ADMINISTRATIVE TRAJECTORY OF DEPORTATION OF FOREIGNERS IN INDIA-
WHERE DOES THE DISCRETION END?

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ABSTRACT

‘Administrative Trajectory of Deportation of Foreigners in India -Where does the Discretion end?’ allows the reader to delve into the administrative practice of deportation of foreigners in India.

The article focuses on discretion practiced by both, the administrative authority and courts, in deciding the fate of foreigners in the Sovereign country of India.

This administrative system is further analysed from the lens of delegation and natural justice to comprehend how the orders of expulsion of foreigners varies based on legal and illegal migrants in the country, despite both being categorized as ‘foreigners’ under the same legislation, i.e the Foreigners Act, 1946.

The author is optimistic that a look into this long article would reveal administrative application of deportation laws, and how a uniform legislation for all migrants does not do justice to the different classes of foreigners deported.
Interplay between citizenship, sovereignty and administrative laws.

A Nation-state’s sovereignty is dependent on the concept of homogeneity, not only for safeguarding citizenship but also for determining the resultant rights of a State-subject. In broader terms, it is the unity and homogeneity of the State-subjects that entitle them the benefit of citizenship. Consequently, any non-citizen is seen as the “other” and deportation is considered to be a viable option if the said “other” unlawfully enters the State boundaries or illegally prolongs stay within its borders.

In legislative textbooks far and wide and altruistic discourses on national and international platforms, one is bound to find numerous humanitarian arguments focusing on duties of a host country of sheltering this “other”, specially refugees and troubled foreigners. While this discourse forms the edifice on which immigration and refugee laws find concretion, at the backfoot, it works in sync with the nation’s deportation regime.

In the sovereign country of India, with no extensive substantive laws pertaining to refugee management, regulation of influx and superintendence over this impotent community becomes an arduous task. The country does not follow any comprehensive laws on refugees both, within the international and the domestic sphere, therefore for its management, the nation’s dependence on its administrative structure is immense.

All Nation-states are essentially defined by their administrative operations that the executive body partakes in, for smooth performance of the state’s daily affairs. Administrative laws, therefore govern the core actions which need to be undertaken by administrative organs for the purpose of social welfare. India being a welfare state, in the Preamble of its Constitution, zeroes in on social, economic and political justice for all its ‘citizens’. To the point that it extends to non-citizens, it may be considered generosity. The question which thus comes to the forefront is to what extent

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1 India is not a signatory to the 1951 UN Convention on Refugees and the 1967 Protocol on the same.
administrative law or administrative justice available to the aforementioned “others” or non-citizens?

A country known for its diverse culture and ‘The Guest is akin to God’ ideology, India has seen a major influx of “aliens” over the years. The term “aliens” could be reflective of various groups under the larger set of “non-citizens” like foreigners, refugees, asylum seekers, and more. The country however, does not have a comprehensive legal structure to demarcate between the above mentioned terms and therefore all of them, irrespective of their status, are considered to be “foreigners” and consequently covered under the same legislation, namely the Foreigners Act, 1946. This system allows for the imposition of both general and specific laws relating to foreigners to also be applicable to refugees in the country.

While there are humanitarian arguments relating to duties of a host country on sheltering refugees and troubled foreigners, this article aims to shed light on the role of the administration in deportation of illegal foreigners (including refugees) as undertaken by the competent authorities. For this purpose, administrative methods are viewed through two lenses namely:

- Delegation of laws and
- Natural justice.

A. Deciphering Delegation

Administrative law draws its powers from the authority of the legislature to delegate non essential legislative functions. While no test has been established for delegation of powers by the Central Legislature, a well settled rule is that a boundary needs to be established by laying down standards and policies within which the delegated authority can exercise its powers. These help guide the executive officers in achieving the object of the legislation. Such standards however, shouldn't be vague or general, nor should they be drafted in a way that they contravene the goal of the statute.

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2 Translation from a Sanskrit phrase, “Atithi Devo Bhava” which means an uninvited guest is equivalent to God, and should be welcomed as one by the host.

3 As has been held by the case ‘In Re Delhi Laws Act v The Part C States (Laws) Act 1951 SCR 747’.
Therefore, a common technique adopted by the courts to check the validity of any impugned provision (a provision which delegates power to another authority in said legislation), is to inspect the Preamble of the said Act in question, as the Preamble is a key to understanding the general object and intention of the Legislature in passing the enactment.

Applying the same modus operandi to the Foreigners Act, 1946 ("the Act"), it can be contended that the Preamble presents a preclude to the objective of the subsequent sections. Notably, unlike most other legislations, the Preamble of this Act specifically highlights the objective of the Act as being delegation of powers to the Central Government to make provisions for foreigners relating to their entry in and exit from the country. With the sole focus being such, the Act hardly leaves any scope for confusion. However, such a Preamble also enlarges the chances of administrative overreach, and has therefore had its fair share of judicial interventions to rectify administrative overstepping of the delegated powers.

The flood of foreigners into the country is regulated and overseen by Section 3(2)(c) of the Act which empowers the Central Government to make orders relating to deportation. This provision however has to be read in conjunction with the fundamental right of Article 21 of the Constitution which ensures that all individuals- even foreigners- are not deprived of their life and personal liberty except by a “procedure established by law”.

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4 Maxwell on Interpretation of Statutes.

5 The Preamble states, “An Act to confer upon the Central Government certain powers in respect of foreigners. Whereas it is expedient to provide for the exercise by the Central Government of certain powers in respect of the entry of foreigners into 1 [India], their presence therein and their departure therefrom.”

6 Section 3(2)(c) of the Foreigners Act, 1948 empowers the Central Government to make provisions for foreigners which “shall not remain in India or in any prescribed are as therein;”

7 As guaranteed by Article 21 of the Constitution on India (A fundamental right to life and liberty)

8 It was held that foreigners too are entitled to protection under Article 21 in Louis De Raedt v. Union of India 1 AIR 1981 SC 1886.
The implication of this right is that while the Central Government is specifically empowered to make orders regarding deportation, it cannot violate the right to life and personal liberty as guaranteed to a foreigner under the Constitution of India unless such deportation is a result of a procedure established by law. This “procedure” has a well defined two forked dichotomy;

a) Procedure or the ‘process’ as detailed under the requisite legislation(s)- Deportation orders by the Central Government cannot go beyond the procedure or skeleton already covered under the requisite legislations. For foreigners who enter the country legally, their stay is governed by the number of days authorised by their visa. This period may be extended on acceptance of application sent to the Ministry of Home Affairs as nowhere does law provide for automatic renewal of visa, much less with the deposit of extension fee for the same. Non registration of foreigners or overstaying beyond the period permissible can lead to deportation under Section 3(2)(c) of the Foreigners Act, 1948. Along with deportation, contravention of conditions of stay in the country is punished under Section 14 of the Act which is penal in nature.

b) Procedure as including ‘due process of law’- The authority empowered to deport is bound by Article 21 to give an opportunity to the accused to justify his presence or prolonged stay in India. This is further covered under the concept of ‘Natural Justice’.

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9 M. Alexander vs Union Of India And Others 2017 SCC OnLine HP 668

10 Section 16 of the Act states that the provisions of the Act shall be in addition to, and not in derogation of, the provisions of the Registration of Foreigners Act, 1939 the Indian Passport Act, 1920, and of any other enactment for the time being in force.

11 Section 14 gives penalty for contravention of the provisions of the Act, and states, “Whoever. — (a) remains in any area in India for a period exceeding the period for which the visa was issued to him; (b) does any act in violation of the conditions of the valid visa issued to him for his entry and stay in India or any part thereunder; (c) contravenes the provisions of this Act or of any order made thereunder or any direction given in pursuance of this Act or such order for which no specific punishment is provided under this Act, shall be punished with imprisonment for a term which may extend to five years and shall also be liable to fine; and if he has entered into a bond in pursuance of clause (f) of sub-section (2) of section 3, his bond shall be forfeited, and any person bound thereby shall pay the penalty thereof or show cause to the satisfaction of the convicting Court why such penalty should not be paid by him.”
This constitutionalisation of administrative power is backed up by judicial review to ensure that no arbitrary deportations shall be tolerated.

Juxtaposing the Preamble of the Act with Section 3 of the same which empowers the Central Government to make orders, it becomes as clear as cloudless sky that the Central Government exercises delegated functions which enables and furthers the aim of the Act. Furthermore, by providing an exhaustive list in Section 3 for which Orders can be made, the Central Legislature also sets a limitation on subjects on which discretion can be exercised by the Central Government. As has been often cited, there is a distinction between “the delegation of power to make the law which necessarily involves a discretion as to what it shall be, and conferring ....discretion as to its execution to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.” By setting out a list, the Central Legislature disallows the executive to make use of its discretion to go beyond the scope of law and make additions or subtractions to the list, but with regard to execution of the provisions of the said list, the Central Government is empowered to specify its own method. This delegative discretion is well within the ambit of the statute.

Commonly, application of delegated jurisdiction is done by rules, regulations, notifications, bye-laws, orders and schemes, depending on what the legislation demands. The Foreigners Act, 1946 allows for provision of Orders under Section 3, in pursuance of which the Central Government introduced the Foreigners Order, 1948 with detailed provisions relating to operation of its duties under the Act.

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12 Section 3 enables the Central Government to make orders with respect to areas mentioned in the Section.

13 Held by Ranney J. in Cincinnati W. & Z.R. Co. v. Clinton County Commissioners (1) 277 U.S. 189 (As also discussed in In Re Delhi Laws Act case).
Such orders can be specific or general in nature, wherein the former refers to administrative actions and the latter to administrative law making. In this context, foreigners, if order for deportation is made, are ousted from the country through specific orders.

Confusion arose as to who is authorised to make orders of expulsion of foreigners from the national territory or part thereof. The Central Government is vested with absolute and unfettered discretion to expel foreigners and as has been held, there is no provision in the Constitution stating otherwise. Contrarily, under Article 258 of the Constitution, the President is empowered to confer on the State Government any executive power of the Union Government with the State Government’s prior consent. Although this action is sanctioned by what can be called the grundnorm of the Country, a version of this law also finds endorsement in the Foreigners Act, 1946 under Section 12. Therefore, by backing of both the above-mentioned provisions, the Central Government is further authorised to delegate the power to order deportation to the State Government, which it does so through notifications from time to time. Such power can be conditional or unconditional, as both Article 258 and Section 12 explicitly provide for delegation done “conditionally” or “otherwise”. Therefore where deporting power is delegated subject to conditions with respect to its usage, such delegation is not ultra vires to the Act.

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14 Under Section 3(2)(c)

15 Orders as a part of Delegated Legislation gain legitimacy under Sections 20-24 of the General Clauses Act, 1897.

16 Hans Muller v. Superintendent, Presidency Jail, Calcutta AIR 1955 SC 367

17 Section 12 states, “Any authority upon which any power to make or give any direction, consent or permission or to do any other act is conferred by this Act or by any order made thereunder may, unless express provision is made to the contrary, in writing authorise, conditionally or otherwise, any authority subordinate to it to exercise such power on its behalf, and thereupon the said subordinate authority shall, subject to such conditions as may be contained in the authorisation, be deemed to be the authority upon which such power is conferred by or under this Act.”

18 A.H. Magermans vs S.K. Ghose And Ors. AIR 1966 Cal 552
The inclusion of these words in both, the statute and the Constitution highlights the importance of intricacies of drafting, and with respect to the Foreigners Act has fulfilled two fundamental sides of administrative delegation, i.e allowing the Central Government to retain its overarching power of deportation by putting in condition to delegation, and curtailing the remit of the delegated authority by limiting the scope of administrative discretion.

The question which has come to the fore, therefore, is whether this power can be sub delegated, as Sub Delegation is not allowed unless it is done so expressly or by necessary implication.

Paragraph 2(2) of the Foreigners Order, 1948 provides for appointment of Civil Authority by the Central Government. This authority however does not have the power to evict aliens from the country, as is explicitly vested in the Central Government, reference to which has been made in two different aspects with regard to the question of sub delegation. The following cases.

In the *State of M.P. v. Mumtaq Ali Faiz Ali & Ors*\(^\text{19}\), the main question for deliberation was which authority was authorised to issue a deportation order under the Foreigners Act. The High Court of Madhya Pradesh observed while it was true that the accused had overstayed his welcome in the country as was also indicative by the date mentioned in his passport, the deportation order was passed by a notice issued by the local District Superintendent of Police who was empowered to act as the “Civil Authority” by the State Government under the Foreigners Order, 1948. It was held that an order under Section 3(2)(c) of the Foreigners Act can be passed only by the Central Government or by the State Government. Such power cannot be delegated to any Civil Authority constituted under the Foreigners Order, 1948.

\(^{19}\) AIR 1959 MP 387
Similarly, in the *State v. Ibrahim Nabiji*\(^\text{20}\), it was held by the High Court of Bombay that the respondent could not be held otherwise guilty of the infringement of the provision of section 14 of the Foreigners Act, because there was no lawful valid order or direction issued against him under section 3(2)(c) of the Foreigners Act requiring him to leave India. The order passed by the Deputy Superintendent of Police was held to be unauthorised and failure to comply with such order cannot be penalised under section 14 of the Foreigners Act.

In another case of *Rev John Robert Thnaytes v State of Bengal*\(^\text{21}\), the court held that unlike in the above mentioned two cases, in the present case, the order was in fact issued or passed by the Central Government, whereas the Superintendent of the Police only executed it by serving it, therefore the order of deportation was valid.

These cases therefore prove that sub delegation with respect to deportation orders although allowed (by virtue of Section 12 of the Act), deportations cannot be made unless sub delegation is done expressly. Irrespective of sub delegation being done or not, the Civil Authority appointed under the Foreigners Order, 1948 is competent to grant or reject permission for leave of foreigners based on certain already decided conditions.\(^\text{22}\)

\(^{20}\) AIR 1959 Bom 525

\(^{21}\) 2002 SCC OnLine Cal 605

\(^{22}\) Paragraph 5 of the Foreigners Order, 1948 specifies that leave can be refused by the civil authority if (a) the foreigner has failed to comply with the formalities of departure prescribed under the Registration of Foreigners Rules, 1939;
(b) the foreigner's presence is required in India to answer a criminal charge;
(c) the foreigners' departure will prejudice the relations of the Central Government with a foreign power; (d) the departure of the foreigner has been prohibited under an order issued by a competent authority.

Furthermore, leave can also be denied if the civil authority is of the view that such departure will not be conducive to public interest.
Furthermore, a review of the provisions of the Act show that it adheres to strict principles of delegation. The delegated authority, namely the Central Government is provided with an exhaustive list to work on under Section 3 which acts as skeletal structure to be followed, is empowered to make administrative orders on deportation without any power to legislate, and allowed to sub delegate conditionally.

B. Natural Justice in Eviction Laws

The concept of natural justice is considered to be the basic structure of the Constitution. It is a system which is not only followed in the court of law to secure justice, but also to prevent its miscarriage. It helps curtail any arbitrary action under the guise of law. Although it is incapable of exact definition, it can be understood as a procedure which any reasonable man would consider to be fair. Non codification of the rules of natural justice allows it an amount of flexibility that is imperative in the field of law. Some essential principles that have developed to further Natural Justice is that of ‘Audi Alteram Partem’\(^23\) and the principle of Reasoned Decision.

Resultantly the essence of natural justice needs to be followed in decisions, directions or orders made under Administrative law. This process generally begins with the service of notice to the accused party and ends with hearing them before giving a final decision.

Applying the concept of natural justice in the orders of deportation, two branches emerge:

i) Deporting foreigners who enter the country legally.

ii) Deportation of foreigners who enter the country illegally (this category includes refugees)

There have been varying decisions on the question as to whether the rule of Natural Justice should be followed in cases of deportation.

\(^23\) which means that ‘no one shall be condemned unheard’
1. Foreigners entering the country legally:

India being a signatory to the ICCPR\textsuperscript{24} is bound to follow the principle of lawful deportation as enumerated under Article 13\textsuperscript{25} of the covenant. This principle clearly follows that all aliens who enter legally into a foreign country shall be deported only by decisions which follow the letter of law, unless such expulsion is a result of other compelling factors like national security. A basic reading of this Article sheds light on the dignity in deportation, provided to “legal” foreigners. In the case of \textit{Hasan Ali Raihany v Union of India}\textsuperscript{26} the Hon’ble Supreme Court upheld the principle of natural justice to state that based on the facts of the case it could be seen that the foreigner had entered the country legally using the single entry permit which was issued to him. Therefore, it is only fair that “the competent authority must inform him the reasons for his deportation. If such a decision is taken, the petitioner must be given an opportunity to submit his representation against the proposed expulsion.”

Similarly, in \textit{Leonid Beyzer v Union of India and Ors}\textsuperscript{27} the High Court of Bombay directed the Home Department of the Government of Goa to give a show cause notice to the petitioner who shall then accordingly give a response. It would only be post which the concerned Home Department would be entitled to pass a reasonable order regarding deportation.

\textsuperscript{24} International Covenant on Civil and Political Rights

\textsuperscript{25} Article 13 states, “An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.”

\textsuperscript{26} (2006) 2 SCC (Cri) 33

\textsuperscript{27} 2007 SCC OnLine Bom 921
This judgement came in the light of the petitioner having entered the country legally. Therefore it was only fair that he was given a fair opportunity of hearing.

Another scenario of legality is where the stay of a refugee becomes legal in the country on being given a refugee certificate. Here too, natural justice comes into play and the concept of *audi alteram partem* should be followed if deportation order is made without giving the deportee a fair chance of being heard.

For instance, in the case of *Mohammad Sediq vs. Union of India and Ors*\(^2\), the petitioner who was an Afghan refugee, held a refugee certificate issued by the UNHCR, New Delhi in 1987. The validity of the certificate was extended for another two years till 1999. However, just a year later in 1998, the petitioner received the impugned order to leave India from the Government under Section 3(2)(c) of the Foreigners Act. It was the contention of the petitioner that this order came without him being given any opportunity of hearing. He further stated that due to the prevailing disturbances in Afghanistan, he was unable to return as there was a feared harm to his well being. He therefore prayed to the court that the order be quashed for violation of the principles of natural justice.

The Court observed that when any refugee is asked to leave the country he must get an opportunity of hearing; however the court left the judgment open- ended by stating that the extent of the opportunity would depend on the facts and circumstances of each case.

Certification plays an important role in validating the presence of refugees in the country and the UNHCR being a humanitarian organisation, once it gives unto an individual the status of a refugee through certification, the Government is under obligation to ensure that protection is granted by the state to the certified individual\(^2\)

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\(^2\)1998 SCC OnLine Del 572

\(^2\)Ktaer Abbas Habib Al Qutaifi & Others Vs. Union of India & Others, 1999 Cri LJ 919
All the above mentioned decisions have taken a route divergent from the famous Supreme Court judgement of *Hans Muller of Nuremberg v. Superintendent, Presidency Jail, Calcutta and Ors* \(^{30}\) where the ratio decidendi asserted that under the Foreigners Act, the Central Government is vested with an “absolute and unfettered discretion and, as there is no provision fettering this discretion in the Constitution, an unrestricted right to expel remains.” Although this was further referred to in the case of *Mr. Louis De Raedt and Ors v Union Of India and Ors* \(^{31}\), where the Hon’ble Supreme Court stated that right to be heard cannot be a hard and fast rule, in recent years there is a shift in judicial consciousness from the absolution of the Central Government’s deportation orders to a more foreigner friendly approach- although this cognizance comes at a snail’s pace.

2. *Foreigners entering the country illegally:*

Denial of illegal entrants at the border by immigration authorities does not raise the scope of natural justice, however expulsion of refugees after entry into the country without due process certainly is violation of the principles of the same. India may not be a signatory to the Refugee Convention and Protocol \(^{32}\) which details the principle of non-refoulement in Article 33(1) \(^{33}\), however being a signatory to the ICCPR certainly binds the state to follow other principles encapsulated therein including the inherent right to life \(^{34}\) and right of people to not be subjected to torture, cruelty, inhuman or degrading treatment- both of which are essential ingredients of the non-refoulement

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30 AIR 1955 SC 367
31 1991 SCC (Cri) 886
32 1951 and 1967, respectively
33 Article 33(1) states ‘No contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom ’ would be threatened on account of race, religion, nationality, membership of social group or political opinion.’
34 Article 6
principle in question. These Articles are to be read parallely with the fundamental right to life in the Constitution under Article 21\(^{35}\) as also guaranteed to citizens and non citizens alike.\(^{36}\)

Understanding deportation \textit{vis a vis} the customary International law principle of non-refoulement also deserves special mention of Article 51(c) of the Constitution of India which casts a duty on the Indian state to “\textit{endeavor to foster respect for international law and treaty obligations in the dealing of organised people with one another}”. The aforesaid provisions discussed only further prove that the scope of non-refoulement is wide enough to make it binding on all Nation-states despite no specific assent being given by them.\(^{37}\)

Judicial decisions vary on illegal entry of refugees in India, some giving heed to non-refoulement, while some have been dismissive of the same.

\textbf{i) When Natural Justice is discredited:}

In April of 2021, the Hon’ble Supreme Court made an interim order\(^{38}\) refusing to order release of Rohingya refugees detained in Jammu, and rejected the prayer to direct the Union of India to not deport the refugees to their home country, Myanmar. This had come in the light of delegation by the Union Government to state governments to identify and deport Rohingyas under the Foreigners Act.

One exception to the principle of non-refoulement is the threat to the security of the state. The court accepted the contention of the Union Government to dismiss the interim relief prayed for by the petitioners on the ground that the Government had made “serious allegations of threat to security of state” and that there was misuse of the “porous borders” of India by touts for illegal

\(^{35}\) Fundamental right to life and personal liberty

\(^{36}\) Louis Deraedt v. Union of India reported in (1991) 3 SCC 554 : AIR 1991 SC 1886,

\(^{37}\) S. Goodwin Gill from his book on “The Refugees in International Law”

\(^{38}\) Mohammad Salimullah and Anr. v Union of India and Ors. WP(C) No. 793 of 2017
immigration. Deporting individuals in violation of the principle of non-refoulement requires serious reasons of national security with the burden of proof on the Government alleging the same. In the order, the court did not put the onus on the Government to prove this threat, and further disregarded the petitioners’ contention of Article 21\textsuperscript{39} of the Constitution incorporating the essence of non-refoulement. It was instead held by the Hon’ble Supreme Court that while even non citizens can avail the benefit of Article 14\textsuperscript{40} and 21, the right to not be deported is only available to citizens as it is ancillary to the right to reside or settle in any part of the territory of India under Article 19(1)(e).

Moreover, the court, while acknowledging the duty of the state to endeavor to respect international treaty obligations under Article 51(c), acknowledged the contention that such duty can be only fulfilled when India has ratified a convention in question. India not being a party to the Refugee Convention was therefore not bound by the above mentioned Article. While it was also acknowledged by the Supreme Court that domestic courts can “draw inspiration from International convention/ treaties, so long as they are not in conflict with the municipal law”, the court did not go into this any further. The argument by the petitioner that India’s obligation of non-refoulement under ICCPR, UDHR, CRC, and other International treaties, was thus ignored.

Having detailed the ‘reasons’ given by the court in this order, how much of it is a reasoned decision is therefore a point of controversy.

However, it is also worthy to mention that the petitioners being certified refugees by the UNHCR were given protection by the Hon’ble Supreme Court, which stated that they shall not be deported unless the “procedure prescribed by deportation is followed”.

This shows that in the same order, the court negates and affirms the concept of natural justice by denying protection against deportation to other refugees, while at the same time granting protection to the petitioners certified by the UNHCR.

\textsuperscript{39} Supra note 35

\textsuperscript{40} Fundamental right to equality before laws and equal protection of laws
ii) When Natural Justice was upheld:

The courts- although not equipped with the power of deportation- are empowered to disregard a deportation order if it does not conform to the rule of law.

For instance, in the case of State v. Chandra Kumar41 the Ld. Judge of the district court of Dwarka thwarted the order of deportation of a Sri Lankan refugee by holding that “The very idea of deporting the convict to his country of origin where he has a well founded fear of persecution would not be in consonance with the principles of natural justice”

The court went a step further to hint at the unconstitutionality of the Foreigners Act in covering refugees under its ambit. The court opined that the term “foreigners” by including refugees within its sphere bears witness to an unreasonable classification42 as the refugees are influenced to participate in cross-border travel because of a fear of persecution and are not afforded the luxury a foreigner has, by virtue of having discretion to travel to India.

Refugee and Asylum Seekers (Protection) Bill, introduced in the year 2006 brought a hope for strengthening of humanitarian jurisprudence in India.

The Bill adheres to the principle of reasonable classification of Article 14 by considering “refugees” as a different class than foreigners and provides for an “effective system to protect refugees”43. Section 744 of the same gives a blanket prohibition against deportation, expulsion,

41 FIR No. 78/10, adjudicated by the Court of Metropolitan Magistrate, Dwarka, New Delhi on September 20, 2011

42 This is in reference to the concept of ‘reasonable classification’ in contrast to that of ‘class legislation’ which is prohibited. Article 14 of the Constitution of India sustains the idea of classification of people into certain groups for application of laws, as long as such division is done on a reasonable basis. The test for such reasonableness was evolved in the case of State of W.B. v. Anwar Ali Sarkar, AIR 1952 SC 75. It lays down two conditions; (i) the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others, and (ii) that differentia must have a rational relation to the object sought to be achieved by the Act.

43 Preamble to the Bill states, “To provide for the establishment of an effective system to protect refugees ... ... and, by providing necessary social and economic protection both before and after the date of asylum.”

44 Section 7 of the Bill provides for a “General prohibition against refusal of entry, expulsion, extradition, deportation, return etc. and provisions for removal from India. − (1) Notwithstanding anything contained in this Act
return and extradition of refugees from India to a country where he is subject to persecution, or where there exists a threat to his physical safety or freedom.

Although a beacon of hope, having been introduced more than a decade ago, this bill only remains a distant memory amongst few. Till the moment the Bill is solidified into law, the decision on deportation by lower courts shall be based on the discretion of Higher courts and their judicial precedents.

The High Court of Gujarat has consolidated a list for the enforcement of principles of humanitarian law which summarily depict its practice, specially by the Indian state. The list clearly states that although certain treaties and international conventions are not enforceable, there still exists an obligation by the Government to respect them. This however, does not limit the absolute power of the Government to expel a foreigner. The Courts, on the other hand can nevertheless enforce such international covenants which effectuate the fundamental rights guaranteed in the Constitution.

A deportation order can be interrupted by the courts under Article 21 in the name of non-refoulement, provided that the stay of such refugee in the state is not prejudicial to the security of the state.

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or any other law for the time being in force, no person may be refused entry into India, expelled, extradited, deported or returned to any other country or be subject to any similar measure if, as a result of such refusal, expulsion, extradition, deportation, return or other measure, such person is compelled to return to or remain in a country where:

(a) he may be subjected to persecution on account of race, religion, sex, nationality, ethnic identity, membership of a particular social group or political opinion, or,

(b) his life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination, serious violations of human rights or other events seriously disrupting public order in either part or whole of that country.”

45 Ktaer Abbas Habib Al Qutaifi & Others Vs. Union of India & Others, 1999 Cri LJ 919
As of April 2021, the interim order\textsuperscript{46} by the Supreme Court however has set a completely different precedent which disregards the principle of non-refoulement and strengthens the Central Government’s power of ordering deportation of refugees, on the reasoning that the right to not be deported is concomitant to the fundamental right to reside or settle in any part of India\textsuperscript{47} - which is only guaranteed to citizens.

This implies till the time a structure is given to the rights of refugees through codification of new statute focused entirely on them, the fate of the refugees will always hang in the balance between judicial discretion and administrative overreach.

\textsuperscript{46}Supra note 38

\textsuperscript{47}Article 19(1)(e) of the Constitution of India.