# PROPORTIONAL CURTAILMENT OF FUNDAMENTAL RIGHTS: BETWEEN JUDICIAL BORROWING AND CONSTITUTIONAL DESIGN

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## ABSTRACT

There have been several debates about the borrowing of doctrine from American jurisprudence by the Indian Judiciary in Indian cases without any application of mind to it which often leads to dis-harmony between the Indian society and the rules. This paper, tends to look at doctrine of proportionality as one of the principles applied by the Indian Judiciary in Fundamental rights curtailment cases to delve into the merits of the criticism. The main question around which the paper revolves is whether the said doctrine was adopted as rule or as a principle. And how such a transplantation of doctrine happened in our jurisdiction (if any). The article further engages with the argument of whether the doctrine of proportionality was wholly borrowed from other jurisdictions or was it somewhat inherent to Art 19(2) of the Indian Constitution.

**Keywords:** proportionality, balancing, rules and principle, legal transplantation, reasonable restriction

## INTRODUCTION

*You must not use a steam hammer to crack a nut, if a nutcracker would do?*[1]

Laws and Institutions no matter how efficient and well arranged, must be reformed or abolished if they are unjust[2]. This work of checking if the law is actually violating a person's fundamental right or not, is done by the judiciary through the doctrine of Proportionality. Proportionality can be said as doctrinal construction "*which emerged and then diffused as an unwritten, general principle of law through judicial recognition and choice*"[3]. Proportionality as stated by Aristotle is proportional is what is just and unjust on the other hand violates proportion.[4] It is a decision making procedure to deal with the tension between a governmental action and rights of the people[5]. The origin of the doctrine of proportionality can be traced back to 18th century Prussia, a German land. From Germany the doctrine of proportionality spread all across Europe. Courts have not only adopted this 'global' doctrine, but also "*adapted it in ways that gives proportionality a local flavour in each jurisdiction*"[6]. The German Court failed to foresee the growing importance of this doctrine in the constitutional law and thus the structured form of proportionality is accredited to Canada.

The said principle has also been used and re-used by the Indian Courts in a number of cases. The most recent was Anuradha Bhasin case[7] which followed the dicta of the K.S. Puttaswamy judgement[8] and declared that the Authorities must adhere to the requirements of the Doctrine of Proportionality while restricting the fundamental right of freedom of Speech and Expression through the medium of internet.

## SCOPE AND OBJECTIVE OF THE PAPER

This paper engages with question of whether the doctrine of proportionality in India is a product

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[1] R v. Goldsmith [1983] 1 WLR 151, 155 (DIPLOCK J)
[2] John Rawls, 1921-2002 author. A Theory of Justice. Cambridge, Massachusetts :The Belknap Press of Harvard University Press, 1971.
[3] Alec Stone Sweet and Jud Mathews, Proportionality Balancing and Global Constitutionalism, Colum. J. Transnat'l L. 19, 74 (2008),
[4] Aristotle. Nicomachean Ethics. (Cambridge University Press, 2004). Book V. pp 79
[5] *Ibid* at 74-75
[6] 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' 66 American Journal of Comparative Law 537. (2018)
[7] Anuradha Bhasin and Union of India and Others [2020] 1 MLJ 574
[8] K.S. Puttaswamy (Retired) v. Union of India LNIND 2018 SC 535

of legal Transplantation[9]. If yes, then was it Transplanted as a Rule?[10] Or, if the doctrine was something related to the society of its origin, how was its transplantation possible[11]?

The Author seeks to answer the questions through historical[12] and functional[13] methodology of comparing. I argue that the Doctrine of Proportionality is not a product of simple rule based legal transplantation without the application of mind. Though the Indian courts did take the help of foreign antecedents, it was only to build upon what we already had i.e 'reasonable restriction'. I argue further that, though the Doctrine of proportionality originated in Germany under a given social circumstances, by the reason of its being a Standard based doctrine, it was capable of being adopted in other diverse jurisdictions as well.

The jurisdictions chosen for the paper are German and Canada. The rationale behind choosing the above two mentioned jurisdictions is that the concept of Proportionality has originated in Germany which makes it essential for the comparator to learn how it changed through all this time. Canada's contribution to the development of structured doctrine through the oakes test gives it mandatory space in the paper of any comparator. Despite the scrutiny test provided by the American Jurisprudence, it has been kept out of the discussion here for the reason that it provides for balancing and not as such proportionality. The paper is structured as follows: [I] curtailment of Fundamental Right Using the Doctrine; [II] Doctrine of Proportionality vis-a-vis Reasonable Restriction; [III] The Four Tests of Proportionality; [IV] Amalgamation of the German and Canadian Approach. [V] Current Position of the Doctrine in India.

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[9]To 'transplant', according to the Oxford English Dictionary, is to 'remove and reposition', to 'convey or remove elsewhere', to 'transport to another country or place of residence'. 'Transplant', then, implies displacement. For the lawyer's purposes, the transfer is one that occurs across jurisdictions: there is something in a given jurisdiction that is not native to it and that has been brought there from another.

[10] 'Legal transplants' refer to 'the moving of a rule [...] from one country to another, or from one people to another'. [Alan Watson, Legal Transplants, 2d ed., 21 (University of Georgia Press, 1993).]

[11]If the Doctrine was attached to the society, its history and cultural stratum, it would not be possible to transplant such a doctrine without copying that whole system. [Pierre Legrand, The Impossibility of 'Legal Transplants', 4 Maastricht J. Eur. & Comp. L. 111, 111 (1997),]

[12]Historical work as a method for comparing constitutions requires the comparator to study the development of the constitutional system overtime. It can be in the form of genetic connection i.e. influence of one jurisdiction over another;[Louis Henkin, 'A new Birth of Constitutionalism: Genetic Influence and Genetic defects' in Michel Rosenfield (ed), Constitutionalism, Identity, Difference and Legitimacy: Theoretical Perspective (1994); Henkin and Rosenthal (n2); Jonathan M. Miller, ' The Authority of a Foreign Talisman: A study of U.S. Constitutional Practice as authority in the Nineteenth Century Argentina and the Argentine Elite's Leap of Faith', 46 American University Law Review 1483 (2018)] or can be in the form of genealogical connection. [Sujit Choudhary, "Globalisation in search of Justification: Toward a theory of Comparative Constitutional Interpretation', 74 Indiana Law Journal 819 (1999)]

[13] In Functional Approach Scholar Identifies a doctrine in some society and analyses how the same function is performed elsewhere. [Vicki C. Jackson, Comparative Constitutional Law: Methodologies, 5 (2012). ]

## CURTAILMENT OF FUNDAMENTAL RIGHT USING THE DOCTRINE

Proportionality doctrine cannot be applied to curtail the fundamental rights without going into the question of whether Fundamental rights are rules or principle[14]. Ronald Dworkin supported the concept of rule and believed that Fundamental Right is absolute in nature and cannot be restricted[15]. This view can work in the American Constitution but in the Indian Constitution it becomes difficult to adhere to the concept of rule given the inbuilt restriction under Art 19(2). Thus the Indian Courts tends to treat Fundamental right as Principle which is furthered by Robert Alexy[16]. He says that if there is conflict between two principles, they should be weighed against each other. This treatment of Fundamental rights as principle opens up the opportunity for the application of Doctrine of Proportionality. During the mid 18th century, when the German Jurisprudence was moving from authoritarian State to Rights of the people, it used Rechtsstaat and Proportionality to protect those fundamental rights which were in black and white[17]. Thus it can be inferred that German Courts also interpreted Rights as Principle which can be curtailed when needed. Like India, Germany too has inbuilt restriction on the right to the free development of one's personality[18]. It was not just India and Germany, but in many jurisdictions, as the constitution developed limitation clauses became a norm giving the meaning of principle to fundamental rights which can be restricted. Sec 1 of Canadian Constitution Act (1982) subjects the Freedoms to limits "*prescribed by law as can be demonstrably justified in free and democratic society*."

## DOCTRINE OF PROPORTIONALITY VIS-A-VIS REASONABLE RESTRICTION

Despite showing close resemblance to the German Model of Proportionality, the court in Oakes[19] did not make reference to foreign antecedents. Thus it appears open as to whether the Canadian Court considered any foreign judgement or not. A similar question can be asked with regard to the use of doctrine in Indian Context. Is it a foreign element shoved into the Indian Jurisprudence. Justice N.V. Ramanna answer in negative and calls it to be the part and parcel

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[14] Rules are those norms which are either applied as a whole or rejected as a whole. Principles are those norms which can be realised to the greatest extent possible given the legal and factual possibilities.
[15] Ronald Dworkin, "Rights as Trumps" in Jeremy Waldron (ed.), Theories of Rights, 153 (1984)
[16] Robert Alexy, A Theory of Constitutional Rights (Oxford, Oxford University Press, 2002).
[17] Moshe Cohen-Eliya & Iddo Porat, American Balancing and German Proportionality: The Historical Origins, 8 INT'l J. Const. L. 263, 271 (2010).
[18] Art 2.1 of the basic law (GG) states that "everyone shall have the right to the free development of her personality insofar as she does not violate the rights of others or offend the constitutional order or moral code."
[19] R. v. Oakes (1986) 1 SCR 103 (Can)SC

of ‘reasonableness’ under Art 19(2) of the constitution[20].

In the earliest case of restriction on Fundamental Rights[21], a constitution bench interpreted liberty and balancing. It interpreted reasonable restriction under art 19(2) of the Indian Constitution as application of intelligent care and deliberation. It was only after the case of Om Kumar[22] that the Doctrine was applied to Administrative orders. The court asked the administration to search for the least restrictive choice of measure when curtailing a fundamental right. It imposed a duty on the courts to see that a proper balance between adverse effects on the fundamental right and the purpose of those measures is maintained. But at the same time it restricted from going into analysing the alternative choices of law which a legislature has.

Proportionality in Germany originated in German public law, more specifically administrative law. The foremost instance of limitation on the power of the government can be spotted in Article 10(2) of the Allgemeines Landrecht of 1794 which authorised the government to exercise police powers for the sake of public peace but, with a limitation- welcoming only those measures which were essential in achieving those goals. It hence became the first textual basis for the requirement of the proportionality[23]. It was only after World War II that the concept of proportionality was admitted into the constitution of Germany. Its aim changed from protecting and promoting the rights to imposition of reasonable restriction upon the rights. A conclusion which can be drawn is that unlike India, in Germany the path of development of the doctrine moved from administrative law to constitutional law.

Rather than Germany, one could find similarity in the origin of doctrine between India and Canada. The doctrine of proportionality was adopted in the Canadian courts in mid 1980s for the purpose of deciding claims arising out of the Charter of Rights and freedoms. It was in 1985[24], that the Canadian court hinted that if in future the need comes it would formulate a “proportionality test”.

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[20] Anuradha Bhasin and Union of India and Others [2020] 1 MLJ 574
[21] Chintaman Rao v. State of Madhya Pradesh LNIND 1950 SC 40
[22] Om Kumar v. Union of India LNIND 2000 SC 1585
[23] *Supra,* note 16
[24] R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R (Can.) at 352

**DERIVING REQUISITE BALANCE THROUGH DOCTRINE OF PROPORTIONALITY**

One of the conundrums faced by the Indian Courts was in achieving requisite balance between the restriction and the protection of fundamental rights. This requires a structured format of the doctrine on the touchstone of which the measures restricting the fundamental rights can be tested. The Apex court in Modern Dental College and Research Centre v. State of Madhya Pradesh[25] gave 4 staged proportionality tests which were in line with that of the proportionality test given by the German Federal Constitutional Court. The four stages of proportionality test given in the case were:

(a) A measure restricting a right must have a legitimate goal (legitimate goal stage).

(b) It must be a suitable means of furthering this goal (suitability or rational connection stage).
(c) There must not be any less restrictive but equally effective alternative (necessity stage).

(d) The measure must not have a disproportionate impact on the right-holder (balancing stage).

The doctrine provided by the german counterpart involves four pronged tests, first, it has to be analysed as to whether the measure restricting the rights serves a legitimate goal (also called as legitimate goal test), then it has to be analysed whether the measure is a suitable means of furthering this goal (the rational connection stage), next it has to be assessed whether there existed an equally effective but least restrictive alternative remedy (the necessity test) and at last, it should be analysed if such a measure had a disproportionate impact on the right-holder (balancing stage).

By legitimate purpose the German court meant, any purpose not prohibited by the constitution. The reason for such a narrow interpretation is not provided by the court but can be summarised as[26]:

a. It is the third stage where it is checked if the legislation is so important to infringe the rights of the person

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[25] Modern Dental College and Research Centre v. State of Madhya Pradesh LNIND 2010 SC 846
[26] Dieter Grimm, Proportionality in Canadian and German Constitutional Jurisprudence, 57 University of Toronto Law Journal, 388 (2007),

b. The court believed that in a democratic country the law making job should be left to the legislature unless it goes against the constitution.

c. It further believed that the importance of any legislation cannot be understood in abstract terms.

The Canadian court in Oakes[27] case gave the world a structured Proportionality Test which, won't be wrong to say, became the basis for many other countries' proportionality principle.

Justice Dickson explained the the components of the Proportionality Test[28]:

- The measures adopted by the Government shall aim to achieve the objective in question.(Rational connection test)

- The means connected to the objective should impair 'as little as possible'. The right or freedom in question.( Least restrictive Test)

- There must exist Proportionality between the effects of the measures and the objects described as of sufficient importance.

In the present day, the Oakes test requires firstly that the object of measure restricting the fundamental right must be compelling enough to override the protected rights. Secondly, there must be a rational nexus between the measure and the object sought to be achieved. Thirdly, the means applied for achieving that goal should be least restrictive. And finally there must be proportionality between effects of such a measure on the fundamental right and the object sought to be achieved.

Although Canada Provides for 'sufficient reason', in practice, any lawful purpose is taken as sufficient enough[29].

**AMALGAMATION OF CANADIAN AND GERMAN TEST**

Except for the difference in the first stage of the test in both the jurisdictions, another difference lies in the third stage of necessity. This difference can be attributed to the fact that the German

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[27] Regina v. Oakes, [1986] 1 S.C.R. 103 (Can).
[28] *Ibid*
[29] *Supra,* note 25 at 389

Courts require the assessment of whether there was an equally effective measure but less restrictive in nature. On the other hand, *Oakes test* requires the measure to be least restrictive only, irrespective of its effectiveness. The stage involving necessity can't be said to have gained much prominence in both the jurisdiction and even much less in Germany.

This stage can also be considered as controversial in both the jurisdictions. Usually it is not difficult to find an alternative with less intrusion, but it is hard to find the law with same or equivalent effectiveness[30]. In practice, German Courts treat all policy as necessary by justifying that no equally effective alternative is available. This gives a leeway to the legislature to pass this stage. The Oakes test imposes a strong burden on the Government to justify its policy. This strong interpretation of the Necessity Stage is supported by Robert Alexy[31] considering it one of the most important stages in the test. This strong interpretation can also lead to the problem of Judicial overreach. Thus seeing these problems, David Bilchitz advocated moderate interpretation of the said stage. He recommended a 4 step inquiry for Necessity[32]:

- (MN1) All feasible alternatives need to be identified, with courts being explicit as to criteria of feasibility;

- (MN2) The relationship between the government measure under consideration, the alternatives identified in MN1 and the objective sought to be achieved must be determined. An attempt must be made to retain only those alternatives to the measure that realise the objective in a real and substantial manner;

- (MN3) The differing impact of the measure and the alternatives (identified in MN2) upon fundamental rights must be determined, with it being recognised that this requires a recognition of approximate impact; and

- (MN4) Given the findings in MN2 and MN3, an overall comparison (and balancing exercise) must be undertaken between the measure and the alternatives. A judgement must be made whether the government measure is the best of all feasible alternatives,

[30] Kalkar Case, which involved the risk of atomic energy plants. In the absence of of evidence about the new atomic technology, the court refused to substitute judicial opinions for political ones; but it combined this deference with a constitutional duty on the legislature to observe the development of this technology and if necessary, to amend the law, [BVerfGE 49, 89 at 130 (1978)]
[31] *Supra*, Note 15 at 47
[32] David Bilchitz, Necessity and Proportionality: Towards A Balanced Approach? in L. Lazarus, C. McCrudden and N. Bowles (eds.), Reasoning Rights, 41 (2014).

considering both the degree to which it realises the government objective and the degree of impact upon fundamental rights ('the comparative component').

Considering Bilchitz Recommendation, Dr. Chandrachud J. in K.S. Puttaswamy[33] case reassessed the Modern Dental College judgement.

The two changes made were in the first and the third stage. Mere proper purpose of the legislation would not suffice its enactment. There must be a legitimate goal behind it with sufficient importance to warrant overriding a constitutionally protected right or freedom. The requirement of equal effectiveness from the Necessity stage has been done away. Now the measure must impair freedom as little as possible.

This is how the doctrine in India moved from the German approach to a hybrid of German and Canadian approaches.

## CURRENT POSITION OF THE DOCTRINE IN INDIA

Justice Chandrachud, in the aforementioned case of K.S. Puttaswamy also laid down the threefold requirement the measure invading life and liberty must meet. It involves "(i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate State aim; and (iii) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them."[34]

The third requirement adopts the principle of proportionality. He further gave four fundamental precepts of proportionality involving firstly, legitimate state aim; secondly, rational connection; thirdly, least infringement of the right; and finally the restriction must also be necessary to protect the rights.

## CONCLUSION

Alan Watson regarded legal transplantation a mere displacement of rules which made it easy for any jurisdiction to copy another jurisdiction's rules and apply it without any issue. In other words he disregarded any relation between the social, cultural or historical endowments which led to the birth of a particular rule or doctrine. Pierre Legrand, gives a counter argument and

[33]K.S. Puttaswamy (Retired) v. Union of India (2019) 1 SCC 1 : LNIND 2018 SC 535
[34]*Ibid*

states that legal transplant is a myth and fallacy. He bases his contention on the ground that any rule is made depending upon the societal needs. It develops along the development of the society. Disassociating it with the society and shoving it in another jurisdiction without any similarity is nothing but a mode of creating chaos.

The author can't agree on the point that legal transplantation is mere transfer of rules from one jurisdiction to another, but surely it is wrong to say it is a myth or fallacy. The argument of Pierre Legrand can hold good to some extent in American Jurisdiction where instead of Proportionality, the concept of balancing prevails. It is due to the genealogical difference between the two concepts. Proportionality which originated in a German jurisdiction which was new to the concept of rights, was developed with the purpose of protecting such rights. Balancing, whereas, developed in American jurisdiction with concrete constitutional rights under First Amendment, to avoid absolutism of the rights. Even then, after several judgments analysing the two concepts, they are converging towards each other resulting in interchangeable use of the two terms.

Generalising this argument to every jurisdiction would be unjustifiable to the doctrine. The position of India is quite different and unique from that of America. It does not stand on any Marginal end where the author could easily conclude as to who stands right - Alan Watson or Pierre Legrand. Although the courts did not use the term proportionality, it does not defy the fact that Indian Courts had been balancing protection of rights and limitation on rights from the very early on. What made this possible for the courts was the inbuilt restriction given under Art 19(2) of the constitution. Thus it would be safe to say, the essence of Proportionality principle had always been present in the term 'reasonable restriction'. The object of transplantation was not the doctrine of proportionality, rather it was the four tests given under German and Canadian Jurisdiction. Before the K.S. Puttaswamy(retired) case, the test mainly resembled the German test which, to some extent, can be called the example of legal transplantation as a rule. In the case of K.S. Puttaswamy(retired), the court felt the need to reevaluate the doctrine and modify it as per the Indian society. Thus it explains the effective application of the doctrine in the Anuradha Bhasin case. The conclusion can be drawn that Indian Courts did transplant the structured test of proportionality to build upon the existing essence of the doctrine and finally developed it to suit the Indian Circumstances.