to life or freedom. The principle is expressly recognised in Article 33 of the 1951 Convention Relating to the Status of Refugees. Although India has not ratified the Refugee Convention, the UNHCR regards non-refoulement as a principle of customary international law, and on that view the principle may apply to States even when they are not parties to the Convention. India does not at present have a single, comprehensive law dealing specifically with refugees. In the absence of such legislation, matters relating to refugees are generally addressed through laws concerning foreigners, citizenship and national security. The Citizenship (Amendment) Act, 2019 (“CAA”) created a special provision for obtaining Indian citizenship for persons belonging to six specified religious communities, namely Hindus, Sikhs, Buddhists, Jains, Parsis and Christians, who came from Afghanistan, Bangladesh or Pakistan and entered India on or before 31 December 2014, subject to the conditions prescribed under the law. The Citizenship (Amendment) Rules, 2024 later laid down the procedure for making applications under the amended citizenship provisions. This paper focuses on the relationship between the CAA and the principle of non-refoulement. The two deal with different legal questions. The CAA is primarily concerned with the acquisition of Indian citizenship, whereas non-refoulement is concerned with protecting individuals from being returned to a place where they may face persecution or serious harm. The CAA is nevertheless significant from the perspective of refugee protection in India because it creates a specific pathway to citizenship for certain groups facing religious persecution, while persons who do not fall within its specified categories are not covered by the same special route. This raises the question whether a citizenship-based mechanism such as the CAA can adequately address the broader need for refugee protection in India. Against this background, the paper also examines the relevance of Articles 14 and 21 of the Constitution of India and the approach adopted by Indian courts towards the protection of non-citizens.

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I. INTRODUCTION

Refugees hold a special and often difficult position under international law. A person becomes a refugee when the protection of his or her own country is no longer available or cannot safely be relied upon. In such circumstances, the person has to seek protection from another State. One of the most important forms of protection in that situation is the assurance that the person will not be sent back to a country where he or she may face persecution or serious harm.

This protection is known as the principle of non-refoulement. Article 33(1) of the 1951 Refugee Convention provides that no Contracting State shall expel or return a refugee to a territory where his or her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion.¹ The UNHCR considers non-refoulement to be a fundamental part of the international refugee protection system and has also recognised it as a rule of customary international law.²

India presents a different legal situation. It is not a party to the 1951 Refugee Convention or to the 1967 Protocol. Nevertheless, India has provided shelter to several groups of refugees and displaced persons over the years. These include Tibetan refugees, Sri Lankan Tamils, Chakmas, Afghans and persons from Myanmar, among others. Since India does not have a single law dealing comprehensively with refugees, their protection is generally governed by executive policies, existing laws and the decisions of Indian courts.

The Citizenship (Amendment) Act, 2019 (“CAA”) added a new dimension to India’s approach towards certain groups seeking protection. The CAA amended the Citizenship Act, 1955 and introduced a special legal route to Indian citizenship for persons belonging to six specified religious communities who came from Afghanistan, Bangladesh or Pakistan and fulfil the conditions prescribed by the Act.³ The amendment also changed the manner in which such persons are treated under the definition of “illegal migrant” for the purposes of the Citizenship Act.⁴

The relationship between the CAA and refugee protection, however, requires careful examination, because citizenship and refugee protection are not the same legal concept.

¹ Convention Relating to the Status of Refugees art. 33(1), July 28, 1951, 189 U.N.T.S. 150.

² U.N. HIGH COMM’R FOR REFUGEES, *The 1951 Refugee Convention*, UNHCR India, <https://www.unhcr.org/in/about-unhcr/overview/1951-refugee-convention> (last visited Sept. 22, 2026).

³ The Citizenship (Amendment) Act, 2019, No. 47, Acts of Parliament, 2019 (India), §§ 2–3.

⁴ *Id.* § 2.

Citizenship creates a continuing legal relationship between an individual and a State. Non-refoulement, on the other hand, provides protection against removal to a country where the individual may face persecution or serious harm. A person may therefore need protection against refoulement even when that person has no claim to citizenship under the CAA.

This distinction becomes particularly significant for individuals who do not fall within the categories specifically covered by the CAA. A person may face persecution in his or her country of origin and may consequently require protection from return, even though the person does not meet the requirements for citizenship under the CAA.

Against this background, this paper examines whether the CAA has resulted in a form of selective protection, and considers whether India's existing legal framework provides sufficient protection against refoulement to individuals who fall outside the scope of the CAA.

II. THE PRINCIPLE OF NON-REFOULEMENT

A. Meaning and purpose

Non-refoulement means not returning a person to a territory where that person would face a serious threat of persecution or harm. The principle prohibits such return, and it rests on humanitarian values.

The principle is contained in Article 33(1) of the Refugee Convention, 1951, which is reproduced below for ready reference:

“No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”⁵

Non-refoulement is not limited to cases where a person is formally deported from a country. The protection may also apply in other situations. The UNHCR has explained that refoulement can take different forms, including refusing entry to a person who is seeking protection and may face serious danger if returned.⁶

The importance of the principle lies in the fact that refugee protection would have little meaning if a State could acknowledge that a person faces persecution and still send that person back to the same place of danger. Non-refoulement therefore seeks to ensure that a person in need of

⁵ Convention Relating to the Status of Refugees, *supra* note 1, art. 33(1).

⁶ U.N. HIGH COMM’R FOR REFUGEES, *Note on International Protection* ¶ 10, <https://www.unhcr.org/publications/note-international-protection> (last visited Sept. 22, 2026).

international protection is not exposed again to the threat from which protection was originally sought.

B. Article 33(2) and its exceptions

The principle of non-refoulement is not entirely free from qualification. It is subject to exceptions, although these are very limited. Under Article 33(2) of the Convention, the benefit of the principle may not be claimed by a refugee:⁷

1. where there are reasonable grounds for regarding the refugee as a danger to the security of the country in which he or she is; or
2. where the refugee, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

The UNHCR has, however, emphasised that, in view of the serious consequences to a refugee of being returned to a country where he or she is in danger of persecution, these exceptions should be applied with the greatest caution.⁸

As far as India is concerned, this point is very relevant, because the issue of national security is raised in almost every discussion about the protection and deportation of refugees in India. Every State has a legitimate duty to protect its security and its people, but that duty must be exercised with due regard to international law and to the domestic legal framework.

III. NON-REFOULEMENT AND THE INDIAN POSITION

The fact that India is not a party to the 1951 Refugee Convention does not bring the discussion on non-refoulement to an end. The principle continues to raise important questions under both international and domestic law.

The UNHCR has stated that non-refoulement is now recognised as a principle of customary international law. On this view, the principle binds States even if they have not become parties to the 1951 Refugee Convention.⁹ This is particularly relevant in the Indian context, because the discussion is not limited to India's obligations under a particular treaty. It also involves the broader development and application of international law.

⁷ Convention Relating to the Status of Refugees, *supra* note 1, art. 33(2).

⁸ U.N. HIGH COMM'R FOR REFUGEES, *Note on Non-Refoulement (Submitted by the High Commissioner)*, U.N. Doc. EC/SCP/2 (Aug. 23, 1977), <https://www.unhcr.org/in/publications/note-non-refoulement-submitted-high-commissioner>.

⁹ U.N. HIGH COMM'R FOR REFUGEES, *Access to Territory and Non-Refoulement*, UNHCR Emergency Handbook, <https://emergency.unhcr.org/protection/legal-framework/access-territory-and-non-refoulement> (last visited Sept. 22, 2026).

Indian courts have, on several occasions, considered international refugee principles while dealing with cases involving the detention, protection and deportation of refugees.

In *Ktaer Abbas Habib Al Qutaifi v. Union of India*, the Gujarat High Court referred to Article 33 of the Refugee Convention while considering the detention and release of two Iraqi nationals. The Court relied upon Article 21 of the Constitution and recognised that the protection of life and personal liberty is available to human beings, including persons who are not Indian citizens.¹⁰ The Court also referred to Article 51(c) of the Constitution, under which the State shall endeavour to foster respect for international law and treaty obligations.¹¹

A similar approach can be seen in *National Human Rights Commission v. State of Arunachal Pradesh*. In that case, the Supreme Court recognised that the protection of life and personal liberty under the Constitution is available to every person, citizen or not. The Court directed the State to take appropriate measures to protect the Chakma community from threats to their life and liberty.¹²

These judgments reflect an important aspect of India's constitutional framework: a person does not lose basic constitutional protection merely because he or she is not an Indian citizen. Refugees and other foreign nationals can therefore claim certain fundamental protections, particularly those relating to life and personal liberty.

At the same time, Indian courts have not established an absolute rule that every refugee is protected from deportation. The State continues to have legal authority to regulate the entry, stay and removal of foreign nationals, subject to constitutional requirements.¹³

The Indian approach therefore involves a balance between two concerns: protecting individuals from serious violations of their basic rights, and recognising the State's authority over immigration and foreign nationals. This balance is central to understanding the development of refugee protection and non-refoulement in India.

IV. THE CITIZENSHIP (AMENDMENT) ACT, 2019

Several provisions of the Citizenship Act, 1955 were amended by the Citizenship (Amendment) Act, 2019.

¹⁰ *Ktaer Abbas Habib Al Qutaifi v. Union of India*, 1999 Cri. L.J. 919 (Guj. HC) (India) (Special Civil Application No. 3433 of 1998, decided Oct. 12, 1998).

¹¹ *Id.*

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

¹³ *See Mohammad Salimullah v. Union of India*, AIR 2021 SC 1789 (India) (I.A. No. 38048 of 2021 in W.P. (C) No. 793 of 2017, order of Apr. 8, 2021) (declining interim relief against the deportation of Rohingya detainees in Jammu, while directing that they not be deported unless the procedure prescribed for deportation is followed).

The amendment most relevant to this paper was made to Section 2(1)(b) of the Act. The CAA inserted a proviso under which any person belonging to the Hindu, Sikh, Buddhist, Jain, Parsi or Christian community from Afghanistan, Bangladesh or Pakistan who entered India on or before 31 December 2014, and who has been exempted by the Central Government under the Passport (Entry into India) Act, 1920 or from the application of the Foreigners Act, 1946, shall not be treated as an illegal migrant for the purposes of the Citizenship Act.¹⁴

The amendment also inserted a new Section 6B, which enables such persons to apply for a certificate of registration or naturalisation as Indian citizens.¹⁵

The CAA therefore does not give refugee status to all asylum seekers. It establishes a special mechanism for obtaining Indian citizenship for a specific group of migrants who came from specific neighbouring countries.

V. THE IDEA OF SELECTIVE PROTECTION UNDER THE CAA

In this paper, the term “selective protection” refers to the limited scope of the protection that the CAA offers to refugees. It neither gives complete protection to all refugees nor completely denies protection to refugees.

The CAA covers three neighbouring countries and six religious communities from those countries. As a result, a person who has come to India from any country other than Afghanistan, Bangladesh or Pakistan does not have access to this special route to Indian citizenship, even if that person fled persecution.

Similarly, a person who came to India from one of these three countries but does not belong to one of the six specified communities does not qualify under the CAA.

For example, suppose two persons leave their country because of religious persecution and enter India. One belongs to a community covered by the CAA, whereas the other belongs to a community that is not covered. Both have suffered religious persecution, but the consequences under the CAA are different: the first person has a pathway to Indian citizenship, while the second does not.

This does not mean that the second person will be returned to a place of persecution. The question of non-refoulement remains relevant and must be considered independently on the basis of constitutional and other legal provisions.

¹⁴ The Citizenship (Amendment) Act, 2019, *supra* note 3, § 2 (inserting a proviso to § 2(1)(b) of the Citizenship Act, 1955).

¹⁵ *Id.* § 3 (inserting § 6B into the Citizenship Act, 1955).

VI. THE CAA AND NON-REFOULEMENT: DIFFERENT LEGAL FUNCTIONS

The CAA cannot be considered a substitute for the principle of non-refoulement. The two deal with different legal issues and provide different forms of protection. There are several reasons for drawing this distinction.

A. Non-refoulement applies before the question of citizenship

A person may face the risk of deportation and may require protection from being returned to a dangerous country even if that person has no right to claim Indian citizenship. Non-refoulement is therefore mainly concerned with preventing removal to a place where a person may face persecution or serious harm. Citizenship, on the other hand, gives a person a permanent legal status in relation to the State.

B. Non-refoulement has a wider scope

The application of non-refoulement depends primarily on the danger faced by the individual. The CAA follows a different approach: it identifies specific categories of persons who may benefit from its special route to Indian citizenship. The protection available under the CAA is thus linked to the categories and conditions laid down in the legislation, while non-refoulement focuses on the actual risk faced by a person.

C. Refugee protection does not necessarily mean citizenship

Citizenship is only one possible form of long-term legal protection. A refugee may require protection from forced return, temporary permission to remain, access to essential services and other basic safeguards without immediately seeking or receiving citizenship. The absence of a citizenship pathway does not, therefore, by itself remove the need for protection against refoulement.

The UNHCR treats non-refoulement as a separate and fundamental element of refugee protection and describes it as the core principle of the 1951 Convention.¹⁶

For these reasons, the CAA should be understood as a specific citizenship mechanism rather than as a complete system of refugee protection. Its existence does not, by itself, address the wider legal questions concerning the protection of refugees and other persons who may face serious harm if returned to their country of origin.

¹⁶ U.N. HIGH COMM'R FOR REFUGEES, *The 1951 Refugee Convention*, *supra* note 2.

VII. ARTICLE 14 AND THE QUESTION OF CLASSIFICATION UNDER THE INDIAN CONSTITUTION

The CAA has been criticised and questioned on the basis of Article 14 of the Constitution of India, and a batch of petitions led by *Indian Union Muslim League v. Union of India*, which challenges its constitutional validity, remains pending before the Supreme Court.¹⁷ Article 14 guarantees equality before the law and the equal protection of the laws.¹⁸ The Supreme Court has, however, permitted reasonable classification founded on an intelligible differentia, where the differentia has a rational relation to the object sought to be achieved by the law.¹⁹

The CAA draws three classifications:

1. nationality, that is, Afghanistan, Bangladesh and Pakistan;
2. six religious communities, that is, Hindu, Sikh, Buddhist, Jain, Parsi and Christian; and
3. the date of entry, that is, on or before 31 December 2014.

The legislative explanation for the classification is set out in the Statement of Objects and Reasons of the Bill, which states that the constitutions of Pakistan, Afghanistan and Bangladesh provide for a specific state religion and that, as a result, many persons belonging to the Hindu, Sikh, Buddhist, Jain, Parsi and Christian communities have faced persecution on grounds of religion in those countries.²⁰

The constitutional question is whether the chosen classification bears a rational relation to this legislative objective, and whether the different legal treatment of persons outside the classification can be justified on that basis.

The question becomes more important when the concern is the protection of refugees against return, rather than citizenship.

VIII. THE CAA AND THE ABSENCE OF A COMPREHENSIVE REFUGEE LAW

The difficulty in understanding the CAA in relation to refugee protection arises from the absence of a comprehensive refugee law in India.

¹⁷ *Indian Union Muslim League v. Union of India*, W.P. (C) No. 1470 of 2019 (India) (pending).

¹⁸ INDIA CONST. art. 14.

¹⁹ *Budhan Choudhry v. State of Bihar*, AIR 1955 SC 191, (1955) 1 SCR 1045 (India).

²⁰ The Citizenship (Amendment) Bill, 2019, Bill No. 370 of 2019 (as introduced in Lok Sabha), Statement of Objects and Reasons ¶ 2 (India), https://prsindia.org/files/bills_acts/bills_parliament/2019/Citizenship%202019%20Bill%20Text.pdf.

At present, refugee matters are governed by domestic legislation, chiefly the laws dealing with foreigners and the Citizenship Act, together with executive policies. The CAA provides an additional pathway to Indian citizenship, but it contains no specific provisions for the protection of refugees.

In particular, the CAA does not provide:

- a general definition of a refugee;
- a procedure for the determination of refugee status;
- a provision or policy on non-refoulement;
- a legal mechanism to challenge an official decision rejecting a claim to refugee status; or
- a mechanism for protection while a claim to refugee status is pending.

As a result, refugees not covered by the CAA may face uncertain protection against forced return.

IX. CRITICAL ANALYSIS: DOES THE CAA STRENGTHEN OR FRAGMENT REFUGEE PROTECTION?

The CAA can be understood in two different ways when examined from a legal perspective.

On the one hand, the Act provides a specific route to Indian citizenship for a defined category of persons who satisfy the conditions laid down in the law. The Citizenship (Amendment) Rules, 2024 also set out the procedure through which applications can be made under the amended provisions.²¹

On the other hand, the limited coverage of this citizenship route leaves an important issue unresolved. There may be people who have experienced persecution or who face a serious risk of harm but do not fall within the categories covered by the CAA.

This situation can result in what may be called a “protection gap”.

It is important to clarify that the CAA was not introduced as a general law on non-refoulement or as a complete refugee-protection statute. Its primary purpose is to deal with citizenship. The difficulty arises because India does not have a separate and comprehensive statutory framework for refugees. As a result, the citizenship mechanism created by the CAA may appear to address a wider protection problem that citizenship law, by itself, cannot fully resolve.

²¹ The Citizenship (Amendment) Rules, 2024, G.S.R. 172(E), Gazette of India, Extraordinary, pt. II sec. 3(i) (Mar. 11, 2024) (India), https://www.mha.gov.in/sites/default/files/2024-09/TheCitizenshipAmendmentRule_10092024.pdf.

A comprehensive Indian refugee law would help to separate two different questions:

1. the need to protect refugees against return; and
2. the eligibility of a person for Indian citizenship.

That distinction would make the legal system clearer, and would make it plain that citizenship is not the only means of protecting refugees.

X. CONCLUSION

The Citizenship (Amendment) Act, 2019 brought an important change to Indian citizenship law. It does not, however, provide a complete system for the protection of refugees.

Citizenship and non-refoulement are two different concepts that serve two different purposes. The principle of non-refoulement protects a refugee against compulsory return to a territory where he or she faces persecution or a danger to life, whereas citizenship creates a permanent legal relationship between a person and the State.

The CAA provides a special pathway to Indian citizenship for persons who came from Afghanistan, Bangladesh or Pakistan and belong to one of the six communities specified in the amending Act.²² The Citizenship (Amendment) Rules, 2024 provide the procedure for making an application under the Act.²³ A person who does not fall within these criteria cannot, however, be regarded as having no protection against refoulement for that reason alone.

Indian courts have also held that the protection of life is not confined to citizens but extends to foreigners. In *National Human Rights Commission v. State of Arunachal Pradesh* and *Ktaer Abbas Habib Al Qutaifi v. Union of India*, the courts recognised the importance of the life and liberty of non-citizens. *Mohammad Salimullah v. Union of India*, by contrast, illustrates the tension between the protection claimed by refugees and the State's authority to deport foreign nationals in the interest of national security.²⁴

The central issue, therefore, is not whether the Citizenship (Amendment) Act, 2019 protects particular persecuted persons. It is whether India has a comprehensive legal framework to protect every person who faces a real risk of persecution or serious harm to life on return, whether or not that person is covered by the CAA.

A more comprehensive refugee law could fill this gap by providing a procedure for the determination of refugee status, by establishing minimum procedural safeguards, and by

²² The Citizenship (Amendment) Act, 2019, *supra* note 3, §§ 2–3.

²³ The Citizenship (Amendment) Rules, 2024, *supra* note 21.

²⁴ *Mohammad Salimullah*, *supra* note 13.

providing protection against refoulement. It would allow citizenship law and refugee protection law to perform their respective functions as separate but complementary parts of the Indian legal framework.
