Proportionality in India: A Bridge to Nowhere?

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Abstract

From the very dawn of India's constitutional republic, the Supreme Court of India has held that a measure that restricts a fundamental right should bear a proportional relationship to the right. However, it is only recently, starting in 2016 with *Modern Dental College and Research Centre v State of Madhya Pradesh*, that the Court has adopted a structured four-part proportionality test to determine the validity of rights restricting measures. In this article, I describe how the Supreme Court has engaged with the doctrine of proportionality in its recent case law. I argue that the Supreme Court's approach to proportionality is riddled with conceptual confusion which stems from the Court's (mistaken) assumption that proportionality has always existed in Indian constitutional jurisprudence and that therefore adopting the test requires the Court to do nothing very different from its existing practices of rights review. The Court's approach of assimilating proportionality into the pre-existing framework for rights review has limited the disruptive potential of proportionality in reshaping legal culture, and in re-aligning the relations between citizens and the State, and between the Court and other branches.

Keywords: Proportionality; Fundamental Rights; Constitutional Adjudication; Judicial Review; Supreme Court of India; Constitution of India

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1. Introduction

Proportionality has been adopted by constitutional and human rights courts across the world as the gold standard for adjudicating the validity of limitations on fundamental rights. [1] The global move towards proportionality has led many scholars to call this an 'age of proportionality."[2] However, while there is a broad consensus on the overall structure of the proportionality test, its exact contours differ from state to state. Courts have not only adopted this 'global' doctrine, but also adapted it in ways that gives proportionality a local flavour in each jurisdiction.[3]

In India, at the very dawn of the constitutional republic, the Supreme Court determined that a rights-limiting measure should bear a proportional relationship to the right.[4] However, the Court did not adopt a structured step-wise test for the proportionality analysis. Over the years, the Court sporadically referenced proportionality in discussing the nature of judicial review of State action but did not apply the structured test to determine the validity of a rights-limiting measure. Recently however, starting with *Modern Dental College and Research Centre v State of Madhya Pradesh,*[5] the Court has begun applying proportionality in its four-part doctrinal form as a standard for reviewing rights-limitations in India.

In this article, I describe how the Supreme Court has engaged with the doctrine of proportionality in its recent caselaw. To do so, I first describe the proportionality test and explain the value choices underlying different variants of the test. I argue that how a court constructs its version of the proportionality test shapes political and legal relationships and (re)distributes power – between citizens and the State as mediated through rights; between parties to a case in terms of their burdens and responsibilities in the course of adjudication; between the court and the polity; and between the court and the elected branches (Section 2).

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[1] Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 Columbia Journal of Transnational Law 73, 161; David Beatty, *The Ultimate Rule of Law* (OUP 2004) 159-88; David Law, 'Generic Constitutional Law' (2005) 89 Minnesota Law Review 652.

[2] Vicki Jackson, 'Constitutional Law in an Age of Proportionality' (2015) 124 Yale Law Journal 3094.

[3] Jacco Bomhoff, 'Beyond Proportionality: Thinking Comparatively about Constitutional Review and Punitiveness' in Vicki Jackson and Mark Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (CUP 2017) 148; David Kenny, 'Proportionality and the Inevitability of the Local: A Comparative Localist Analyst of Canada and Ireland' (2018) 66 American Journal of Comparative *Law* 537.

[4] *Chintaman Rao v State of MP* AIR 1951 SC 118; *VG Row v State of Madras* AIR 1952 SC 196.

[5] (2016) 7 SCC 353.

This analysis forms the basis for reviewing the jurisprudence of the Indian Supreme Court on the doctrine of proportionality (Section 3). I find that the Court has not engaged coherently or consistently in defining or applying the proportionality test. I argue that this conceptual confusion stems from the Court's (mistaken) assumption that proportionality has always existed in Indian constitutional jurisprudence and that therefore it requires nothing very different from its existing practices of rights review. I conclude that the Court's approach of assimilating proportionality into the pre-existing framework for rights review limits the disruptive potential of proportionality in reshaping legal culture, re-aligning the relations between citizens and the State, and between the Court and other branches (Section 4).

A couple of caveats before I begin. First, in this article, I do not provide a normative critique of proportionality as a principle, or the specific instantiation of the principle in any version of the proportionality test. Second, while it is quite possible that there are cases where the Court has engaged with a few or all strands of the proportionality analysis without expressly calling it proportionality,[6] I limit my analysis to those where the Court expressly seeks to engage with the four-part proportionality test, so that I can focus on the Court's understanding of the requirements of the test.

2. Proportionality: Variations on a Theme

The proportionality test provides a "heuristic tool" to determine the constitutionality of an action that limits a fundamental right.[7] It requires that a rights-limiting measure should be pursuing a *proper purpose*, through means that are *suitable* and *necessary* for achieving that purpose and that there is a *proper balance* between the importance of achieving that purpose and the harm caused by limiting the right.[8]

While most versions of the test broadly converge on these four limbs of analysis,[9] there is great variation within and across jurisdictions on what

[6] In a study of cases involving rights limitations between 2004-2016, I found that the Court almost never engages in an analysis of alternatives analogous to the necessity limb of the test; Aparna Chandra, 'Limitation Analysis by the Indian Supreme Court' in Mordechai Kremnitzer, Talya Steiner and Andrej Lang (eds), *Proportionality in Action: Comparative and Empirical Perspectives on the Judicial Practice* (CUP 2020).

[7] *Bank Mellat v HM Treasury (No 2)* [2014] AC 700, 790-91 (UK Supreme Court).

[8] Aharon Barak, *Constitutional Rights and Their Limits* (CUP 2012) 3.

[9] Stone Sweet and Mathews (n 1) 76.

exactly each prong means and requires.[10] These variations depend on how intensely a court scrutinises rights infringing measures. There are two aspects to the court's scrutiny: (1) the *substantive standards*, that is, the four component sub-tests that the rights infringing measure has to satisfy; and (2) the *evidential standards*, comprising the *burden of proof*, *standard of proof*, and the *quality of evidence* that have to be fulfilled to prove that the substantive standards have been met or violated.[11]

The higher the intensity of review, the heavier is the justificatory burden on the State to satisfy the court that a rights-infringing measure is proportional. So, for example, in the test for proper purpose, at a low-level of scrutiny the court determines whether the impugned measure is pursuing a legitimate aim.[12] At a comparatively higher level of scrutiny, the court asks not only whether the law serves a legitimate aim but also whether the aim is of sufficient importance to warrant overriding a fundamental right.[13] Courts in various jurisdictions show similar variations in intensity of review for each of the four substantive tests.[14]

Where the court locates itself on the spectrum of choices under each test determines the ease with which the State can infringe rights in the pursuit of other public interests. Therefore, the different locations on the spectrum configure in specific ways the importance of fundamental rights within a legal system and consequently, the scope of State power when confronted with a rights claim.

If the substantive aspect of proportionality tells us what the standards of review are, the evidential aspect of review explains how to determine whether those standards have been met or not. Evidential components of proportionality review include the *burden of proof* (who has to prove each standard), the *standard of proof* (to what degree of certainty do the underlying facts and inferences pertaining to each standard have to be proved)[15] and the *quality of evidence* (the robustness, cogency and

[10] Cora Chan, 'Proportionality and Invariable Baseline Intensity of Review' (2013) 33 (1) Legal Studies 1, 5.

[11] ibid; Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 Cambridge Law Journal 174, 190.

[12] This is the standard followed in Germany; Dieter Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57 University of Toronto Law Journal 383, 388.

[13] *R v Oakes* [1986] 1 SCR 103, 138 (Canadian Supreme Court); *R v Big M Drug Mart Ltd* [1985] 1 SCR 295, 352 (Canadian Supreme Court) stating that the rights limiting measure should be pursuing an objective 'of sufficient importance to warrant overriding a constitutionally protected right of freedom'.

[14] Grimm (n 12); Barak (n 8) for a detailed discussion on such variations.

[15] Chan (n 10) 15 writing that 'the idea of the court being certain of a proposition to a requisite degree is applicable to evaluative as much as it is to factual questions'.

sufficiency of the proof) that should be adduced to satisfy each prong of the substantive review.[16]

As with substantive standards of review, each of these evidential standards can be placed along a spectrum of intensity of scrutiny. For example, in relation to quality of proof, at a low level of scrutiny, the court may accept the State's *ipse dixit* or abstract inferences, instead of seeking evidence to demonstrate a claim. At a higher level of scrutiny, the court may require the relevant party to produce 'cogent and sufficient evidence' for its claims.[17] Allowing the State's claims on the basis of its own assertations, without putting it to proof, may significantly weaken rights protection. On the other hand, in the context of factual indeterminacy, epistemic gaps, and more broadly human subjectivity in making policy decisions, the need for a high degree of empirical proof may place too great a burden on the State – one that it may not always be in a position to discharge, especially in complex policy areas.[18] This approach also may not give sufficient weight to the constitutional judgment of co-equal branches of government in the context of such indeterminacy. Thus, as with the substantive standards of scrutiny, where the court locates itself on the spectrum of evidential intensity carries implications for the importance of rights and the scope of State power.

Where the court locates itself on the spectrum of substantive and evidential scrutiny depends on how the court views its institutional role *vis a vis* the elected branches. This register varies along a spectrum of how much or how little deference the judiciary gives to the decisions of the elected branches. The court places itself on this spectrum through considerations of the comity it owes to other institutions as co-equal branches of government mandated to uphold the constitution, authorised directly or indirectly by the people themselves, and often having better resources, expertise and institutional capacity to understand and respond to social needs. On the other hand, deference is tempered by the judiciary's conception of its own role as a guardian of fundamental rights, with a duty to ensure that other branches work within constitutional limits.[19] One could imagine a spectrum starting from high deference at one end

[16] ibid.

[17] *Oakes* (n 13) [71] stating that the evidence to prove the constituent elements of a s1 inquiry 'should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit'. See Paul Daly, 'Wednesbury's Reason and Structure' (2011) Public Law 237, 251-53; Chan (n 10).

[18] Grimm (n 12) 390; Sujit Choudhry, 'So What is the Real Legacy of *Oakes*?: Two Decades of Proportionality Analysis under the Canadian Charter's Section 1' (2006) 35 Supreme Court Law Review 501, 503-04.

[19] Aileen Kavanagh, 'Defending Deference in Public Law and Constitutional Theory' (2010) 126 Law Quarterly Review 222.

and moving towards no deference at all, on the other.[20] A court that views itself as the final arbiter of constitutional rights may very well determine that it owes no deference to the other branches and that it will determine for itself that the right was limited for very strong reasons, and the State is put to strict proof of the same. As such, the court would conduct the proportionality analysis as if it is the primary decision-maker, without providing any deference to the decision reached by the State.[21] On the high deference end of the scale, the court will adopt a low intensity of substantive and evidential scrutiny. For example, at this end, it will accord wide discretion to the elected branches to set priorities and determine policy goals, as long as these are not prohibited by the constitution.[22] Taking such an approach, the court is likely to presume the constitutionality of the rights-limitation and place the burden of proof on those who challenge the measure.

In sum then, how the court configures its proportionality doctrine carries implications for the normative importance of rights and the scope of legitimate State power.[23] To understand this impact, contrast proportionality with another possible candidate as a standard for reviewing rights-limitations: the *Wednesbury* review standard.[24] *Wednesbury* review requires that a judge should set aside a rights limiting measure only if a petitioner can show that the measure was so 'outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.'[25] Under this test, judges strike down State action only on the ground of illegality, irrationality and procedural impropriety.[26] *Wednesbury* review is thus a highly deferential doctrine, and if this standard were used for adjudicating rights limitations, the State would be permitted vast powers to

[20] ibid 223-24.

[21] Alexy's theory of rights as optimisation requirements lends itself to this form of deference. If rights have to be optimised, this implies that there is only one optimal extent to which a right can be limited by the impugned measure. The court would have to decide what that optimal extent of limitation is, and whether the impugned measure limited the right optimally; Robert Alexy, *A Theory of Constitutional Rights* (OUP 2002). See also Rivers (n 11) 180-81; *Om Kumar v Union of India* (2001) 2 SCC 386; *R v Ministry of Defence Exp Smith* (1996) 1 All ER 257 CA (UK Court of Appeal) disapproved in *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26 (UK House of Lords).

[22] Grimm (n 12) 388.

[23] Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture* (CUP 2013); Mattias Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) 4 Law and Ethics of Human Rights 141; Kai Möller, *The Global Model of Constitutional Rights* (OUP 2012) 194-95.

[24] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (UK Court of Appeal).

[25] *Council of Civil Service Unions v Minister for the Civil Service* [1984] UKHL 9 (UK House of Lords).

[26] ibid.

infringe rights with very little accountability for such restrictions. Citizens would have limited power to question the State's exercise of power. Rights within this conception would carry minimal normative weight and would shape the relations between citizens and the State accordingly. As a highly deferential doctrine, proportionality analysis would not be the site for claiming and contesting rights, impacting thereby the judicial role within the polity.[27]

On the other hand, even at its lowest level of scrutiny, proportionality requires the court to determine that the measure was legitimate, suitable, necessary and balanced. This implies a deeper level of scrutiny of the State's reasons as compared to *Wednesbury* and places a greater restriction on the scope of State power. At higher levels of scrutiny, the court signals that rights are extremely important, that rights-infringing State action is presumptively illegitimate, and that the State is tasked with justifying, based on clear and cogent evidence, that it infringed the right only in very exceptional circumstances. Such an approach can shape the political expectations of both citizens and the State. Raising the legal significance of rights can impact the culture and the practice of claiming and contestation of rights. With the confidence that rights violations will be taken seriously, and with the diffusion of rights into legal consciousness and culture, citizens are more likely to demand accountability from the State for rights violations.[28] Further, based on iterative learnings from the court, the State may self-regulate to mirror the salience attributed to rights.[29] It has been noted before that in countries where courts routinely require proportionality analysis for rights infringements, State actors learn to deliberate within the proportionality framework themselves.[30] Their self-understanding of their own power and legitimacy, or at the very least, their self-interest, comes to be shaped by the importance placed upon rights by courts in their decision-making.

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[27] Since the avenue of enforcing rights at courts is closed, a robust culture of political discourse on rights might emerge. This is doubtful however, since the nature of legal argumentation is itself based on an underlying legal culture. If rights are considered important in a society, and the judiciary is authorised to perform judicial review for rights violations, it would be culturally incongruous and cognitively dissonant for courts to legitimate extensive rights violations as valid under the Constitutional framework. At the very least, this would create a legitimacy crisis for the courts. See Lawrence Lessig, 'Delineating the Proper Scope of Government: A Proper Task for a Constitutional Court?' (2001) 157 Journal of Institutional and Theoretical Economics 220, 222 holding 'legal cultures will affect what is or is not a possible legal argument within that culture'; Owen Fiss, 'Objectivity and Interpretation' (1981) 34 Stanford Law Review 739.

[28] Lessig (n 27).

[29] John Griffiths, 'The Social Working of Legal Rules' (2003) 35 Journal of Legal Pluralism and Unofficial Law 1.

[30] Stone Sweet and Mathews (n 1) 112-13.

Having noted the variations in the proportionality test, the choices and consequences they reflect, and the power dynamics that they constitute, let us now turn to the Indian Supreme Court's engagement with the doctrine.

3. Proportionality in India: Old Wine in a New Bottle

A. Early Encounters

The Indian Constitution does not have an overarching limitations clause applicable to all fundamental rights. Each right has its own corresponding limitation, either contained in the text or determined judicially.[31] While the Supreme Court has stated that the requirement of reasonableness of State action runs through the entire fundamental rights chapter,[32] it has not expressly understood this to mean that there is a single limitations test implied by such a principle of reasonableness.[33] In its absence, there exist multiple, overlapping, and often contradictory approaches to limitations within and across fundamental rights.[34] Lack of a consistent approach has led to ad-hocism in the Court's rights adjudication, giving rise to legal uncertainty and lack of accountability for judicial decisions.[35]

[31] Article 19 is an example of the former; Article 14 of the latter.

[32] *Ajay Hasia v Khalid Mujib* AIR 1981 SC 487 holding that 'the concept of reasonableness and non- arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution'; *Shayara Bano v Union of India* (2017) 9 SCC 1, 91 holding that 'the thread of reasonableness runs through the entire fundamental rights chapter'.

[33] I have found that in practice the Court does have a common structure of limitations analysis running through its Article 14, 19 and 21 jurisprudence. Based on an empirical analysis of cases between 2004-2016, I argue that the Court reviews rights infringing measures to examine whether it was following a legitimate aim through means that were rationally connected to that aim, and that on a general balance between the right and the public interest sought to be pursued, the measure was a justified infringement of that right. The necessity step of the proportionality review is missing from limitations analysis for these fundamental rights. See Chandra (n 6).

[34] Vikram Aditya Narayan and Jahnavi Sindhu, 'A Historical Argument for Proportionality under the Indian Constitution' (2018) 2(1) Indian Law Review 51, 52-53; Chandra (n 6).

[35] See *Natural Resource Allocation, in re: Special Reference No. 1 of 2012* (2012) 10 SCC 1 for the Court criticising itself for the 'arbitrary use of the "arbitrariness" doctrine' under Article 14 of the Constitution. Also, Chandra (n 6); Mrinal Satish and Aparna Chandra, 'Of Maternal State and Minimalist Judiciary: The Indian Supreme Court's Approach to Terror Related Adjudication' (2009) 21 (1) National Law School of India Review 51.

From 1950 itself, the Supreme Court has recognised the need for proportionality between rights and measures that seek to limit such rights.[36] In *Chintaman Rao v State of MP*, the Supreme Court held that

> *[T]he limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word "reasonable" implies intelligent care and deliberation, that is, the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in article 19 (1)(g) and the social control permitted by clause (6) of article 19, it must be held to be wanting in that quality.*[37]

Soon thereafter, in *VG Row v State of Madras* the Court held that, in examining the reasonableness of restrictions on fundamental rights

> *[t]he nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time should all enter into the judicial verdict.*[38]

Though in its articulation this requirement of reasonableness traverses the same grounds as the proportionality test in other parts of the world, the Court did not intend for any 'abstract standard or general pattern of reasonableness [to] be laid down as applicable to all cases.'[39] Neither has it been understood as such in subsequent cases.[40] The Court was articulating proportionality as a broad principle rather than as a structured test or doctrine to be applied across cases.[41] Further, as some commentators have

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[36] *Om Kumar* (n 21) 399.

[37] *Chintaman Rao v State of MP* AIR 1951 SC 118 [6] (emphasis added).

[38] ibid *VG Row v State of Madras* AIR 1952 SC 196 [15].

[39] ibid.

[40] *Pathumma v State of Kerala* (1978) 2 SCC 1.

[41] In *Om Kumar* (n 21) the Court expressed the broad principle of proportionality as follows: 'Under the principle, the court will see that the *legislature* and the *administrative* authority maintain a *proper balance* between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve.' (emphasis in original).

pointed out, even when the Court has used the language of proportionality, the actual standard of review that it has applied is that of *Wednesbury*.[42]

By and large, in testing the reasonableness of restrictions on rights, the Court typically presumes the constitutionality of laws and places the burden of proof on the petitioner;[43] any doubt as to the validity of the law is resolved in favour of the State.[44] The approach of the Court to rights limitation is captured by the following quote

> *Courts do not and cannot act as appellate authorities examining the correctness, suitability and appropriateness of a policy…Courts cannot interfere with policy either on the ground that it is erroneous or on the ground that a better, fairer or wiser alternative is available. Legality of the policy, and not the wisdom or soundness of the policy, is the subject of judicial review…*[45]

It follows that the Court rarely examines the necessity of the rights infringing measure.[46] And while balancing is often implicit in its review of rights infringing measures, the Court does not expressly set out to determine whether the measure and the right are properly balanced.[47] Overall, the Court's approach to rights review is deferential. It involves low evidential scrutiny and does not engage with all the substantive elements of the proportionality test.

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[42] See Abhinav Chandrachud, '*Wednesbury* Reformulated: Proportionality and the Supreme Court of India' (2013) 13(1) Oxford University Commonwealth Law Journal 191; Prateek Jalan and Ritin Rai, 'Review of Administrative Action' in Sujit Choudhury et al (eds), *Oxford Handbook of the Indian Constitution* (OUP 2016); Ashish Chugh, 'Is the Supreme Court Disproportionately Applying the Proportionality Principle?' (2004) 8 Supreme Court Cases (Journal) 33 all noting that the Court confused the application of proportionality with *Wednesbury*; Chan (n 10) observing strands of a similar trend in other jurisdictions.

[43] *Ram Krishna Dalmia v Justice S R Tendolkar* AIR 1958 SC 538; *Pathumma v State of Kerala* (1970) 2 SCR 537; *State of Gujarat v Mirzapur Moti Kureshi Kassab Jamat* (2005) 8 SCC 534; *State of Madhya Pradesh v Rakesh Kohli* (2012) 6 SCC 312.

[44] *Delhi Transport Corporation v DTC Mazdoor Congress* AIR 1991 SC 101.

[45] *Directorate of Film Festivals v Gaurav Ashwin Jain* 2007 (4) SCC 737 (emphasis added).

[46] Chandra (n 6) examining cases from 2004 to 2016 and finding that the Court rarely examines the necessity of a rights infringing measure.

[47] ibid; finding that balancing between the importance of the right and the cost from its limitation on the one hand, and the importance of the social objective sought to be achieved on the other, is implicit in many decisions on the validity of rights limitations.

B. The Structured Test

1. *Anuj Garg v Hotels Association of India*

In the 2007 case of *Anuj Garg v Hotels Association of India,*[48] the Court moved towards adopting a structured proportionality test.[49] Here, the Court had to determine the constitutionality of Section 30, Punjab Excise Act 1914 which prohibited, *inter alia*, the employment of women in premises where alcohol was consumed by the public. This provision was challenged, *inter alia*, for violating the prohibition on sex discrimination and the right to freedom of occupation under the Constitution.[50] The purported aim of the provision, at least as argued before the Court, was to provide for women's security. In deciding whether this restriction was justified, the Court examined whether the measure's 'legitimate aim of protecting the interests of women are proportionate to the other bulk of well-settled gender norms such as autonomy, equality of opportunity, right to privacy et al.'[51] Proportionality between means and ends was to be judged on 'a standard capable of being called reasonable in a modern democratic society.'[52] Holding that the burden was on the State to justify that the measure was proportional,[53] the Court sought evidence not only of the stated aims of the law, but also the effect that the law had on women's rights.[54] The Court found that the measure was not justified since enhancing women's security and empowering them was a 'more tenable and socially wise approach' than placing curbs on their freedom.[55] Though this was not a fully fleshed out necessity analysis, the Court did look at less rights-intrusive alternative measures that would have been more appropriate in a democratic society. The Court appeared to use strict scrutiny and proportionality interchangeably in its judgment however,[56]

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[48] (2008) 3 SCC 1.

[49] Previously in *Sahara India Real Estate Corporation Ltd v SEBI* (2012) 10 SCC 603, the Supreme Court had adopted a limited structured proportionality test. In determining whether and when courts can order postponement of publication of a sub judice matter, the Court stated that '[s]uch an order of postponement has to be passed only when other alternative measures such as change of venue or postponement of trial are not available. In passing such orders of postponement, courts have to keep in mind the principle of proportionality and the test of necessity'.

[50] Article 15(1) and Article 19 (1)(g) respectively.

[51] *Anuj Garg v Hotels Association of India* (2008) 3 SCC 1, 19.

[52] ibid 15.

[53] ibid 12.

[54] ibid 15.

[55] ibid 18.

[56] ibid 18 holding 'strict scrutiny test should be employed while assessing the implications of [protective discrimination] legislations. The test to review such a Protective Discrimination

and did not expressly lay out the contours of proportionality analysis in a structured way, though it did seem to have applied that standard.

2. *Modern Dental College and Research Centre v State of Madhya Pradesh*

In 2016, in *Modern Dental College* a Constitution Bench of the Supreme Court expressly stated that it would adopt and apply the structured four-part proportionality test. In this case, the Court had to decide whether the impugned legislation and rules made thereunder that sought to regulate admission, fees and affirmative action in certain types of private colleges, impermissibly interfered with the right to freedom of occupation under Article 19 (1)(g) of the Constitution. In deciding this question, Justice AK Sikri, writing for the majority, held that the test for determining reasonableness of restrictions under Article 19 was one of proportionality. The Court cited Aharon Barak's version of the test[57] as well as the Canadian test in *R v Oakes*[58] to state that '*this* doctrine of proportionality, explained hereinabove in brief, is enshrined in Article 19 itself.'[59] Since proportionality was already part of Article 19 jurisprudence, the existing evidential standards for deciding the reasonableness of restrictions under Article 19 were applicable to the proportionality analysis, including those relating to the presumption of constitutionality, burden of proof and judicial deference.[60] The Court described its overall approach as the 'well settled' proposition that courts would presume that the legislature 'understands the needs of the people,' and that they would set aside a statute only if it "clearly" violates the fundamental right.[61] The Court did not link this broad approach of deference to the substantive form of its proportionality analysis, much less investigate whether and how proportionality 'unsettles' the well settled propositions of the past.

The Court's application of the proportionality doctrine to the facts at hand might have clarified the exact contours of the doctrine. However, when it came to applying proportionality, the Court completely side stepped the question. For example, on the issue of State regulation of admission into private educational institutions covered by the impugned Act, the Court baldly stated that 'the larger public interest warrants such a

statute would entail a two-pronged scrutiny: (a) the legislative interference...should be justified in principle, (b) the same should be proportionate in measure'.

[57] Barak (n 8) 3.

[58] (n 5)

[59] ibid [65] (emphasis added).

[60] Reading proportionality alongside principles laid down in *PP Enterprises v Union of India* AIR 1982 SC 1016; *Mohd Hanif Quareshi v State of Bihar* AIR 1958 SC 731; *MRF Ltd v Inspector Kerala Government* (1998) 8 SCC 227.

[61] *Modern Dental College* (n 5) [57].

measure' since various malpractices had been noticed when private institutions were conducting entrance examinations themselves.[62] On this basis, the Court concluded that the restrictions satisfied the test of proportionality, without engaging in either a structured analysis or even examining whether less restrictive means could have been adopted.

3. *Subramanian Swamy v Union of India*

Soon after *Modern Dental College*, the Court delivered its judgment in *Subramanian Swamy v Union of India*.[63] Here, the Court had to decide the constitutionality of provisions relating to criminal defamation contained in Sections 499 and 500 of the Indian Penal Code 1860 and Section 199 of the Code of Criminal Procedure 1973. These provisions were challenged for violating the freedom of speech and expression in Article 19(1)(a) of the Constitution. This was an opportune moment for the Court to apply the doctrine of proportionality not least because it already had an alternative, less intrusive means to consider: civil defamation. Therefore, it was perfectly placed to evaluate the necessity prong of the doctrine of proportionality. The Court quoted *Modern Dental College* both for the proposition that it had to inquire into the proportionality of the limitation and that proportionality was already a part of the Court's jurisprudence on reasonableness of restrictions.[64]

Yet again, however, in its analysis, the Court did not engage with the doctrine of proportionality. It concluded that the impugned provisions were 'not a restriction on free speech that can be characterised as disproportionate' since individuals have a right to reputation and therefore the right to free speech does not include the right to defame others.[65] The Court did not explain why civil defamation was not sufficient to protect this right to reputation, or why given the importance of free speech and the impact that criminal defamation has on such speech, the balance should be struck in favour of the measure.

4. The *Aadhaar* Litigation

The Court again engaged with the doctrine of proportionality in three interconnected judgments arising out of a challenge to the constitutionality of Aadhaar. Through the Aadhaar, Targeted Delivery of Financial and other Subsidies, Benefits and Services Act 2016 (Aadhaar Act), and through executive orders that preceded it, the State created a biometric

[62] ibid [68].
[63] (2016) 7 SCC 221.
[64] ibid 343.
[65] ibid 344.

identification enabled identity card called the Aadhaar card. Enrolling for this card required a person to provide biometric data such as fingerprints and iris scans. The identity of the person could be verified, so the State claimed, by matching their biometric data, such as their fingerprints, with data stored with the government. The State also created a Central Identities Data Repository (CIDR) to store the identification data of each individual, to be used for authenticating the identity of any enrollee. Details of any authentication request, including the time of such authentication and identity of the entity seeking authentication were also stored in the CIDR. From time to time, the State passed various orders making it compulsory to provide one's Aadhaar details for purposes such as opening back accounts, getting a mobile phone connection, filing taxes, and receiving a range of social welfare benefits.

The entire apparatus was challenged on multiple grounds, including on the ground that it violates the right to privacy. Due to potentially conflicting prior precedent on the issue, the Court had to decide whether the right to privacy is in fact a right guaranteed by the Indian Constitution. Therefore, the main hearing in the challenge to Aadhaar was deferred to allow a nine-judge bench to first decide on the right to privacy issue. Meanwhile, the Parliament enacted the Finance Act 2017, incorporating Section 139AA into the Income Tax Act 1961 which made it mandatory to link Aadhaar with the Permanent Account Number (PAN). PAN is issued by the Income Tax Department and is required for carrying out a range of financial and banking activities, including filing one's taxes. Quoting the Aadhaar number was also made mandatory for filing one's taxes. The penalty for defaulting was that one's PAN would be declared void *ab initio*, which would limit a person's ability to carry out various financial and banking transactions, amongst other consequences. The constitutionality of Section 139AA, Income Tax Act 1961 was challenged immediately, and because of looming deadlines, this matter was hived off from the main Aadhaar challenge and decided separately in *Binoy Viswam v Union of India*.[66] Thus, *Binoy Viswam* came to be decided first. Next came the decision on the right to privacy issue. And finally, the Court decided the constitutionality of Aadhaar itself.

a. Binoy Viswam v Union of India

In *Binoy Viswam*, the petitioners argued, and the Court accepted, that since PAN was essential for carrying out a range of business transactions, cancelling PAN would seriously infringe the right to profession,

[66] (2017) 7 SCC 59.

occupation, trade and business as guaranteed by Article 19(1)(g).[67] The Court held that the limitation should be scrutinised on the basis of the doctrine of proportionality as propounded (and assimilated into existing jurisprudence) in *Modern Dental College*.[68] In scrutinising the validity of the provision, the Court held that the primary purpose of the law was to secure the de-duplication of PAN cards. According to the State, and as accepted by the Court, by means of multiple PAN cards in different names, a person could engage in money laundering, tax evasion, corruption, and crime. By linking the databases of Aadhaar and PAN, a person's "unique" biometric identification could help de-duplicate PAN. The Court accepted, without putting to proof, the State's contention that fake and duplicate PAN was a huge problem and that Aadhaar would be effective in de-duplicating PAN, even though the petitioners had specifically challenged the effectiveness of Aadhaar itself in de-duplicating PAN.[69] As per the Court, if the purpose of the law was to ensure that one person had only one PAN, then the penalty imposed for non-linking Aadhaar and PAN was justified since without such a penalty 'the provision shall be rendered toothless.'[70] Therefore, for the Court, the penal consequence was 'directly connected' with the purpose of the law.

The Court stopped here and did not proceed to the necessity and proportionality limbs of the test. For instance, the Court did not explain why the same purpose of de-duplication could not be achieved through a consequence that had a less drastic impact on the right in question. The Court also did not examine whether or not the benefit from the measure outweighed the cost from limiting the right. The absence of such analysis was especially stark for a couple of reasons. First, on the State's own showing, which the petitioners specifically pointed out to the Court, the de-duplication exercise had revealed that less than 0.4% of all PAN was duplicate. On the other side of the balance, the Court itself recognised that the impugned provision entailed 'very severe consequences' which was bound to cause a person to 'suffer immensely in his day-to-day dealings,'[71] and the Parliament should consider 'whether there is a need to tone down the effect of the said proviso by limiting the consequences.'[72] Second, the Court also emphasised another serious consequence of the law: that of data leak. The Court directed the State to take immediate steps to devise a scheme to secure the data. In effect, the Court was cognizant on the one hand, of the limited utility of the law; and on the other hand, of its very

[67] ibid 140.
[68] ibid 140.
[69] ibid 96.
[70] ibid 150.
[71] ibid 152-53.
[72] ibid. 153.

serious intrusion into individual rights. However, the Court did not explain why, if it was following the proportionality test, the balance between the intrusion into the rights and the benefit from the measure should have been struck the way it was in this judgment. By not engaging in the necessity and balancing stages of the proportionality analysis, the Court adopted a very deferential rational nexus test. This deference was writ large not only in the tests adopted by the Court, but also in its approach to procedural questions. The Court cited authority for the proposition that laws enjoy a presumption of constitutionality and that a court 'must be able to hold beyond any iota of doubt that the violation of the constitutional provisions was so glaring that the legislative provision under challenge cannot stand.'[73] This conception of the burden and standard of proof, made the intensity of review minimal. This is why, perhaps, the Court accepted the State's contentions as to the benefits of the law and the effectiveness of Aadhaar itself, without putting it to empirical proof.

b. Puttaswamy (I) v Union of India

A few months later, the Court delivered its opinion on the right to privacy question. In *Puttaswamy (I) v Union of India* (*Right to Privacy*),[74] the Court had to decide whether the right to privacy was guaranteed as a fundamental right by the Indian Constitution, and it if was, the permissible limits thereto. As noted earlier, this issue was referred to a nine-judge bench because of conflicting precedent on whether the Indian Constitution protects the right to privacy. Since the Court had the opportunity to examine the existence and scope of the right to privacy as well as the permissible limits to it, this was an opportunity to more fully elaborate on the doctrine of proportionality, unhampered by the need to apply the test to facts. The Court unanimously held that the Indian Constitution protects the right to privacy. The petitioners had argued that such a right could be limited only in accordance with the following the test of proportionality

> (i) The action must be sanctioned by law;
>
> (ii) The proposed action must be necessary in a democratic society for a legitimate aim;
>
> (iii) The extent of such interference must be proportionate to the need for such interference;

[73] *State of Madhya Pradesh v Rakesh Kohli* (2012) 6 SCC 312.
[74] *Puttaswamy v Union of India* (2017) 10 SCC 1.

> (iv) There must be procedural guarantees against abuse of such interference.[75]

Per majority,[76] the Court held that a limitation on the right to privacy would be valid only if it satisfies the doctrine of proportionality. However, the judges differed on what this doctrine entailed. The plurality opinion, authored by Justice DY Chandrachud, stated that any interference with the right to privacy has to meet the three-fold criteria of legality, legitimacy of aims, and proportionality, and that these requirements 'emanate from the procedural and content-based mandate of Article 21."[77] This opinion held that the Court's role in the legitimacy analysis is not to second guess the value judgement of the legislature, but to ensure that there is no 'palpable or manifest arbitrariness' in the aims of the law.[78] Thus, legitimacy standards should be pegged at the deferential end of the intensity of review spectrum. Note that previous cases had required that in right to privacy adjudication, the standard of scrutiny of State interests had to be that of compelling State interest – a much higher standard drawn from the strict scrutiny test in US constitutional law.[79] The plurality opinion in *Puttaswamy I* did not specifically engage with the rationale for reducing the intensity of substantive review of purpose.

Next, the plurality decision looked at the proportionality limb of the test, and stated that this prong ensures 'that the nature and quality of the encroachment on the right is not *disproportionate* to the purpose of the law.'[80] Subsequently, however, the opinion asserted that the limb of proportionality 'ensures a *rational nexus* between the objects and the means adopted to achieve them."[81] A rational nexus between means and ends does not secure proportionality by itself. Rational nexus only requires that the means be capable of securing or advancing (depending on the intensity of the test) the ends for which they have been put in place. So, though the plurality opinion used the language and principle of proportionality, in effect, it reduced the standard to a much less intensive

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[75] ibid 89.

[76] The majority on this point comprised the plurality opinion authored by Justice DY Chandrachud (for himself and three other justices) and Justice SK Kaul (writing for himself).

[77] *Right to Privacy* (n 74) 504.

[78] ibid 504.

[79] See *Gobind v State of MP* (1975) 2 SCC 148 at [22]; If the Court does find that the claimed right is entitled to protection as a fundamental privacy right, a law infringing it must satisfy the compelling State interest test. Justice Chelameshwar was the only one who engaged with this test – albeit briefly. While his opinion was silent on the proportionality test, he stated that the compelling State interest test should be reserved for the most serious intrusions into privacy; *Right to Privacy* (n 74) 378-80.

[80] *Right to Privacy* (n 74) 504 (emphasis added).

[81] ibid 504 (emphasis added).

rational basis review.[82] As in *Modern Dental College*, the opinion read the requirement of proportionality alongside the 'settled principles' of reasonableness review, especially those relating to evidential standards.[83] The Court's general deferential approach to judicial scrutiny, based on such settled principles, was evident in its statement that the legislature

> *best understands the needs of society and would not readily be assumed to have transgressed a constitutional limitation. The burden lies on the individual who asserts a constitutional transgression to establish it. Secondly, the Courts tread warily in matters of social and economic policy where they singularly lack expertise to make evaluations. Policy making is entrusted to the state. The doctrine of separation of powers requires the Court to allow deference to the legislature whose duty it is to frame and enact law and to the executive whose duty it is to enforce law. The Court would not, in the exercise of judicial review, substitute its own opinion for the wisdom of the law enacting or law enforcing bodies*.[84]

In his concurring opinion, Justice Kaul accepted the petitioners' articulation of the proportionality test, but without any explanation for why he was doing so. Neither opinion explained why their preferred doctrinal formulation should be adopted from amongst the different models of limitations review, such as *Wednesbury*, strict scrutiny, etc. Neither of the two opinions explained whether proportionality was now a standard for rights review across all fundamental rights, across all violations of Article 21 on the right to life or only for the right to privacy within that right, and if so, why the right to privacy required this special treatment.[85] *Modern Dental College*, though a Constitution Bench decision from the previous year, was not cited at all.

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[82] Rational Basis Review is a term borrowed from American Constitutional Law. Thomas Nachbar, 'The Rationality of Rational Basis Review' (2016) 102 Virginia Law Review 1627. An analogous test is used to test classifications under Article 14 of the Indian Constitution (called the reasonable classification test) where once the existence of a classification is proved, the court will examine whether there is a rational nexus between the classification and the objective that is sought to be pursued by the law; *In re: Special Courts Bill 1978* AIR 1978 SC 478.

[83] ibid 496.

[84] ibid 496 (emphasis added).

[85] The previous limitation standard for the right to privacy – of demonstrating 'compelling state interest' – as laid down in *Gobind* (n 79) was also used only for the right to privacy; and the Court never addressed why the right to privacy amongst all other enumerated and unenumerated fundamental rights deserved this searching scrutiny.

c. Puttaswamy (II) v Union of India

Justice DY Chandrachud had an opportunity to clarify the proportionality test in the main Aadhaar challenge, and here he applied a much more stringent proportionality test. However, he was in the minority in this decision. In *Puttaswamy (II) v Union of India* (*Aadhaar*),[86] the Court decided the challenge to various parts of the Aadhaar Act, as well as various rules, notifications and circulars that had been issued under that or other laws pertaining to Aadhaar. The State had made providing Aadhaar details *de jure* or *de facto* mandatory for availing various services from the State or from private entities and these provisions were included in the scope of the challenge. In my discussion below, I will focus on the challenge to Sections 7 and 8 of the Aadhaar Act, and the challenge to Rule 9, Prevention of Money Laundering (Maintenance of Records) Rules 2005 (as amended by Prevention of Money Laundering (Maintenance of Records) Seventh Amendment Rules 2017) (Rule 9, PML (MR) Rules).

According to the Statement of Objects and Reasons of the Aadhaar Act, one of the main purposes of the law was to identify beneficiaries of various government schemes in a manner that eliminated duplication or fraud. According to the State, the failure to establish the identity of beneficiaries of various welfare programmes was leading to a lot of leakage and corruption, and was causing a hindrance to their successful implementation.[87] To this end, Section 7 of the Aadhaar Act required that any individual wanting to avail subsidies, benefits or services,[88] had to produce their Aadhaar number. Section 8 made Aadhaar based authentication of identity mandatory for the availing such subsidies, benefits or services.

The petitioners argued, and the Court accepted, that these provisions infringed Article 21. The question then was whether the infringement was justified. According to the petitioners, the burden was on the State to justify the infringement and the State had failed to do so because: (1) the State had failed to demonstrate that the purported leakages in the system were being caused due to identity fraud and that if the Aadhaar was implemented these leakages would stop. The petitioners had filed affidavits to show that leakages existed for a variety of reasons including 'eligibility frauds, quantity frauds and identity frauds,' with the first two types being the substantial cause of leakages. They also raised questions about the evidence produced by the State to show how Aadhaar was helping in identifying and deleting fake beneficiaries from the Public

[86] (2019) 1 SCC 1.
[87] ibid 207.
[88] This provision applied to subsidies, services and benefits that were funded from the Consolidated Fund of India, see section 7, Aadhaar Act.

Distribution System (PDS); (2) Aadhaar was itself not fool-proof and was open to its own forms of mischief; (3) the State had not discharged the burden of demonstrating that other less, rights-restrictive ways would have been significantly worse in addressing the problem. The petitioners produced studies which pointed to other mechanisms that were working well in reducing leakages in PDS; and (4) finally, the petitioners argued that Aadhaar was leading to systemic exclusion of marginalised groups from welfare schemes, which also militated against its proportionality.[89] In sum, the petitioners argued that while Aadhaar might have a legitimate aim, the State had failed to demonstrate that the measure was suitable for achieving that aim, necessary for achieving that aim, or proportional to the rights infringement, especially since it had other very severe consequences.

On the other hand, the State argued that it was pursuing a legitimate aim; that Aadhaar would help achieve that aim, and that the State had already considered and rejected alternatives offered by the petitioners after due deliberations. In any case, the State argued that the standard of necessity in the proportionality analysis could not be the 'least intrusive test,' among other reasons because 'it involves a value judgment or second guessing of the legislation' which the judiciary should refrain from doing.[90] Even if the least intrusive test was applicable, the Court should defer to the State's determination on whether the impugned measure was the least intrusive one, since this involves a 'technical exercise and cannot be undertaken in the court of law.'[91] On proportionality *strictu sensu*, the State argued that Section 7 and 8 involved minimal invasion into the right. On the other hand, it had significant benefits since by achieving its aims, it would help in better targeting of services that were essential for people to live a dignified life. Therefore, the measure was itself in furtherance of fundamental rights and directive principles of state policy.[92]

These then were the arguments. Justice AK Sikri, the author of the lead judgment in *Modern Dental College* wrote the majority opinion for the Court in *Aadhaar*. In this opinion, he fleshed out further what the test implies, its purposes,[93] its types,[94] the value choices behind different versions of the test and his judgment as to the substantive form of the test. In particular, he noted the differences in the German and Canadian tests and the criticisms of both.[95] He refined his own approach from *Modern*

[89] *Aadhaar* (n 86) 366-67.
[90] ibid 368.
[91] ibid 368.
[92] ibid 369-71.
[93] Citing as three distinct models Alexy (n 22); Kumm (n 23); Möller (n 23).
[94] Focusing on the distinctions between the German and Canadian models.
[95] *Aadhaar* (n 86) 318-19 citing concerns that in the German doctrine the most important stage, where the bulk of the analysis takes place is the final one: the balancing test. This makes the previous stages largely redundant. Another concern with the final stage is that the

Dental College, 'tempered with more nuanced approach' recommended by David Bilchitz. [96] According to the majority, the applicable proportionality test would be as follows

1. Legitimate aim, ensuring that the goal is 'of sufficient importance to warrant overriding a constitutionally protected right or freedom.' [97] Suitable means, implying thereby a rational connection between means and ends.

2. Necessity of means to be judged as follows, '[i]n order to preserve a meaningful but not unduly strict role for the necessity stage':[98]

3. First, identify a range of possible alternatives to the measure employed by the State;

    a. Next, examine the effectiveness of each of these measures in realising the purpose in a 'real and substantial manner;'

    b. Next, examine the impact of each measure on the right at stake;

    c. Finally determine whether there exists a preferable alternative that realises the aim in a real and substantial manner but is less intrusive on the right as compared to the State's measure.

4. Proportionality *strictu sensu*, which should avoid the concerns with 'ad-hoc balancing' by judges by using 'bright-line rules', which implies conducting the 'act of balancing on the basis of some established rule or by creating a sound

balancing is carried out in an unprincipled, ad hoc manner, thereby allowing for "subjective, arbitrary and unpredictable judgments encroaching on what ought to be the proper domain of the democratic legislature." The concern with the Canadian test was with the framing of the necessity stage, which, if taken seriously, "can be read as insisting that only one measure could pass constitutional scrutiny".

[96] ibid 320 citing with approval David Bilchitz, 'Necessity and Proportionality: Towards a Balanced Approach?' in Liora Lazarus *et al* (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart 2014) 49.

[97] ibid 320.

[98] ibid 319.

> rule.'[99] The Court did not specify what these bright line rules might be.[100]

The Court did not expressly articulate the evidential process for carrying out the proportionality analysis. However, its application of the test to facts reveals assumptions about these procedures, which I examine below. I then examine how the minority opinion engages with these questions.

Section 7 and 8, Aadhaar Act

General Approach: The majority opinion stated early on in its proportionality analysis that it will not examine the working of the Act since this 'may not have much relevance when judging the constitutional validity of the Act and the scheme.'[101] This implies that the Court prefers testing the law on its face, an approach that limits consideration of factors such as the actual effectiveness and impact of the law on fundamental rights, and therefore the suitability, necessity and proportionality test of the proportionality doctrine. If the Court's analysis is not based on the working of the Act, but on abstract argumentation, then that implies that it would only test the law for logical consistencies and not for its actual impact on fundamental rights. Information on the actual working of the law can shed light on whether and to what extent the law violates rights. Refusing to engage with such information also reduces the ability of the Court to make a robust determination of how intrusive the impugned measure is, and how effective and necessary it is to achieve its stated aims. The intensity of review would be significantly diluted by looking only at abstract, logical connections.

Further, the Bilchitz test of necessity itself requires an examination into the comparative effectiveness of the impugned measure with other measures that may achieve the same objective in a real and substantial manner. Without information as to the working of the Act, it is not clear how a court may conduct this analysis. Additionally, in measuring the balance between the right in question and the impugned measure, the

[99] ibid 319.

[100] Bilchitz was citing without discussing in detail, J von Bernstorff, 'Proportionality Without Balancing: Why Judicial Ad Hoc Balancing is Unnecessary and Potentially Detrimental to the Realisation of Individual and Collective Self-Determination' in Liora Lazarus et al (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart 2014) 63. See David Bilchitz, 'Necessity and Proportionality' (n 96) 59 doubting to what extent Bernstorff's proposal would end the need for balancing. However, the Court does not engage with Bernstorff's work at all.

[101] *Aadhaar* (n 86) 249.

actual impact of the law would show both, its extent of intrusion into the right, and the benefits that the measure brings.

For reasons of institutional capacity, a court may decide that it should limit itself to an abstract analysis of proportionality. However, since the majority opinion did not explain why it should not look into the working of the Act, it is not evident that the Court weighed the consequences of doing so, and came to a definite conclusion that it was willing to limit the reach of the proportionality analysis.

Legitimacy: The majority examined whether the impugned provision was following a legitimate aim of sufficient importance so as to override a fundamental right. Holding in favour of the law on this point, the majority reasoned that by seeking to ensure targeted delivery of services and benefits, the impugned measure serves the cause of social justice as provided for in Part IV of the Constitution.

Suitability: The next question for the Court was whether the impugned measure advances its legitimate and important aim. Since it refused to examine the actual working of the law, the Court applied this limb formally, and concluded that the law which required biometric authentication of beneficiaries would advance the aims of the law. The Court did not, indeed could not, given its stance on the working of the law, examine the extent to which the law actually advanced the aim, and whether it did so in a substantial manner.[102] For example, the State's own evidence showed that Aadhaar had experienced an authentication failure rate of 8.54% for iris scan-based authentication and 6% for fingerprint authentication.[103] The Court did not examine whether failure rates of this magnitude—which translates into authentication failures in millions of cases—implies that the impugned measure was not a suitable means to achieve the objective of targeted delivery of services, benefits and subsidies.

Necessity: In the initial parts of the judgment, the majority opinion discussed in great detail Bilchitz's criticism of the necessity standard in the German and Canadian proportionality tests. It decided to adopt Bilchitz's four-part test for necessity in order to overcome this problem. Yet, surprisingly, it devoted only three sentences to the application of this test. More surprisingly still, the Court stated that the necessity analysis was already answered in the discussion pertaining to the purpose and suitability components. This was clearly not the case since the Court had not

[102] Gautam Bhatia, 'The Aadhaar Judgment and the Constitution—I: Doctrinal Inconsistencies and a Constitutionalism of Convenience' (*Indian Constitutional Law and Philosophy*, 28 September 2018) <https://indconlawphil.wordpress.com/2018/09/28/the-aadhaar-judgment-and-the-constitution-i-doctrinal-inconsistencies-and-a-constitutionalism-of-convenience/> accessed 7 April 2020.

[103] *Aadhaar* (n 86) 231.

examined alternatives to the impugned measure at all. By refusing to examine the working of the Act, it could not also look into the effectiveness of the impugned measure in achieving its aims, which is a crucial component of the necessity analysis in general, and specifically in the test as propounded by Bilchitz. The Court's terse necessity analysis merely stated that in light of past malpractices in availing services, benefits and subsidies, the Court was left with little choice but to hold that 'apart from the system of unique identity in Aadhaar and authentication of the real beneficiaries, there is no alternative measure with lesser degree of limitation which can achieve the same purpose.'[104] For the Court, the burden to suggest possible alternative measures rested with the petitioners and since 'on repeated query by this Court, even the petitioners could not suggest any such method,' this implied that no such method existed.[105] This proposition appears factually incorrect since, in narrating the petitioners' claims, the majority opinion had itself noted the petitioners' contention that

> *the State has failed to demonstrate that other, less invasive ways would be significantly worse at addressing the problem, especially given recent studies that found a significant reduction in PDS leakages, due to innovations devised to work within the PDS system; alternatives such as food coupons, digitisation of records, doorstep delivery, SMS alerts, social audits, and toll-free helplines have not been looked at.*[106]

This is an important issue. Facts are critical to proportionality analysis. Each substantive analysis may turn on underlying facts. By refusing to engage with facts, or missing facts brought before the Court, crucial elements of the analysis may be wrongly conducted. In this case, it appears that a less than rigorous treatment of facts vitiated the proportionality analysis considerably.

Another aspect of the Court's brief analysis on necessity is that it places the burden on the petitioner to furnish alternative measures. This, by itself, is not necessarily problematic, but does involve a choice between seeking alternatives from petitioners who may not have sufficient information to adequately furnish such details, and asking the government to explain what other models were examined and why these were rejected. In the present case, the government had expressly stated that it had determined that

[104] ibid 382.
[105] ibid 382.
[106] ibid 366.

Aadhaar was necessary after 'due deliberation.'[107] The Court could have sought from the government, information about how it conducted its own necessity analysis, what measures it considered, and why these measures were rejected in favour of the impugned measure.

Balancing: Finally, the Court conducted the balancing step of its proportionality analysis. Per the majority opinion, this prong of the test requires, the Court to examine the proportionality between the 'importance of achieving the proper purpose and the social importance of preventing the limitation on the constitutional right.'[108]

The Court highlighted the importance of the measure. First, accepting the State's contention, the Court found that the measure was intended to further the socio-economic rights of citizens, and that therefore the proportionality limb involved balancing between apparently conflicting rights of the same individuals. The Court then had to decide whether in securing the socio-economic rights of individuals, the impugned measure required them to give up their right to privacy to an impermissible extent.[109] It is unclear how this question can be decided without empirical information as to the working, effects and effectiveness of the law. If the law excludes people, or does not have adequate safeguards for data protection, or is ineffective in stemming leakages, then the balance may be in favour of the right to privacy. If the law works as advertised, the balance may be drawn differently.

Instead of examining the working of the law, the Court based its analysis on the purported aims and purposes that the law sought to secure. Justice Sikri held that the Act 'truly seeks to secure to the poor and deprived persons an opportunity to live their life and exercise their liberty'[110]; 'aims at efficient, transparent and targeted delivery of subsidies, benefits and services,'[111] and 'wants to achieve the objective of checking the corrupt practices at various levels of distribution system which deprive genuine persons from receiving these benefits.'[112] Note that each of these aims were contested and this contestation was the precise basis for arguing that the law impermissibly infringed Article 21. The Court however focused only on the stated intent of the law (and perhaps, given the use of the word "truly," the sincerity of the State's motivation behind enacting the law), not its actual impact, without explaining why this was adequate to judge the proportionality of the law.

[107] *Aadhaar* (n 86) 369.
[108] ibid 383.
[109] ibid 384.
[110] ibid 521.
[111] ibid 393.
[112] ibid 393.

Ranged against the important social purposes of the law was the right to privacy. The Court engaged in an analysis of the scope of the right to privacy,[113] and held that there was minimal invasion of the law into the privacy rights of beneficiaries. As such the law was not disproportionately intruding into the right. To reach this conclusion, the Court bifurcated and separately addressed two issues: (1) what data was given up to the State; and (2) the exclusion that resulted from authentication failures. In determining whether the measure disproportionately infringed the right, the Court focused only on the first of these issues, without explaining why the question of exclusion was not being considered alongside. If, due to authentication failures, people were losing their entitlements, then the law was failing its purpose of better targeting of beneficiaries. Additionally, by the Court's own logic, access to these welfare schemes, benefits and services was itself part of peoples' fundamental right to life with dignity. Therefore, exclusion from these services would add another type of rights violation to the privacy infringement. Thus, the question of exclusion was central to the proportionality analysis. The Court however, made a determination that the law was not disproportionate because it involved a minimal intrusion into the right to privacy, and then separately referred to the "incidental" aspect of exclusion.[114] Petitioners claimed that even on the State's own showing, Aadhaar was effective 99.76% of the time. While they disputed this claim, even taken at face value, this implied that in a population of 110 million enrollees, 2.7 million people would lose access to essential services, benefits and subsidies, and their very survival might be threatened.[115] The State countered this by stating that it had issued circulars to the effect that no person should be denied services, benefits and subsidies due to authentication failure. In such cases, the beneficiaries could prove their identity by other means. This raises the question: if bypassing the Aadhaar system is permitted in this manner, then it is unclear why the system had to be mandatory in the first place, because clearly there are alternative, less intrusive means of identification.

The petitioners disputed that such alternative means of identification were in fact being allowed, by adducing studies documenting exclusion and denial of benefits due to authentication failure. The State, in turn, disputed these studies. This raised a question of factual uncertainty for the Court.

[113] It is not entirely clear to me why the Court did so. The scope of the right has to be determined at the stage of deciding if the right has been infringed in the first place. If the right has not been infringed, there is no need to carry out a proportionality analysis. If the right has been infringed, then proportionality analysis has to be performed. The scope of the right is immaterial to the question. See Bhatia (n 102) arguing that the Court anyway got its analysis of the scope of the right to privacy wrong.

[114] *Aadhaar* (n 86) 400.

[115] ibid 401.

How should the Court decide in the face of such factual uncertainty? If the burden is on the petitioners, factual uncertainty would be decided against them. If the burden is on the State, factual uncertainty would be decided against the State. The Court decided the issue in favour of the State, arguing that it could not invalidate a Parliamentary legislation on the basis of material whose credence had not been tested. As I have discussed in the previous part, there may be good reasons to decide factual uncertainty in favour of the State, particularly the legislature. The issue does highlight however the centrality of factual determinations in proportionality analysis—an issue that the Court expressly refused to address.

In sum, the majority opinion articulated an intensive substantive standard of proportionality review. However, in carrying out the analysis, it did not engage in the necessity analysis at all. Further, it calibrated down the intensity of the test by taking the claims of the State at face value without seeking proof of its factual accuracy, basing its analysis on abstract assumptions routed in the intent of the law and not its actual working, and shifting the burden of proof and the burden of factual uncertainty onto the petitioners.

Rule 9, PML(MR) Rules

Contrast the analysis above with the Court's evaluation of whether Rule 9, PML(MR) Rules was a proportional infringement of the right to privacy. The impugned rule required the mandatory linking of Aadhaar with every bank account. The purpose behind the rule, as per the State, was to curb money laundering and tax evasion.[116] The Court held that while there may be a legitimate State aim in curbing money laundry and tax evasion, mere 'ritualistic incantation' of these phrases would not suffice to render the rule proportional.[117] The State had to show that any limiting measure was 'rationally connected to the *fulfilment* of the purpose.'[118] Per the majority, the State had failed to demonstrate that the measure would actually curb money laundering and tax evasion, and that such a sweeping rule that covers every bank account, and presumes everyone to be a potential criminal, is justified.[119] Further, the majority found that the rule could be more precise by excluding certain types of bank accounts that are generally not used for tax evasion and money laundering purposes. Noting that

[116] *Aadhaar* (n 86) 401.
[117] ibid 475.
[118] ibid 475.
[119] ibid 401 holding '[T]here cannot be such a sweeping provision which targets every resident of the country as a suspicious person. Presumption of criminality is treated as disproportionate and arbitrary'.

alternative methods of identification and KYC (Know Your Customer) standards existed, the Court held that the State had not 'discharged its burden as to why linking of Aadhaar is imperative.'[120]

The Court also took into account the fact that the consequence of not linking one's existing bank account would result in a deactivation of the account, thus depriving the account holder of her property. Given this serious consequence, the sweeping nature of the measure without attempting to narrowly tailor the limitation to its purposes,[121] and the failure to demonstrate the effectiveness of the measure, implied that the measure was disproportionate. In coming to this conclusion, the Court was also guided by the fact that the State had not carried out any study about the methods used by persons engaged in money laundering, what kinds of accounts they use for these purposes, and the targeting of those types of accounts for linking with Aadhaar.[122]

This is an entirely different approach to the one the Court took in analysing Sections 7 and 8, of the Aadhaar Act 2016. There, the Court refused to look into the effectiveness of the law in preventing leakages; here, in the case of Rule 9, the State's failure to prove the effectiveness of the law in curbing money laundering and tax evasion counted against the law's proportionality. Here, the Court found a blanket requirement for linking Aadhaar in order to curb malpractices by a few to be overbroad; there, a similar presumption of potential criminal behaviour on part of all beneficiaries was approved. Here, the existence of other modes of identification counted against the law's necessity; there it did not. The deprivation of property in this instance was too severe a consequence; deprivation of entitlements, and exclusion from essential benefits and services, which according to the majority itself were facets of the right to life with dignity, did not have the same consequence. Overall, here the burden was on the State to prove, through evidence about the facts underlying its claims and its process of decision-making, that the law was proportional. The State was put to proof of its claims instead of accepting them *ipse dixit*. The State did not discharge this burden and the measure failed. Though the majority was applying similar substantive standards, by following a less deferential approach and by allocating evidential burdens differently, the Court came to very different conclusions, in otherwise similar circumstances. Concerns have been raised in scholarship that the structured nature of the proportionality doctrine nonetheless provides significant leeway to judges such that within the same broad tests, courts tend to perform proportionality analysis differently when they want to

[120] ibid 476.
[121] ibid 401.
[122] ibid 476.

uphold a law, compared to when they want to strike it down.[123] The majority opinion in Aadhaar is perhaps an illustration of this claim.

The Minority Opinion

Justice DY Chandrachud dissented. He also applied proportionality to test the limitation, albeit a very different form of the test as compared to the one proposed by him in the *Right to Privacy* judgment. He now read his *Right to Privacy* judgment to require the '*State to justify* that the means which are adopted by the legislature would encroach upon the right to privacy *only to the minimum degree necessary* to achieve its legitimate interest.'[124] He asserted that the Court cannot 'mechanically defer' to the State's assertions, and the burden in on the State to demonstrate that the rights infringing measure was necessary and proportionate to the goal.[125] This is a revisionist account of the proportionality test laid out in the plurality opinion in the *Right to Privacy* case.[126] Here the burden of proof is placed on the State, whereas in the *Right to Privacy* case, it was on the petitioners. The standard of scrutiny is also much higher—from rational nexus between means and ends in *Right to Privacy*, to necessity and proportionality in *Aadhaar*. Overall, the minority understood proportionality as rooted in the 'global shift from a culture of authority to a culture of justification.'[127] However, Justice DY Chandrachud did not understand himself to be deploying a new or distinct test. Like the judgments discussed above, he understood proportionality to be 'the core of reasonableness since the 1950s,'[128] and as a 'judicially-entrenched principle which has invigorated fundamental rights jurisprudence in the country.'[129]

The minority approached the issue of validity of the rights limiting measure, by asking whether the State had discharged its burden of justifying each stage of the limitation. It examined the evidence proffered by the State to satisfy each prong of the test, and found such evidence lacking. It found that Section 7 was overbroad, in that it could cover potentially any kind of service, benefit or subsidy, without needing to demonstrate on a case by case basis that the requirement of linking Aadhaar to each specific service, benefit or subsidy was necessary or

[123] See Choudhry (n 18).
[124] *Aadhaar* (n 86) 678.
[125] ibid 815.
[126] See *Right to Privacy* (n 74) and the subsection in this article analysing the judgment.
[127] *Aadhaar* (n 86) 814.
[128] ibid 815-16.
[129] ibid 819.

proportional to the right.[130] This provided the government 'uncharted discretion' to expand the scope of Aadhaar.[131]

The minority also held that the State had failed to demonstrate the necessity of the measure or that other, less rights restricting measures would not have sufficed in achieving the State's aims.[132] Contrast this with the majority opinion, where this burden of demonstrating less rights restrictive measures was placed on the petitioners.

Overall, the minority opinion placed a 'heavy onus' on the State to justify any rights restriction, which could not be limited lightly.[133] In this case, the minority found that the State had failed to discharge this burden of showing why the better targeting of various services and subsidies automatically requires the sacrifice of privacy. The State failed to discharge its burden of showing why less rights invasive measures could not have sufficed.[134] Overall, the State failed to demonstrate that the measures met the requirements of necessity and proportionality.[135]

The two opinions demonstrate the variability of the proportionality doctrine, both in substance and in evidential requirements; and also highlight the importance of engaging with the evidential questions because the intensity of review can be varied without changing the substantive standards of review. The fundamental difference between the majority and minority opinions on proportionality is in their understanding of these evidential requirements of proportionality. The majority placed the burden on the petitioners and deferred to the claims of the State. The minority placed the burden on the State and required proof of its assertions. For example, the majority accepted the State's contention that the basic tenets of Aadhaar work—that the biometric identification and authentication system is reliable, secure and mostly infallible—and would aid in targeting beneficiaries. Any exclusion was thus marginal and could be rectified by other means. On the other hand, the minority opinion sought proof of each of these claims rather than accept them at face value. It found that there was enough evidence to suggest that biometric identification is probabilistic, and probability of failure was greatest for the most marginalised. Linking entitlements to this system would therefore convert an 'entitlement to a chance.'[136] Since the entitlements themselves are protected as part of the fundamental rights guarantees, the concerns with the effectiveness of the law added to its unconstitutionality.

[130] ibid 857.
[131] ibid 857.
[132] ibid 857.
[133] ibid 862.
[134] ibid 862.
[135] ibid 862.
[136] ibid 869.

A comparison between the two opinions also demonstrates that proportionality does not necessarily require the Court to go into disputed questions of fact, but only to allocate the burden of factual uncertainty. While the majority placed this burden on the petitioners, the minority stated that 'given the intrusive nature of the Aadhaar scheme' it is for the State to demonstrate both factually and logically that each step of the test was indeed satisfied.[137] The burden of uncertainty is on the State.

3. Conclusion: Proportionality is Business as Usual

The Court delivered its *Aadhaar* judgment in September 2018, around which time it also decided other landmark rights cases under the Constitution. However, these other cases either did not engage with the proportionality test at all or did so in a very cursory manner.[138] It is therefore not clear whether the proportionality test is here to stay in Indian jurisprudence, or not.

If the Court is indeed inclined to move towards a structured proportionality test, then its present approach needs course correction. The Court's engagement with the structured proportionality test has been inconsistent and incoherent. As discussed above, the Court has articulated very different substantive standards of scrutiny within and across cases in which it has engaged with the proportionality test. Further, the Court has tended to set out substantive standards of scrutiny of proportionality (often drawn from comparative literature) that are at odds with the evidential standards that are drawn from pre-existing Indian case law. This leads to an internal incoherence in the structure of proportionality. On the one hand, the Court articulates a very high standard of substantive scrutiny, implying thereby that rights are of great normative significance and can be overcome only in exceptional circumstances. However, at the same time, the Court is highly deferential to the State and places minimal evidential burdens on it. The *Aadhaar* majority judgment on the constitutionality of Sections 7 and 8, Aadhaar Act is a prime example of this concern.

A theme running through the cases discussed above is the Court's assertion that the proportionality test has always been part of the Indian constitutional landscape – it is 'well-settled' in constitutional jurisprudence.

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[137] ibid 815.

[138] *Joseph Shine v Union of India* (2019) 3 SCC 39; *Navtej Johar v Union of India* (2018) 10 SCC 1; *Indian Young Lawyers Association v State of Kerala* (2018) SCC OnLine SC 1690.

If so, adopting the proportionality test does not unsettle or disrupt pre-existing configurations of relations between citizens and the State as mediated through rights, or between the judiciary and other branches. By assimilating the proportionality test into existing approaches to judicial review, the Court severely restricts the ability of the doctrine to re-shape legal culture. Despite articulating the four-pronged test, the Court continues to not engage with the necessity prong of the test since this distinctive feature of proportionality is not part of pre-existing rights review mechanisms in India. Coupled with its low intensity of evidential scrutiny and high deference to the State, incorporation of the proportionality test does not make much of a difference to how the Court conducts rights adjudication—it is business as usual. If, as Justice DY Chandrachud acknowledges, proportionality reflects a bridge from a culture of authority to a culture of justification,[139] the Court's invocation of the structured proportionality test is a bridge to nowhere.

Since proportionality is supposedly already a part of the Court's rights review standards, the invocation or otherwise of proportionality does not make much of a difference in the outcomes of specific cases or in re-configuring existing power dynamics more generally. Hence, the Court can choose to not engage with proportionality at all, or only pay it lip service. In the context of the UK, Tom Hickman had cautioned that proportionality

> *must be accompanied by a well-thought-out, clear, consistent and principled approach to its content and structure…There is a real danger that proportionality will become no more than a label attached to outcome of a judge's consideration of the facts of case…[P]roportionality can either become [a] fig leaf…[or] a powerful normative and predictive tool in public law.*[140]

The Indian Supreme Court's approach to proportionality appears to be an apt demonstration of these concerns.

[139] *Aadhaar* (n 86) 814. See Etienne Mureinik, 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) South African Journal of Human Rights 31, 32; Cohen-Eliya and Porat (n 23).

[140] Tom Hickman, 'The Substance and Structure of Proportionality' (2008) Public Law 694, 714-16.