# PROPORTIONALITY ANALYSIS AND NON-REFOULEMENT JURISPRUDENCE IN INDIA: A COMPARATIVE APPROACH

**SABREEN AHMED***

**Abstract:** India does not have an explicit refugee regime and most of the jurisprudence on refugee protection comes from the judgements. However, in the absence of law or explicit domestication of international refugee law, the Supreme Court of India (SCI) struggles with consistent interpretation of *non-refoulement*. Many scholars suggest the presence of non-refoulement as a substantive right under the Right to life in the Constitution of India (1950). However, it has not been consistently accepted. Significantly Art 21 allows limitation in the form of 'procedure established by law', to avail constitutional justification for limiting non-refoulement rights citing national security concerns. An analysis of the recent repatriation judgment of SC of India suggests the application of the Wednesbury-like approach which is aimed at finding a reasonable justification for the state's action without getting into the 'balancing mechanism'. This article adopts comparative, analytical and doctrinal methodology to examine how the Indian Judiciary can utilize the proportionality analysis in non-refoulement cases to attain better outcomes. Firstly, this article explains the concepts of Wednesbury and Proportionality Analysis rooted in European Jurisprudence and its application by the EctHR, the Inter-American System of Human Rights and the African Courts. In the absence of any consistent European and American scholarship, this article draws from the African court's jurisprudence to understand how proportionality analysis is interpreted regionally and applied by national courts (Kenyan High Court) in non-refoulement cases. Finally, the article suggests that without any constitutional provision of limitation (like in Kenya), the Supreme Court of India needs to adopt the 'rainbow of review' approach in *refoulement* decisions to achieve better outcomes. This would allow the SC to make a gradual shift towards the proportionality analysis from the Wednesbury principle, depending on the criticality of human rights violation, without signalling a complete change in judicial attitude.

**Keywords:** Non refoulement, Proportionality analysis, Wednesbury Principle, ECtHR, African Courts.

## 1. Rights-based context of proportionality analysis in the European legal system

Proportionality as a general principle of law finds space in most legal systems. Significantly invoked in terms of its constitutional adjudication of European Union (EU) Law and finds its origin in German constitutional and administrative jurisprudence (Tridimas, 2018). In this context, proportionality is considered a defining principle of a limited government and acts as a preferred procedure for managing disputes involving a rights provision and a conflicting state interest (Sweet and Mathew, 2008). Alec Stone Sweet and Jud Mathews (2008) have noted that Proportionality analysis 'emerged and then diffused as an unwritten, general principle of law through judicial recognition and choice'. Thereby materializing as a judicial doctrine for courts to apply while reviewing the legality of a government action vis a vis a fundamental right. In International Human Rights law, proportionality plays an important role in the application of human rights instruments like the International Covenant on Civil and Political Rights ('ICCPR'). From there it even

* Jindal Global Law School, O.P Jindal Global University, Sonipat, India. E-mail: sabreen.ahmed@jgu.edu.in

translates into regional human rights instruments like the European Convention on Human Rights (ECHR) (Ellis 1999). Since the principle of proportionality permeates the whole EU legal system, ECHR offers a good starting point for understanding the principle. Art 8 to 11 of the Convention lays down the proportionality test. However, the European Court has conducted such proportionality inquiry for other convention rights as well. For example, in *Belgian Linguistics* (1968) the Court held that:

> Art 14 is violated when it is established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized.

In simple terms, proportionality analysis aims to strike a balance between the interest of the community and the protection of an individual's fundamental rights (*Cossey v. UK*, 1990, para. 37). Essentially, it entails two tests: 1. a test of suitability and 2. a test of necessity. The former determines the relationship between the measure and the objective it aims to achieve. The latter assesses the consequences of a measure on a right worthy of legal protection (*Fromancais v Forma,* 1983). Additionally, a comprehensive three-part test for proportionality analysis was given in the opinion of Van Gerven AG in *SPUC v Grogan* (1991). First was the test of suitability, second, the test of the least restrictive alternative, and finally proportionality *stricto sensu.* The test of suitability aims to establish if the measure adopted by the state is suitable for achieving the prescribed aim. The test of least restrictive alternative test aims to establish if the measure is necessary and if there are no alternative means of achieving the desired outcome. The third test in the continuum to the second test examines irrespective of no less restrictive means, if the measure has an excessive effect on the right Similarly, *Nada v. Switzerland* (2012) offers a structured inquiry conducted by ECtHR regarding Art 8 to 11 of the Convention. In ascertaining the right to respect for private and family life, the court asserted that any interference would amount to a breach of the article unless the requirement of Art 8(2) were satisfied. The court determined whether the interference was in 'accordance with the law', 'was pursued for a legitimate aim' and was 'necessary in a democratic society', to achieve such aims (*Nada*, 2012, p. 167). As a last limb of the proportionality test, the court also applied the least restrictive means test. The court held that:

> For a measure to be regarded as proportionate and necessary in a democratic society, recourse to an alternative measure that would cause less damage to fundamental rights must be applied.

In light of the ECHR jurisprudence, the decisions and standard of review adopted by domestic courts in Europe, particularly the English courts, are relevant. Following a non-uniform, non-mutually exclusive case-by-case standards of review for public rights and administrative practice cases the jurisprudence in the United Kingdom (UK) offers a variety of opportunities to weigh the benefits of each process(es) individually. For instance, many rights-based judgments in the UK have set out grounds for proportionality review borrowed from the ECtHR. One example is *Quila and Another* (2011) whereby Lord Wilson encapsulated the test in the present case as follows: First, is there a sufficiently important legislative object? Second, are measures adopted rationally connected to the

legislative object? Are the measures no more than necessary? Fourth, do they strike a balance between the rights of the individual and the interests of the community?

Earlier, in the 1990s, the ground standard of review opted by the UK courts was the Wednesbury rationality review (*Associated Provincial Houses Ltd. v Wednesbury Corporation,* 1948). It stated that a decision may be attacked if it is so unreasonable that no reasonable decision-maker could have made it. This test was limited in the sense that it required the court to be only satisfied that the 'decision was so unreasonable that it would not have been made by any reasonable public authority'. It was made clear that such a rationality review suggested that:

> Irrationality would only apply to an administrative action which is so outrageous in its defiance of logic or if accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it (*Council of Civil Service Unions v Minister for the Civil Service*, 1985).

Although the House of Lords in *R v. Secretary of State for the Home Department Ex p Brind (*1991) accepted that Wednesbury could vary in its intensity while determining fundamental rights, it was never abandoned. At this point, the courts also began to reconfigure the Wednesbury review to acknowledge that the test was modifiable. However, with Wednesbury unreasonableness still on the table, the courts realized that a more comprehensive analysis appeared pertinent to review cases involving substantive rights. The context for the need appeared after the emerging trend towards human rights in the UK, following the Human Rights Act of 1998 subsuming the ECHR code in line with the mechanisms set by the court. (McHarg, 1999). Naturally, the courts began to acknowledge that the actual test requires the concept of proportionality mirroring the ECtHR and the Convention itself (*Smith and Gardy v. United Kingdom*, 1999). Finally, an explicit transition from Wednesbury to a more intense proportionality analysis was seen in the case of *R v. Secretary of State for the Home Department ex parte Daly* (2001). Lord Bingham stated that the:

> Infringement of prisoner's rights to maintain their confidentiality is greater than is shown to be necessary to serve legitimate public objectives.

This showed a complete abandonment of the Wednesbury review especially where fundamental rights were at stake (*Daly*, 2001, pp. 24-28).

Justifying such a shift towards proportionality analysis, Lord Crooke in *Daly* stated that:

> Wednesbury was an unfortunate retrogressive decision in English administrative law, in so far as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative action within the legitimate scope of judicial review. However, the law can never be justified merely by finding that the decision under review is not absurd and hence valid.

However, the 'shift' could not be formally translated into a complete disregard of the Wednesbury principle in the following cases because a rigid constitutional division between the two would not only be difficult but also, as noted in the case of *Keyu v. Secretary of State for Foreign and Commonwealth Affairs* (2015) "would have potentially profound and far-reaching consequences" (*Keyu*, 2015, para. 133). The nature of both standards is thus, that placed within specific contexts, their existence, independent of one another, is hardly distinguishable.

In *Pham v. Home Secretary* (2015) 1 WLR 1591) Lord Sumption while observing the difference between Wednesbury unreasonableness and proportionality review stated that in the former the court asks whether the decision was within the range of rational balances that may be struck whereas, under the latter, the court has to form its own view of the balance struck by the decision maker. Lord Sumption further noted that:

> the use of proportionality in cases involving human rights and EU law but not domestic law produced "some rather arbitrary distinctions between essentially similar issues" (*Pham*, 2015, para. 104)

The approach of highlighting the similarities between the two standards began with the case of *Kennedy v Charity Commission (Secretary of State for Justice intervening)* (2015) where Lord Mance noted that even though proportionality and unreasonableness may have similar elements the advantage of the terminology of proportionality is that it introduces an element of structure into the exercise, by directing attention to factors such as suitability or appropriateness, necessity and the balance or imbalance of benefits and disadvantages. Lord Mance also highlighted that these factors may be relevant outside the convention too, i.e. even where Wednesbury applies.

Therefore, *Daly* suggests that the proportionality test be applied to all human rights cases even if outside the scope of the Human Rights Act 1998 so far as fundamental rights or human rights are in question. This is because proportionality analysis is clearer and transparent and enhances the intensity of the review depending on the context. However, post-*Daly* jurisprudence clarifies that the two standards of review are not mutually exclusive; they operate in parallel, serving similar purposes and employing comparable methodologies to achieve largely the same outcomes. This argument, however, has its limitations, which are discussed in Part 3 of the paper.

### 1.1. Proportionality and nonrefoulement

The principle of non-refoulement is explicitly provided for in Article 33 of the 1951 Geneva Convention relating to the status of refugees, and also in the 1967 Protocol linked to the latter. Article 33 (1) specifies that a State party to the Convention or its Protocol may not return ("refouler") a refugee "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". UNHCR (1997) notes that non-refoulement is the cornerstone of asylum and international refugee law. Further, it explains that the application of the provision is not dependent on the lawful residence of a

refugee in the territory of a contracting state. The note also makes mention of Art 3(1) of the UN Declaration on Territorial Asylum adopted unanimously by the General Assembly (1967). It stated that:

> No person referred to in Article 1, para 1, shall be subjected to measures such as rejection at the frontier or if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any state where he may be subjected to persecution.

Art 33(2) of the Convention (1951) provides exceptions to the non-refoulement obligation whereby there are reasonable grounds for regarding the refugee as a danger to the security of the country in which he is or who, having been convicted by a final judgement of particularly serious crime, constitutes a danger to the community of that country. While these exceptions are argued to weaken the refugee protection machinery, there are vast debates in academia about the implementation of such exceptions (Teferra, 2018).

In these debates, the application of proportionality analysis is also frequently discussed, especially in the context of refoulement triggered by national security grounds (Teferra, 2018). This means that there is a requirement to balance security interests with possible dangers faced by the refugees. Hathaway and Harvey oppose such a balancing mechanism because Art 33 has an inbuilt threshold of severity. Moreover, they argue that there is a requirement for a strong standard of national security under Art 33(2) (Hathaway, 2005, pp. 353-354). Contrarily, Professor Geoff Gilbert (2003) and Goodwin Gill (1996) contend that proportionality analysis is essential to Art 33. Goodwin (1996) states that principles of natural justice and due process are inherent in international law and require something more than an 'exception' clause. Similarly, Professor Gilbert (2003) advocates for the balancing of the refugee's fear of persecution against the danger that he or she presents to the security of the country. Moreover, from an absolute right context, Lauterpacht and Bethlehem (2009) argued that this absolute ban requires the asylum state to give full consideration to the dangers faced by the refugees before executing its deportation order.

### 1.2. ECtHR jurisprudence: From no proportionality to something illusory

In the context of Europe, there is no explicit right against non-refoulement, however, it has been read into Art 3 of ECHR which states that 'no one shall be subjected to torture or inhuman or degrading treatment or punishment'. Although such a construction implying non-refoulement obligations dates to the 1970s (Cassese, 1993), it materialized only with *Soering v. The United Kingdom* (1989). Since then, ECtHR has time and again expanded the jurisprudence in many cases. The court has described Art 3 to be absolute (Harris, 1995). This means that Art 3 admits no exceptions, cannot be derogated, and applies to everyone no matter what (*Ireland v. UK* 1979-1980, p. 163). In the context of non-refoulement, the resulting obligation is not to deport, expel, extradite, reject at the frontier or otherwise '*refoule*' someone at risk (Mavronicola and Messineo, 2013, p.595) In *Vivalrajah and Others v. The United Kingdom* (1991) the court said that:

> Expulsion by a contracting state of an asylum seeker may give rise to an issue under Article 3 and hence suggests the responsibility of that state under the Convention where substantial grounds have been shown that the person concerned faced a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the country to which he returned.

Further, in the first deportation case, *Chahal v. The United Kingdom* (1996) the British government claimed that Art 3 allows a state to expel an alien if such removal was required on national security grounds. This needs to be balanced with the non-refoulement obligations. The court rejected this reasoning and stated that Art 3 was an absolute right. In the context of balance, ECtHR stated that 'Art 3 makes no exceptions even in the event of a public emergency threatening the life of the nation'. Moreover, in *Saadi v. Italy* (2008) ECtHR concluded that:

> The concepts of risk and dangerousness in the context of refugees do not lend themselves to a balancing test because they are notions needing independent assessment. The prospect that a person may pose a serious threat to the community if not returned does not reduce the degree of risk of ill-treatment that he or she may face after returning. For this reason, it would be incorrect to require a higher standard of proof where the person is considered to represent a danger to the community since assessment of the level of risk is independent of such a test…'

However, in R (*Wellington) v. Secretary of State for the Home Department* (2008) the court accepted the application of the 'minimum level of severity' test. In this, the UK government requested to balance the severity of ill-treatment to the person returned with the danger it posed to society. The court stated that these notions be assessed independently, however, it is to be assessed if a 'minimum level of severity' has been met for Art 3 purposes. Lord Scott states that the majority view implied a 'relativist approach' to Art 3 whereby it suggested inhuman or degrading treatment in Europe might not be so categorized in the receiving country (Natasa and Francesco, 2013). The absolute nature of Art 3 was now based only on torture implying that what is torture for Art 3 in Europe is torture everywhere else. But not inhuman or degrading treatment. This means that after balancing the inhuman or degrading treatment with the danger posed by him or her if the inhuman or degrading treatment is not severe, he may be removed.

Similarly, in *Socialist Party and Others v. Turkey* (1998) the court said that considering the National Security exception to non-refoulement obligations, the court should carry out scrutiny. The task is not to substitute its view for the relevant national authority but to review the decision delivered by them. Such a review should satisfy those national authorities who made such a decision after an acceptable assessment of relevant factors. In *Babar Ahmad v UK* (2012) ECtHR agreed with the *Wellington* rationale. In this case, the applicants claimed that on account of being extradited, there is a prospect for them to be imprisoned in a 'supermax' security prison in Colorado. Also, the conditions of detention would breach Art 3 due to prolonged periods of 'solitary confinement' (*Babar*

*Ahmed v UK*, 2012). They also argued that if they were convicted, they would face a mandatory sentence of life imprisonment without any possibility of parole. They argued this was disproportionate to the offences they were accused of. The court held that:

> The absolute nature of Art 3 does not bar the removal of a person if the act or omission does not fulfil the 'minimum level of severity test'.

Nevertheless, in the absence of an exception clause to Art 3, ECtHR jurisprudence also does not encapsulate how proportionality analysis in the context of 'minimum level of severity' would apply in case of national security concerns. It has been left to be determined on a case-to-case basis which is more theoretical and illusory, unless the Grand Chamber sets the record straight (*Mamatkulov and Askar v Turkey,* 2005).

The case-to-case-based analysis of non-refoulement and parallel balancing mechanisms complicates the court's jurisprudence to the extent that no practical trend seems to emerge. In *Hirsi Jamaa and others v. Italy* (2012) for example, the violations alleged against Italy in the case were that on May 6, 2009, three boats were intercepted in international waters bound for Italy with about 200 people on board. Once rescued the migrants were forcibly handed over to the Libyan authorities as required by the bilateral agreement between Italy and Libya of February 2009. The appeal to the ECtHR was filed by 11 Somalis and 13 Eritreans who were present on board and who accused Italy of the violation of various provisions of the ECHR, but the most serious concerning Articles 3 and 4 of Additional Protocol No. 411 (see Scovazzi, 2016, p. 74) in combination with Article 13.

The court while allowing the appeal relatively extended the jurisdiction of the intervening state, so far as the ECHR rights were concerned to also protect and ensure rights obligations towards migrants in international waters.

> If the state authorities, in the exercise of their powers, act imperiously towards people (Gill, 1998, p. 167) to prevent migrants from reaching the borders of the state, this constitutes an exercise of state jurisdiction as provided for by Article 1 of the Convention and therefore makes the state responsible for the violation of Article 4 of Protocol No. 4 (*Hirsi,* 2012, para. 180)

Similarly, the court also recognized the potential risks faced by migrants who would be subjected to the treatments prohibited by Article 3 by Libyan authorities, as they would enter the Libyan territory illegally, bearing no practical difference from already present illegal migrants there.

Against the backdrop of this rationale stands the contentious and highly debated ruling in *ECtHR, N.D. and N.T. v. Spain* (2020) in which the court stressed the importance of the state's role in protecting external borders while rejecting the decision of the Chamber of ECHR holding that Spain carried out collective rejections without considering the personal circumstances of each of the migrants and without resorting to a decision-making

process (*N.D. and N.T*, 2020, para. 124) negating the declaration of the chamber that such process stands in violation of Article 4 of Protocol No. 4 and Article 13 of the ECHR.

Both courts rejected arguments made towards the violations of Article 3 of the ECHR. The Grand Chamber even went on to note that the refoulement was a consequence of the applicants' "own conduct" (*N.D. and N.T*, 2020, para. 242). This garnered specific criticism from scholars and refugee rights advocates as individual situations were not comprehensively assessed nor accessibility limitations of asylum procedures were analysed, leading to a horrible precedent justifying collective expulsions.

So far it can be concluded that ECtHR has earlier set the 'proportionality test' only for the qualified right and has agreed that absolute rights (Art 3) are neither subject to any exceptions or balancing. However, ambiguity in standards in various cases suggests no conclusive pattern. The newfound limb of the 'minimum severity test' in non-refoulement cases, not only defeats the point of the absolute nature of the right under Art 3 of the ECHR but also creates a confusing balancing mechanism for non-refoulement rights.

### 1.3. Proportionality analysis in the in the inter-American human rights system (IAHRS)

Before delving into the African stance on proportionality analysis a brief reference to the affirmative practice of the doctrine in the inter-American human rights system (IAHRS) especially through the Inter-American Court of Human Rights (IACtHR) and Inter-American Commission on Human Rights should be made. The court while interpreting and applying the principles of the American Convention on Human Rights (1969) (ACHR) also employs a 'balancing test' defined as a means of weighing competing rights and interests against one another, which can also in some readings be an opportunity to incorporate local circumstances and subsidiarity (Sagüés, 2013, p. 9). Although the test is heavily contextual, i.e., case-by-case based, and no thread of standard practice exists as such. Similarly, the test remains very limited given the gross and systematic human rights context of the cases that are usually dealt with by the court within the Convention for example, violations of rights such as the right to life (Art 4 ACHR), physical integrity (Art 5 ACHR) and judicial guarantees (Arts 8.1 and 25 ACHR) (Lixinski, 2019). The absolute nature of such rights eliminates the exercising of balancing, but non-absolute convention rights are subject to scrutiny of due process and proportionality analyses. This is also explicitly enshrined in article 30 of the convention which states that:

> The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.

In *Usón Ramírez v Venezuela* (2009) the IACtHR noted that that the restriction (in the case the restriction on effective exercise of the right to freedom of expression) shall be

proportional to the interest that justifies it and shall be closely adjusted to the achievement of such legitimate objective, interfering as little as possible with the right at question.

Similarly, in *Gomes Lund et al. ("Guerrilha do Araguaia") v Brazil* (2010) the court while balancing the right of access to justice of the presumed victims of a human rights violation against state interests noted that

> in applying the principle of proportionality [principio de ponderación], the State has omitted any mention of victims' rights arising under Articles 8 and 25 of the American Convention. Indeed, said proportionality [ponderación] is made between the State's obligations to respect and guarantee and the principle of legality, but the right to judicial guarantees [fair trial] and judicial protection of the victims and their next of kin are not included in the analysis, which have been sacrificed in the most extreme way in the present case (*Gomes Lund et al. ("Guerrilha do Araguaia") v Brazil*, 2010, para. 178).

In non-refoulement context Article 22 of the ACHR affirms in para. 7:

> the right of a person to seek and be granted asylum in a foreign territory if she or he risks persecution for political offenses or related common crimes',

and in para. 8,

> [i]n no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions".

The court thus rely on these provisions along with international (general and treaty) laws such as the 1951 Convention on Refugees its 1967 Protocol, the 1961 Convention relating to the Status of Stateless Persons, the Convention on the Reduction of Statelessness, or the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, to balance the rights of individuals along with state interests. In the case of *Haitian Interdiction – Haitian Boat People* (1993) the Commission found the United States in violation of the principle of non-refoulement, having based its argument on the second part of Article 26 (Right of asylum) of the American Declaration. In that sense, the principle of non-refoulement is not an exclusive component of international refugee protection, but serves to protect other universal human rights (*Advisory Opinion OC-25/18, The Institution of Asylum, and its Recognition as a Human Right under the Inter-American System of Protection,* 2018, para. 180). Similarly, The Inter-American Court in the case of *Advisory Opinion OC-21/14, Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection* (2014) interpreted Article 22 of ACHR in relation to other Convention provisions, like access to justice and due process. The court established that 'a flagrant violation of the basic guarantees of due process in cases of administrative proceedings related to migratory status, in expulsion or deportation proceedings, and in proceedings to determine refugee

status, may result in the violation of the principle of non-refoulement'. (*Advisory Opinion OC-21/14, Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, August 2014, para. 230).

Concerning the scope of application of the non-refoulement principle, the Court in *Pacheco Tineo Family v. Plurinational State of Bolivia* (2013) posited that States also have an obligation, not to hand over a person in need of international protection where there is a possibility that he may risk persecution, or to a State from which he may be returned to the country where such a risk exists i.e. "indirect refoulement". Similarly, in the *Advisory Opinion OC-25/18, The Institution of Asylum, and its Recognition as a Human Right under the Inter-American System of Protection* (2018) the Court emphasized that the principle of non-refoulement also requires positive State action, including individualized risk assessment in the case of refoulement. These judgements are sufficient to establish that IAHRS jurisprudence has been covertly converging and coalescing around central themes and prongs for the balancing test of proportionality in locating state interests with individual rights. The practice, unlike the ECHR does not take a doctrinal form in non-refoulement context, but the same exists albeit in multiple manifestation.

## 2. African courts and the proportionality analysis: meaning and context

Unlike the ECHR, the African Charter on Human and People's Rights is silent on the requirements of any restriction on a human right. Hence, most of these restrictions in the human rights context come from judicial creativity. Following a very similar construction of ECtHR proportionality analysis, the African Court of Human and People's Rights (ACtHPR) held that, any restriction on human rights needs to conform to a three-part test (*Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher R Mitilika v, United Republic of Tanzania*, 2013). First, it should be prescribed by law. Second, it serves a legitimate aim. Third, it is proportionate to the aim pursued. To ascertain proportionality, the court assesses the following. First, its suitability. Then it's a necessity—third proportionality *stricto sensu*.

The ACtHPR does not apply all the tests and might decide based on the initial tests if the issue at hand fails to meet the criteria. For example, in *Tanganyika Law Society* (2013*)*, the Tanzania regulation prohibited independent candidates from seeking public office. The law society contended that such restriction on candidacy was on account of the social needs of the country and all candidates either ascertain a sponsor or be a member of a political party. The applicant contended that this conflicted with the constitution and should therefore be declared void. Here the court found such a regulation to be violative of the applicant's right to political participation. The court said such a measure did not meet the legitimacy criteria under Art 27 (2) of the ACHPR and cannot stand. The court did not proceed to balance the competing interests and rights at hand and deemed as unnecessary given the measure failed to even meet the initial criteria of legitimacy. Similarly, in *Actions pour la protection des Driots de l'Homme (APDH) v. Republic of Cote d'Ivoire* (2016) the court held that setting up of an electoral body which is neither independent nor impartial, to the State has breached Art 12 of the ACHPR. The court

did not apply the proportionality analysis to examine if such a restriction on the right to political participation was proportionate. Usually, the court applies the strict necessity test and the proportionality analysis once it is affirmed that a restriction on an individual's right is provided by law and serves a legitimate purpose. A similar pattern can be observed in the *African Commission on Human and People's Rights v. Republic of Kenya case* (2013). The state evicted the Ogiek population from the Mau Forest area for reasons of preserving the natural environment. The Ogiek population claimed this to be a violation of their cultural rights. The ACtHPR applied the first test and argued that preserving the natural environment is not a legitimate justification for the eviction of the Ogiek population. Hence there is no need to apply the necessity or the proportionality test. The court was dissatisfied with the argument of interference prompted by the need to protect the common interest. It was held that dispossessing the Ogiek population of their land was a violation of their right to property.

So far, the court has managed to reach the balancing mechanism only in the *Loge Issa Konate Case* (2014). This case concerned journalist Lohe Issa who wrote two articles for a newspaper in which he accused a state prosecutor of corruption. The prosecution filed a defamation came. He was convicted by the national court and brought before the African Court for review. The court applied the three-part test as follows. First, the question of the legality of Burkina Faso's defamation laws that allowed restriction on one's freedom of expression rights. Second, does the restriction serve a legitimate purpose? Third, is the restriction necessary to achieve the purpose? The court found that the domestic laws in Burkino Faso allowed for criminal penalties for defamation and was a permissible restriction to one's freedom of expression rights. The purpose of the restriction was to protect one's reputation and the court found this as a legitimate purpose. Turning to the third analysis of whether the criminal penalties were necessary and proportionate against the freedom of expression, the court held that there should have been lesser interference with free speech. The criminal penalties though legitimate, where not proportional as civil recourse could have been enough to save the reputation in question. The law calling for criminal penalties was found to be disproportionate to the freedom of speech and expression. The court took into consideration the practice of international courts and bodies of human rights to state that, 'freedom of expression in a democratic society must be subject to a far lesser degree of interference'.

The careful analysis of these judgements suggests a pattern of the court's scrutiny of all interference measures by the national authorities. The theory of margin of appreciation devised within the European human rights jurisprudence holds value in this regard. The concept informs the reasoning of ECtHR in its assessment of those provisions of the Convention and its Protocols that require balancing with other rights or need to be weighed up against other aspects of the public interest. The rationale was first introduced in *Handyside v United Kingdom* (1976) where it was held that a sequence is involved in the process of securing human rights: an assessment of the compatibility of national measures with the Convention is first made by national courts; and subsequently, a review of this assessment is undertaken by the ECtHR if needed. (Frantziou, 2014).

For example, in *Tanganyika* while the court accepted in principle the importance of applying the 'Margin of appreciation', the court reiterated the need for applying such

discretion in good faith and to assess the relevance, sufficiency, and fair balance between the general interest of the community and the individual's fundamental right.

In a few rare cases, the court has been completely non-receptive to such state discretion. For example, in *Ingabire Victoirie Umuhoza* (2017) applicant argued that Rwanda interfered with his freedom of expression and the Court upheld it. Rwanda argued that they intended to minimise the risk of 'double genocide' incited by the applicant turning the citizens against the government and spreading rumors of internal strife. However, the court stated that while it acknowledged the history of genocide in Rwanda and the need for measures to be adopted not to incite another, the said restrictions are disproportionate restrictions on his human rights.

While this is not the general trend to shut down all arguments of margin of appreciation, it can be concluded that the ACtHPR generally has a cautious approach while dealing with 'Margin of Appreciation' in human rights cases. A careful look suggests that the court does not adopt a mere procedural approach while determining the proportionality of a state measure but scrutinises the decision. This means that only sufficient reasons for carrying out a measure are not enough, it is to be assessed if such a measure is also necessary and proportional to achieve the objective. This means that the ACtHPR jurisprudence is entirely based on the 'Proportionality Analysis' instead of the 'Wednesbury principle' so far as the human rights case is concerned.

However, there has been no direct application of proportionality analysis in non-refoulement cases. Nevertheless, *Anudo Ochieng Anudo v. United Republic of Tanzania* (2018) comes very close to such determination so far as 'arbitrary removal' is concerned. In this case, Mr. Anudo was forced to live between non-man's border between Tanzania and Kenya as neither country recognized him as a citizen. He applied for marriage licenses and was accused of misrepresentation, leading to his expulsion from Tanzania to Kenya where he was arrested and convicted. Mr. Anudo challenged Tanzania's action of removal or deportation to Kenya under the African Charter of Human and People's Rights calling such removal and deprivation of nationality as arbitrary. A close observation suggests a shift towards the 'Wednesbury Principle' or a more procedural approach.

As disappointing as this may come in the consistent proportionality analysis jurisprudence, the court does allow more discretionary space to the state in cases of removal and assesses proportionality only to the extent of determining 'whether a given interference reasonably consists of a reasonable approach' –meaning whether the authorities supplied sufficient reasons for their actions? This does not carry out proportionality analysis in detail, however, still determines the sufficiency of reasons by the state, suggesting a proportionality-like analysis which is not completely Wednesbury either. Therefore, in this case, the court decided that Tanzania had violated ICCPR by expelling the applicant without presenting sufficient reasons. However, it did not analyse the proportionality of the decision. Here, although his nationality was in question, and he was not a refugee, such reasoning can be seen in the light of arbitrary removal irrespective of the status of the applicant.

### 2.1. National Courts of Africa and Proportionality Analysis: A threshold?

Contrary to the direct application of such a balancing mechanism with the regional court, such application can be found in the approaches of national courts of Africa like the Kenya High Court. Such application of proportionality analysis by the judiciary is constitutionally motivated due to the presence of a specific limitation clause in the Constitution of Kenya (2010).

Kenya is a signatory of the 1951 Convention, 1967 Protocol, AU Convention, ICCPR, ICESCR, The African Charter, and UDHR. Domestically, it has the Refugee Act 2006 along with the Constitution of Kenya. Sections 4 and 16 of the Refugee Act crystallize Art 33 and the exceptions of Art 33(2) of the 1951 Refugee Convention. Art 24 of the Constitution of Kenya also allows that the Bill of Rights may be limited given the limitation is reasonable, and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account the relevant factors:

(a) The nature of rights or fundamental freedoms
(b) Importance of purpose of the limitation
(c) Nature and extent of limitation
(d) Need to ensure that the enjoyment of rights and fundamental freedom by any individual does not prejudice the rights and fundamental freedoms of others
(e) Relation between limitation and its purpose and whether there are less restrictive means to achieve a purpose.

This means that if national security is cited as a reason for imposing any restrictive measures on the enjoyment of fundamental rights of refugees, states must demonstrate how a specific person's presence or activity in the area is causing danger to the country. Also, how his or her removal would alleviate the menace. Interpreting Art 24 in *Randu Nzai Ruwa and Others v. Minister, Internal Security and Another* (2012), the court stated that:

> The arm of the government is best suited to decide national security matters. What the government says about national security should normally be believed. However, when there is a complaint about wrongfully invoking national security such that it implicates fundamental rights, the court needs to be judicially satisfied that the action of the state is reasonable and justifiable.

This line of jurisprudence was also followed in *Kitua Cha Sheria and others v. The Attorney General* (2017). The state argued that by a directive, all refugees and asylum seekers must reside in gazette refugee camps citing national security reasons. The claimants argued that it violated Art 39 of the Constitution of Kenya which allowed freedom of movement for all. Further, they claimed that such a limitation on their right was beyond the scope of Art 24, which limits rights and fundamental freedoms. Arguing such containment to refugee camps in the context of non-refoulement, petitioners argued that after moving the refugees to refugee camps they would be sent back to their home countries.

The court stated that firstly, a real connection must be established between the affected persons and the danger to national security concerns posed. Further, it must be shown how the removal of all urban refugees to the refugee camps can alleviate the insecurity threats. Additionally, the risk of danger and suffering to the person concerned needs to be squared with the intended results. Finally, the court held that confining some persons to the refugee camps does not serve to solve the insecurity problem. Further, the court asserted that:

> While national security cannot be compromised, safeguards must bear a relationship with the measures taken by the state. The state fails to demonstrate how refugees are the main source of insecurity and does nothing to justify how the use of security operations will solve security concerns. Through the constitutional lens, all that is visible is the violation of the right of refugees to free movement and non-refoulement.

This way the Kenyan court applies the true proportionality analysis and rarely invokes the Wednesbury principle while determining any detention or deportation decisions. This is significantly possible due to the constitutional provision of limitation which is similar to the court-designed proportionality analysis. Ironically, the courts who designed the test failed to apply it in cases of non-refoulement. Unfortunately, it was not directly applied by other regional courts in non-refoulement cases either, even though the test was interpreted broadly. However, it was subsequently adopted by some states like Kenya through constitutional provisions and then applied by the national courts in its true form.

## 3. Proportionality analysis jurisprudence in India: scope for non refoulement?

So far it can be concluded that ECtHR produces a very confusing jurisprudence on the application of proportionality analysis in non-refoulement cases. While the ACtHPR sets a fantastic jurisprudence of application of proportionality analysis in human rights cases, it lacks instances of direct application in a non-refoulment context. Moreover, the national courts of India do not have a limitation provision like that of Art 24 of the Constitution of Kenya, to rely on

The Constitution of India (1950) provides separate limitation clauses, like in Art 19. Traditionally, just like all common law countries, India has followed the Wednesbury unreasonableness as the standard of limitation (Chandra, 2004). When proportionality analysis emerged in the UK courts, Wednesbury became debatable in India. However, a few scholars have called the proportionality approach mispacked for Indian jurisdiction given they are invoked in other jurisdictions and are not suitable (Chandra, 2004). A revisit to the previous cases suggests that the court has used ‘proportionality’ language in the context of reasonableness analysis. For example, in *Chintaman Rao v. State of* MP (1915) the court stated that:

The limitation imposed on a person should not be arbitrary or excessive. The word reasonable implies intelligent care and deliberation. The quality of reasonableness cannot

be attained if, the freedom guaranteed in Article 19(1)(g) and the social control permitted by Clause (6) of Art 19 are properly balanced.

Similarly in *VG Row v. State of Madras* (1952), the court held that in determining the reasonableness of the restrictions of fundamental rights, the court should determine the underlying purpose, extent and urgency of the evil to be remedied, proportionality of the imposition. However, the court rarely examines the necessity of measures (Chandra, 2020) and also does not properly determine how measures and rights are balanced. This suggests that in the guise of articulating proportionality, the court applies the 'Wednesbury review' (Chandra, 2020). This means that a measure needs to be set aside only if a petitioner can show that the measure was so outrageous that no sensible person could have arrived at it (*Council of Civil Service Unions v Minister for the Civil Service*, 1984).

A careful review of cases concerning fundamental rights, from 2004 to 2016 suggests this pattern (Chandra, 2020). Though not a consistent structured proportionality test, SC judgements offer some common elements applied by the court in determining the limitation which suggests a Wednesbury-like approach (Chandra, 2020).

This common structure can be focused on the worthiness of purpose, suitability of means in achieving that purpose and (Balancing) whether the state is justified in limiting the right. Under the worthy purpose test, the court determines if the right can be restricted under Art 19 or for reasons for general public interest. There are no listed worthy or unworthy purposes as such. However, what it means is, whether the purpose is legitimate (Chandra, 2020, p. 519). The suitability of means has been interpreted as requiring a direct and proximate link between the restriction and the goal (*Superintendent Central Prison v Ram Manohar Lohia*, 1960) Additionally, it is emphasized by the court that such goals should be rational and not hypothetical or illusory. For example, in *O K Ghosh v E X Joseph* (1963). the court held that non-payment of taxes by one individual would ignite a revolution in the future, thereby destroying public order is imaginary. Finally, in the balancing mechanism, the court balances 'if all things considered, should the measure outweigh the right in context. The court does not perform proportionality analysis but determines what priority is (Chandra, 2020, p. 529). It is not seen as an independent stage but a continuum of other stages. The court also doesn't apply less restrictive means at this stage. The court has repeatedly held that it will not examine if a better policy could be made, or a better law could be designed. The court refuses to analyze any other method to achieve the aims of the law but only the constitutionality of the law at hand (*Manohar Lal Sharma v Union of India*, 2021).

However, in recent cases like cases like *Modern Dental College and Research Centre v. State of Madhya Pradesh* (2016), the SC suggested that it would adopt a structured four-part proportionality test. The issue before the court was whether the impugned legislations and rules that sought to regulate admission, fees and affirmative action in certain types of private colleges, were in breach of the freedom of occupation under Art 19(1) (g) of the constitution. The majority decision agreed that the test of reasonableness in this scenario is that of proportionality. The court relied on *R v. Oakes* (1986) a Canadian test to state that the doctrine of proportionality is envisaged within Art 19 itself. However, when it came to

the actual application of the test, the court went with the assumption that such a restriction on private colleges was essential in the interest of the general public without engaging with the question of the proportionality of such measures or determining if there exist less intrusive means. Following this judgment, the court delivered *Subramanian Swamy v. Union of India* (2016)*,* dealing with the constitutionality of Sections 499 and 500 of the IPC and Section 199 of the CrPC 1973, dealing with criminal defamation. It was contended that these provisions were violative of freedom of speech and expression under Art 19 of the constitution. In this case, the court went with *Modern College's rationale* that the proportionality analysis was already a part of the reasonableness test. Further, the court held that such provisions did not violate free speech and expression 'disproportionately'. As, there is a separate right to reputation, the right to free speech cannot include the right to defame others. However, the court did not even consider why 'civil defamation' cannot be applied as a less intrusive means in cases where the right to reputation is in conflict. Very recently, the court delivered a landmark judgment on the Right to Privacy (*Puttaswamy (II) v. Union of India*, 2019). The question was, 'Whether the right to privacy is a fundamental right'? In this case, the petitioners argued that the right to privacy can be limited by the proportionality test that is:

1. The action must be by law.
2. Must be necessary in a democratic society.
3. Interference must be proportionate to the need for such an interference.
4. There must be procedural guarantees against abuse of such interference.

While the court agreed that such limitation needs to be as per the proportionality test, the encapsulation of proportionality was very different. The majority opinion stated the following as the proportionality test:

1. Legitimate aim such that the goal is sufficiently important.
2. Necessity of means.
3. Identify alternatives to the measure.
   a. Effectiveness of each measure
   b. Examine the impact of each measure.
   c. Determine if there is a preferable alternative that realizes the aim in a real and substantial manner but is less intrusive.
4. Proportionality *strictu sensu:* This should follow the 'bright line' rule while balancing which means balancing based on some established rules or by creating a sound rule.

The minority opinion laid down the three-fold criteria of legality, legitimacy of aims and proportionality as envisaged under the 'procedural mandate' of Art 21 of the constitution (*Puttaswamy (II) v Union of India 2019*, p. 504). What legitimacy entailed was to determine that the measures can be justified by law, and not to scrutinise the law as such. Moreover, the proportionality limb ensures that interference with the right is not disproportionate to the purpose of the law which requires a rational nexus between the measure adopted and the aim. However, the nexus was interpreted as, if the means used could achieve the aim.

While presenting two different versions of the proportionality test the majority opinion tried to take a more scrutinised approach than the minority opinion. Nevertheless, the majority test also failed to examine the law itself, that is, how it works and how it violates the rights, in the proportionality limb. It only tests for logical consistency, which is not the true test for determining how intrusive the measure is. Thereby the test is less intensive so far as an examination of the necessity and effectiveness of the measure is concerned. Consequently, this impacts the proportionality analysis, balancing such measures with the right in question. In effect, while the court did move slightly away from the Wednesbury principle or the reasonableness analysis, it reduced the reach of proportionality analysis (*Louis De Raedt v. Union of India*, 1991).

### 3.1. 'Non-Refoulment' in India: A Fundamental Right?

India follows dualist system in the application of international law i.e. in order for a treaty obligation to become binding, it has to be backed by a legislative enactment. (Alexander, 2021). However, given that India has not ratified the 1951 Convention relating to the rights of the refugees, and does not have a comprehensive nationwide refugee mechanism the application of Art 33 prohibiting non-refoulement or return of refugees to places where their lives are at threat does not find a consistent interpretation. Some scholars have argued the application of non-refoulement obligations by International Human Rights obligations emanating from the UDHR and the ICCPR provisions. Some have also argued direct application of the obligation as a part of customary international law extending a *jus cogens* or premptory norm argument in this regard. But the country's position on customary international law and administrative practical interpretations (Kumar, 2018) of the principle so far fall short in creating a binding legal obligation of non-refoulement in India.

In the absence of any domestic law to this effect the judiciary approaches the question of non-refoulement from the constitutional perspective under Art 21 (Right to Life) and utilises the International Human Rights Convention in this context. However, the application of Art 21 in non-refoulement is also debatable. For example, in *Hans Muller of Nuremberg v. Superintendent, Presidency Jail Calcutta* (1955) the Supreme Court of India held that the government has the power to deport foreigners despite the applicability of Art 21 to such cases and in *Loius De Raedt v. Union of India* (1991) the court held that Art 21 applies to not only citizens but also to foreigners. However, this line of jurisprudence has been applied to all subsequent cases blurring the line between a foreigner and a refugee. Nevertheless, there are cases like *the State of Arunachal Pradesh v. National Human Rights Commission* (1996) where the SC has taken a proactive approach towards refugees. It was held in this case that while the refugee applications for citizenship are due for consideration then they cannot be evicted from Arunachal Pradesh.

Recently, the court dealt with the question of deportation of Rohingya refugees in *Mohammad Salimullah v. Union of India* (2021). On August 8, 2017, the Ministry of Home Affairs advised the State government through a letter, the deportation of 40,000 Rohingya refugees (Krishna and Sanjeev, 2017). The government argued that the influx of immigrants posed a national security threat and hence needed to be deported (*Mohammad*

*Salimullah v Union of India* 2021, Rejoinder). It was also argued that Art 14 and 21 apply to foreigners as well as citizens but there is no application of Art 19 (1) (e) on foreigners which talks about the right to reside and settle. To this, the SC upheld the deportation. Surprisingly, the court did not dwell upon the application of Art 21 at all. Only based on Art 19 (1) (e), it was decided that foreigners could be deported as they did not have any right to reside or settle within the territory. A careful analysis suggests that the court focused on the application of 'due process' in returning the refugees and did not scrutinise the legality of the deportation itself. The court refused to apply the international law obligations saying that it is beyond the scope of the court's power to analyse or take into consideration something happening in other jurisdictions.

Additionally, *Mohammad Salimullah v. Union of India* (2021) rationale made clear that 'national courts could draw inspiration from treaties or Convention unless it is not in contravention of the municipal law.' To locate the subject matter more inclusively, it is important to review Article 51(c) of the Constitution of India and the fundamental right to life under Article 21. The inference that practicing non-refoulement would be against the municipal law of India, in particular the Foreigners Act, 1946 as it does not hold the obligation in text and spirit of the legislation and in its section 3(1) grants wide discretion to the Central Government to prohibit, regulate and restrict the entry of foreigners is a distasteful insinuation. The justification for collective deportations against the arguments of national security and legitimacy of power leads to rights violations explicitly recognized by the apex court in previous instances.

In contrast stands the case *Nandita Haksar v. State of Manipur* (2021), decided by the Manipur High Court. Although it is a High Court judgment, this case emphasized the application of Art 21 of the constitution in such matters leading to a more nuanced interpretation of the issue at hand than the SC in *Mohammad Salimullah v Union of India* (2021). The court highlighted the importance of providing relief from the threat of life and liberty rather than prioritizing violations of domestic laws. It carefully situated non-refoulement within Art 21 taking from the earlier jurisprudence of the Supreme Court supporting such a view. In the context of national security concerns, the court said that since there is no evidence to prove such a contention, it cannot be the basis for the deportation of the refugees to a place where their lives are threatened.

A lens of review jurisprudence discussed before suggests that the SC has applied a Wednesbury-like principle in the *Mohammad Salimullah* case (2021) whereas the High Court has scrutinised the deportation based on something that inclines more towards the balancing mechanism of the proportionality analysis in *Nandita Haskar* case (2021). Even if the HC did not consider necessity tests or the least intrusive means, it moved towards balancing the measure against a fundamental right to life. Although this does not set a precedent for the application of proportionality analysis in non-refoulement cases, still it showcases familiarity with proportionality analysis jurisprudence and attempts to move towards something like proportionality which is not entirely Wednesbury-like. Hence lays down a pathway to adopt a better approach to the question of non-refoulement which stems from the Constitution itself, and not from the Refugee Convention.

### 3.2. 'Rainbow of Review' in non-refoulement cases: A way forward for India?

In such a context where the existing jurisprudence in India, neither supports complete abandonment of a Wednesbury-like approach nor application of proportionality analysis in its true form, the court needs to aspire for something in between. This finds a place in the concept of 'Rainbow of Review' by Michael Taggart (Knight, 2010). Taggart argues that under this approach a context-specific variable-intensity Wednesbury test is gradually replaced by a context-specific variable-intensity proportionality test. This means that Wednesbury and proportionality can be placed on a scale and judges can move from the end of Wednesbury to the other end of Proportionality analysis depending upon the question of fundamental rights at hand. According to Taggart at points where sub-Wednesbury ends, proportionality review begins (Knight, 2010).

Scholars who subscribe to monolithic proportionality review are disappointed by Taggart's qualified acceptance of proportionality in his rainbow of review approach. (Craig, 2010). Others like Dean Knight (2010) are skeptical of Proportionality along with Philip Sales (2004) and Mark Elliott (2001) who advance similar arguments, albeit differently. For David Mullan (2010) proportionality should inform rationality review. The front-running opponents of rainbow of review like Professor Craig along with Murray Hunt and Philip Joseph are against the hypothesis of "bifurcation" (Hunt, 2009; Joseph, 2007; Craig, 2010). Hunt specifically is vexed by the 'rights'– 'public wrongs' dichotomy (Hunt, 2009) and how significant it gets in practical cases. Taggart while acknowledging that 'this sort of line drawing has gone out of fashion' noted that it 'can appear formalistic and possibly arbitrary'. (Taggart, 2008). But the same demarcation would make administrative law more predictable and would encourage 'lawyers [to] argue and judges [to] articulate a clearly reasoned position' in close cases (Taggart, 2008).

Scholars who offer a variegated unreasonableness or simplified formulations of unreasonableness also seem to be disappointed (Knight, 2008) as Taggart proposes the eradication of such developments and for him there was no room for Wednesbury's offspring: variegated, intensified or 'Cookeian' unreasonableness.

> The supremacy of the traditional conception of Wednesbury unreasonableness (the 'longstop', 'safety net' or 'residual' kind) should be restored on this side of the rainbow. (Taggart, 2008)

Limitations building on the recent approach of UK courts as noted earlier in the paper – around the fact that both the tests are intertwined and hardly distinguishable - arguments are advanced against the scales of the variability approach. However, the difference between the two approaches placed on each side of the rainbow is not only of name but also of kind. As (Srirangam, 2016) points out, the key difference lies in how each standard approaches the "relative weight given by the decision-maker" to different factors. While Wednesbury focuses on whether a particular consideration was legitimate, proportionality mandates courts to assess if the weight assigned to each factor, even if legitimate, was appropriate in reaching a balanced decision. Even if the argument of varied Wednesbury is placed with degrees of

unreasonableness the same cannot sufficiently overcome the structure and sophistication involved in proportionality review of an administrative decision.

Thus, in borderline cases, it becomes necessary to acknowledge that neither proportionality nor Wednesbury review are monolithic standards of review and that both exist with variable intensity depending on the context of a given case. In non-refoulement cases particularly such intensity needs to be determined on grounds of evidence suggesting national security concerns posed by the refugee and evidence of threat to the life of the refugee at hand. If the evidence suggests a real risk to national security, then the court can apply some deference under the Wednesbury Test, making it some sort of sub-Wednesbury test. Such a sub-Wednesbury test is advocated in all human rights cases. For example, Sir Bingham MR's speech in *R v. Ministry of Defence ex parte Smith* (1996), where he states:

> In judging whether the decision-maker has exceeded this margin of appreciation, the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable.

This means that in the absence of any real evidence of national security concern, proportionality analysis must be applied. From here on the proportionality review gets increasingly intrusive as the context changes from human rights to more fundamental and absolute rights. In the context of non-refoulement, it means that when there is no real evidence of a national security threat, the proportionality analysis has to be applied in its true form, most intrusively. This suggests that even Wednesbury has some balancing test, however the court applies institutional deference as the court lacks the specialized knowledge often possessed by the decision makers themselves. However, when a court is approached with a fundamental question, then it takes on constitutional deference which increases the scrutiny of the decision of the decision maker. Now the court's job will turn to determining whether the decision taken falls within the range of reasonable decisions open to the decision maker.

> Both these concepts already exist within the Indian Jurisprudence; however, the application is wobbly, inconsistent, and unstructured. Therefore, applying these tests in a structured way, like that suggested by the 'Rainbow of Review' approach would enable the court to produce better outcomes in human rights cases and most significantly, in the contexts of 'non-refoulement' cases. Like how in New Zealand Taggart's approach is only normatively accepted through explicit means, even though its judiciary leans on contextualism and covert variability i.e. not a one-size-fits-all approach should be adopted in all cases (Knight, 2010). Thus, the judicial approach in New Zealand regards variability is not to acknowledge it as a formal or doctrinal practice. Similarly Indian courts often go beyond traditional grounds of review to enforce rights, direct policies, and intervene in governmental decisions in a way that is less constrained by formal categories- thereby being context-specific. The kind of deference to governmental decisions implied by

> Taggart is not always seen in India, where courts sometimes engage in fact-finding, issue broad directives, and examine policy decisions more intrusively. This judicial tendency of 'activism' by the SCI elevates the argument in favor of proportionality analyses in cases involving substantial rights-violation like in non-refoulement.

In determining how proportionality analysis in practise can be applied to non-refoulement cases when national security concerns exist in India, lessons can be learnt from the Kenyan High Court's approach in the *Kitua Cha Sheria case* (2017). The Kenyan High Court in the light of constitutional provision provides a guide on how proportionality analysis be applied in cases where non-refoulement conflicts with national security concerns, to achieve better outcomes for refugee protection. The reliance on foreign precedents in public law litigation is a well-established practice now persistent in the decisions of Constitutional Courts in common law jurisdictions such as South Africa, Canada, New Zealand, the United Kingdom, the United States of America, and India. (Balakrishnan, 2010). Anne-Marie Slaughter used the expression 'trans-judicial communication' to describe this trend. (Slaughter, 1994). The primary reason for such practice is the similarities in the jurisprudence of Indian law with that of these countries. Similarly, foreign judgments are helpful when for a given question of law, no established legal position seems to emerge.

The SCI in many landmark judgments relied on foreign precedents to inform rights in India. In *Maneka Gandhi v. Union of India* (1978), the apex court read the 'substantive due process guarantee' into the language of Art. 21 borrowing from U.S. decisions and laid down the position that governmental action is subject to scrutiny on multiple grounds such as fairness, reasonableness and non-arbitrariness. Other cases include *Kharak Singh v. State of Uttar Pradesh* (1963), *Bennett & Coleman v. Union of India* (1973), and *Bachan Singh v. Union of India* (1980) among others. Following the same analogy, it can be determined how Indian courts can navigate the existing Kenyan jurisprudence and apply proportionality analysis in non-refoulement cases in India.

To encapsulate the same, the court first must determine a real connection between the person in question and the alleged national security concern. Second, it must be shown how their refoulement will ensure the security of the nation. Third, the risk of danger to the person concerned be balanced with intended results for the security of the nation and see if such security can be attained without removal. This decision runs simultaneously to the fact that national security concerns cannot be compromised. However, requires the state to demonstrate how the refugees are the main source of insecurity. If the state fails to justify and meet the standards of review where no real evidence of national security threat exists, all that remains is a violation of the fundamental rights of the refugees.

> While such proportionality review is enabled by the constitution of Kenya for the Kenyan High Court, the Supreme Court of India in the absence of similar constitutional provision, can resort to such application by taking the 'Rainbow of Review' approach for producing similar outcomes in non-refoulement cases.

## 4. Conclusion

While the status of non-refoulement as an international obligation under the Refugee Convention is debatable, its presence in the form of a human right or a fundamental right cannot be dismissed entirely. This finds space in the Jurisprudence of the Supreme Court of India itself. However, an inconsistent approach diminishes the protection mechanism offered by the non-refoulement obligation. In this context, the Wednesbury-like analysis rooted in the 'unreasonableness' of deportation decisions which only assesses 'due process', as seen in the *Salimullah Case*, produces incorrect outcomes. The court's recent trend of restraint in intervening with administrative practices in refugee cases especially given the absence of a nationwide refugee policy, reflects a distasteful precedent capable of varying interpretations in the future. The decision was devoid of a greater scrutiny of human rights violations manifested with the Proportionality review established in the jurisprudence of ECtHR, the UK courts, IAHRS, and the African courts as already discussed.

Understanding variable intensity in this regard as reflecting a compromise between the principles of vigilance and restraint opens up the view to a more context-specific variability paradigm. Rights-based cases particularly need to move towards Proportionality through the 'Rainbow of Review' approach. This would allow the court to apply Wednesbury analysis in non-human rights cases, sub-Wednesbury in qualified human rights cases and as the intensity of violation increases (absolute rights), apply true proportionality analysis. It is of value that such standard differentiation will be hard to place by courts against multiple cases practically, but the same is not impracticable. The first step towards such an assessment of judicial intervention thus will be based on one stage– whether the judges consider something had gone sufficiently wrong to justify intervention. The courts could then plot the degree of intensity on a continuum between the two practices of restraint and vigilance, explaining the contextual factors leading to such a decision. They may then apply the intensity to the circumstances of the particular case. The field of human rights would need to involve a more intensive review is already sufficiently established.

Summarily a careful analysis of vast number of case laws in the paper suggest that while the approach adopted by the EU jurisprudence is rather confusing, and ACtHPR does not guarantee its application in non-refoulement cases, it is the Kenya High Court that has encapsulated Proportionality analysis in instances where non-refoulement conflicts with national security concerns. This comparison offers a recalibration for Indian courts to restructure their non-refoulement jurisprudence based on the standard of review that is appropriately applicable in the context of each case. Similarly, a uniformity in approach can be generalized once a structured analysis is formulated. The 'Rainbow of Review' thus, with all its limitations acknowledged, offers a plan for Indian courts to not rely on the Refugee Convention or locate any inconsistency with municipal laws in concluding a decision involving non-refoulement. It does so without abandoning the Wednesbury principle and by only moving across the scale of review towards a more intense Proportionality analysis based on the contextual intensity of the rights violation placed before it.

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