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Building a Bridge to a Culture of Justification: Guidelines for Designing the Standard of Proportionality in India

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ABSTRACT

As a standard of review, the test of proportionality is associated by its supporters with substantively strong and transparent public reason-giving, as well as with a shift to a 'culture of justification'. However, a stream of scholarship has emerged recently that explains the perceived weaknesses of the test. This has led some scholars to focus on how the standard of proportionality can be redesigned and applied in a way that addresses the concerns raised by the critics and best forwards the values associated with the test. Unfortunately, in the Indian context, where the Indian Supreme Court only recently adopted the proportionality test, there is little discussion of how the test should be designed and operated in practice. This paper therefore lays down a broad design principle that should guide this process, and then, in light of this principle, attempts to offer concrete guidance for coherently conceiving of and applying the four specific stages of the test.

I. INTRODUCTION

The proportionality test is a standard of review that courts employ to determine if the infringement of a right in question by the impugned means was justified. Originating from Germany,[1] the proportionality test has spread across the globe and gone on to become increasingly important in today's rights-based adjudication.[2] It

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[1] Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008–09) 47 Columbia Journal of Transnational Law 72, 74, 97–104; Dieter Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57 University of Toronto Law Journal 383, 384.

[2] Mordechai Kremnitzer, Talya Steiner, and Andrej Lang, 'Introduction' in Mordechai Kremnitzer, Talya Steiner, and Andrej Lang (eds), *Proportionality in Action Comparative and Empirical Perspectives on the Judicial Practice* (Oxford University Press 2020) 1–2; Stone Sweet and Mathews (n 1) 73–74; David Law, 'Generic

is a staple in the jurisprudence of international and supranational courts.[3] It became a central constitutional feature in the courts of Canada, South Africa, and Israel, before migrating to other countries in Europe, Asia, and Latin America.[4] The version of the test that is most commonly referred to as its four-step variant is predominantly used in Germany ('traditional proportionality test').[5] The traditional proportionality test is intended to be structured in a manner that requires the state to justify its infringing measure at each stage, and its failure to do so at any stage ends the analysis.[6] There could be several reasons to explain the popularity of this four-stage test. Its structured nature is linked to improving substantive reasoning, transparency, and public reason-giving.[7] Cohen-Eliya and Porat explain that the widespread migration of proportionality corresponds with the emerging global culture that is shifting from a culture of state authority to a 'culture of justification'.[8]

In the Indian context, the legal discourse has focused on issues with the Indian Supreme Court's ('Indian SC') application of proportionality, the arguments for adopting the traditional proportionality test in line with the reasons

Constitutional Law' (2005) 89 Minnesota Law Review 652; Kai Möller, 'Constructing the Proportionality Test: An Emerging Global Conversation' in Liora Lazarus, Christopher McCrudden, and Niels Bowels (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing 2014) 31.

[3] Stone Sweet and Mathews (n 1) 138–152; Kremnitzer, Steiner, and Lang (n 2) 1–2.

[4] For elaboration on the difference in the standard of proportionality in Germany, Canada, Israel, and South Africa see Kremnitzer, Steiner, and Lang (n 2). For the difference between the traditional proportionality test and the test applied in Colombia and Mexico see Luisa Conesa, 'The Tropicalization of Proportionality Balancing: The Colombian and Mexican Examples' (2008) Cornell Law School Inter-University Graduate Student Conference Papers 13 <https://scholarship.law.cornell.edu/lps_clacp/13> accessed 29 Aug 2022. For the difference between the traditional proportionality test and the test in Australia see Anne Carter, 'Proportionality in Australian Constitutional Law: Towards Transnationalism' (2016) 76 Heidelberg Journal of International Law 951.

[5] Kai Möller, 'Proportionality: Challenging the Critics' (2012) 10 International Journal of Constitutional Law 709, 711–716.

[6] ibid.

[7] Grimm (n 1) 397; 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; Mattias Kumm, 'Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice' (2004) 2 International Journal of Constitutional Law 574, 579; David M Beatty, *The Ultimate Rule of Law* (Oxford University Press 2004) 169–200; Matthias Klatt and Moritz Meister, *The Constitutional Structure of Proportionality* (Oxford University Press 2012) 49–51, 68–70, 72–73; Kai Möller, '"Balancing as Reasoning" and the Problems of Legally Unaided Adjudication: A Rejoinder to Francisco Urbina' (2014) 12 International Journal of Constitutional Law 222; Möller, 'Proportionality: Challenging the Critics' (n 5) 727.

[8] Cohen-Eliya and others, 'Proportionality and the Culture of Justification' (2011) 59 American Journal of Comparative Law 463; Etienne Mureinik, 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 South African Journal of Human Rights 31, 32. Under a culture of authority, a measure is legitimate if carried by those who have the authority to exercise power. Thus, under a culture of authority a procedural justification, such as the measure was passed by a democratically elected legislature or is linked to values set in the constitution, are sufficient. However, under a culture of justification, these justifications based on authority are only the starting point; rather, the measure must be justified based on more substantive reasons which demonstrate the rationality, necessity, and reasonableness of the measure.

above mentioned, and the benefits offered by this standard over the other standards of review, such as the reasonability test.[9] However, there has been little to no attention given to a question of equal, if not greater significance: is this four-stage design of proportionality itself replete with flaws?[10] In other words, there is an urgent need to ensure that this four-stage test is not immune from scrutiny and to begin a conversation about how the proportionality test ought to be best conceived of, and applied by, the Indian courts. One of the major criticisms of the traditional test is that the stage of 'balancing' carries the predominant weight, and the other three stages are, at most, examined in a perfunctory manner.[11] This is concerning as it limits the justificatory potential of other stages, and the stage of balancing has consistently provoked strong criticisms. This is because of the test's design and how courts examine it. This flaw, as will be discussed in-depth in Section II.B, limits the ability of the test to promote public reasoning and reduces the rigour of the test. Overall, such constraints of the test strongly undermine the proposal that this four-stage conception furthers the contemporary culture of justification.[12]

The pressing need to address the major criticisms levelled against this four-stage conception and to ensure that the test remains a valuable judicial tool necessitate this paper.[13] This paper attempts to provide meaningful insights into how the Indian SC should structure and apply the test in constitutional law. As this paper will focus on the theoretical conception of the test, it does not aim to provide a comprehensive account of how the standard of proportionality should operate in India. It will therefore not, for example, address any issues about the degree of deference and evidentiary standard that should be applied when adjudicating

[9] Chintan Chandrachud, 'Proportionality, Judicial Reasoning, and the Indian Supreme Court' (2017) 1 Anti-Discrimination Law Review 87; Abhinav Chandrachud, 'Wednesbury Reformulated: Proportionality and the Supreme Court of India' (2013) 13 Oxford University Commonwealth Law Journal 191; Vikram Aditya Narayan and Jahnavi Sindhu 'A Historical Argument for Proportionality Under the Indian Constitution' (2018) 2 Indian Law Review 51; Aparna Chandra, 'Proportionality in India: A Bridge to Nowhere?' (2020) 3 Oxford Human Rights Journal 56; Kremnitzer, Steiner, and Lang (n 2); Mariyam Kamil, 'Right to Privacy in India: Existence, Scope and Challenges' (DPhil Thesis, University of Oxford 2019) ch 6; Mariyam Kamil, 'Puttaswamy: Jury Still Out on Some Privacy Concerns?' (2017) 1 Indian Law Review 190, 197–201; Mariyam Kamil, 'The Aadhaar Judgment and the Constitution – II: On Proportionality' (*Indian Constitutional Law and Philosophy*, 30 Sept 2018) <https://indconlawphil.wordpress.com/2018/09/30/the-aadhaar-judgment-and-the-constitution-ii-on-proportionality-guest-post/> accessed 29 Aug 2022.

[10] The only work in the Indian context to my knowledge that touches upon this issue is by Duara, who argues for the adoption of the standard of proportionality for cases involving gender equality. The issue of how the test should be applied is discussed in brief. However, there is an absence of a comprehensive and systemic discussion on how the standard should be designed and applied. See Juliette G Duara, *Gender Justice and Proportionality in India Comparative Perspectives* (Routledge Advance in South Asian Studies 2018).

[11] Kremnitzer, Steiner, and Lang (n 2) 44–48, 103–11; Niels Petersen, *Proportionality and Judicial Activism Fundamental Rights Adjudication in Canada, Germany, and South Africa* (Cambridge University Press 2017) 83–98; Lazarus (n 2) 50; Grimm (n 1) 393; Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights? A Rejoinder to Madhav Khosla' (2010) 8 International Journal of Constitutional Law 307, 308; Aharon Barak, *Proportionality Constitutional Rights and their Limitations* (Cambridge University Press 2012) 339.

[12] Kremnitzer, Steiner, and Lang (n 2).

[13] Lazarus (n 2).

cases using the proportionality test, or under which exact provisions of the Constitution the proportionality test should serve as a standard of review.

In pursuing these aims, this paper also relies upon the jurisprudence of the apex courts of Germany, Canada, South Africa, and Israel. The lessons that may be learnt from these jurisdictions about the four-stage test have immense value, given that their courts have considered the test as a central adjudicatory tool.[14]

Section II explains the major faults with the theoretical design of the traditional proportionality test and its application in practice. The section first briefly explains how the traditional proportionality test is designed and the reasons offered by the advocates of this test for its support. Then, it will discuss why under the traditional test the first three stages are marginalised and the key issues with the stage of balancing carrying the predominant weight. Based on this discussion it is argued that proportionality should be designed and applied in a manner that maximises the potential of each stage, instead of marginalising any stage, to ensure that no one stage carries the predominant weight of the test.

Sections III to VI examine how adjudication should be conducted at the stages of legitimate aim, suitability, necessity, and proportionality *stricto sensu* respectively, and how these stages can be redesigned. Section III analyses two proposals for the stage of legitimate aim. The first one urges courts to require states to offer concretely defined goals; the second urges courts to examine both the objective and the subjective purpose of the state's measure. Section IV presents four proposals for the stage of suitability: first, regarding the nature of analysis the courts ought to perform at this stage; second, requiring the state to examine the measures' rational connection with the stated goals both *ex ante* and *ex post*; third, to examine the counter-productiveness of a particular measure; finally, whether the state's measure goes overboard. Section V focuses on the stage of necessity. I argue for the rejection of both the traditional proportionality test and the Blitchz standard. Thereafter, I discuss an alternative that addresses the key problems with both the standards. Section VI explains how Indian courts should adjudicate at the stage of proportionality *stricto sensu*. Moreover, it argues for the rejection of the concept of balancing adopted by the Indian SC in *Puttaswamy II*. Section VII offers concluding thoughts.

II. Examining the Drawback the Drawbacks of the Traditional Proportionality Test

The traditional proportionality test is a structured four-tier test which requires the state to sequentially meet each stage for a measure to be considered legitimate. The four stages are as follows.

[14] Kremnitzer, Steiner, and Lang (n 2); Petersen (n 11); Grimm (n 1).

The first stage is that of a 'legitimate aim'. The state's measure ought to follow a legitimate purpose.[15] This stage serves two purposes: first, it acts as a gatekeeper and weeds out state measures that follow unworthy purposes,[16] as it is critical in a constitutional democracy that rights should only be limited for constitutionally legitimate reasons.[17] Second, the test assists judges in analysing the latter stages by defining the state's goal.[18]

The second stage is 'suitability'. At this stage, we determine whether the state's measure has a rational connection with the declared worthy purpose[19]—in other words, if it can promote that goal. The point of this stage is to establish if the legitimate goal and the right in question clash.[20] If the means contribute to the achievement of the end goal, then there is a conflict between the goal and the right.[21] Conflict necessitates that one value will only be realised at the cost of the other.[22] But, if the means in question do not forward the worthy purpose at all, then there is no clash, and such a measure must fail the test.[23]

The third stage is 'necessity'. The necessity limb requires that amongst two means that can promote the state's aim to the same extent, the one that is less intrusive should be chosen.[24] This involves evaluating the effectiveness of the means in achieving the purported purpose and a relative evaluation of the degree of infringement of the rights in question by the different means.[25] The design of the necessity test is meant to ensure that any infringement of Principle 1 is only allowed strictly to the extent it is necessary to realise another vital competing Principle 2.[26] This can only be met if the least restrictive means that equally realises Principle 2 is adopted.[27] This stage helps a judge understand the scope of the policy, the level of impact of the measure on the right, and the effectiveness of the measure in achieving the State's goal. This information can provide the factual basis for conducting the balancing exercise.

The fourth stage is the balancing exercise, or what is often known as 'proportionality *stricto sensu*'. This stage determines 'whether the interference with the right is justified in light of the gain in the protection for the competing right or interest. To this end, the two values have to be 'balanced' against each other.'[28] The balancing stage is 'particularly well suited, should be tying together the analyses conducted in the previous subtests, while clearly expressing the constitutional

[15] Möller, 'Proportionality: Challenging the Critics' (n 5) 711–12; Barak (n 11) 245–46.
[16] Kremnitzer, Steiner, and Lang (n 2) 565.
[17] Kremnitzer, Steiner, and Lang (n 2) 565; Barak (n 11) 245–246.
[18] Kremnitzer, Steiner, and Lang (n 2) 565.
[19] Barak (n 11) 303.
[20] Möller, 'Proportionality: Challenging the Critics' (n 5) 713.
[21] ibid.
[22] ibid.
[23] ibid.
[24] Barak (n 11) 317–18.
[25] ibid.
[26] Lazarus (n 2) 43–44.
[27] ibid.
[28] Möller, 'Proportionality: Challenging the Critics' (n 5) 715.

values that guide the decision and the balancing considerations that lie at its foundation'.[29]

As noted above, the advocates of this test link it to a culture of justification, public reason-giving, structured reasoning, and substantive reasoning.[30] For instance, Möller explains how the test promotes structured reasoning by allowing judges to be analytical, by breaking one complex question into four relevant subquestions that can be analysed separately.[31] In a similar vein, Grimm notes that the structured nature of the test can have a disciplining and rationalising effect on the judicial decision-making process by requiring the Court to examine the state's measure stage-wise sequentially.[32] Kumm, on the other hand, credits the proportionality test with the promotion of reason-giving and transparency, arguing that proportionality is akin to the Socratic contestation method where the public authority has to justify its actions at each step by providing a public reason.[33] This proposition, however, is only attractive at first blush, because the potential of the traditional proportionality test is limited due to its design and application. This is because in the final stage proportionality *stricto sensu* carries the predominant portion of the weight and other stages are examined in a perfunctory manner.[34] This turns proportionality from a four-stage test to a balancing-centred test. This is concerning for two reasons: first, it severely limits the justificatory potential of the other stages, which can make a meaningful contribution to the test; and second, balancing as an exercise has certain theoretical issues which entail that the weight it carries should be limited in the test.[35] In this light, this section will first explain why the stages other than *stricto sensu* balancing are examined in a perfunctory manner and how this limits their justificatory potential (Section II.A), and second, it will explain the issues with the balancing stage carrying the major weight in the test (Section II.B).

[29] Kremnitzer, Steiner, and Lang (n 2) 590.

[30] Grimm (n 1) 397; Kumm (n 7); Mattias (n 7); Beatty (n 7); Klatt (n 7); Möller, 'Proportionality: Challenging the Critics' (n 5) 727; Möller, 'Balancing as Reasoning' (n 7); Cohen-Eliya (n 8).

[31] Möller, 'Proportionality: Challenging the Critics' (n 5) 727; Möller, 'Balancing as Reasoning' (n 7).

[32] Grimm (n 1) 397.

[33] Kumm (n 7).

[34] Kremnitzer, Steiner, and Lang (n 2) 44–48, 103–11; Petersen (n 11) 83–98; Lazarus (n 2) 50; Grimm (n 1) 393; Barak (n 11) 339.

[35] Concerns regarding it range from that it requires quantitatively balancing incommensurable values ('incommensurability objection'), that it results in ad hoc and impressionistic balancing and decision making ('ad hoc balancing objection'), and finally, that the stage allows the court to second-guess legislative choices ('separation of power objection'). See Francisco J Urbina, *A Critique of Proportionality and Balancing* (Cambridge University Press 2017); Francisco J Urbina, 'Is it Really That Easy? A Critique of Proportionality and "Balancing as Reasoning"' (2015) 27 Canadian Journal of Law & Jurisprudence 167; Petersen (n 11) ch 2; Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7 International Journal of Constitutional Law 468; Lazarus (n 2); Matthias Klatt and Moritz Meister, 'Proportionality—A Benefit to Human Rights? Remarks on the I·CON Controversy' (2012) 10 International Journal of Constitutional Law 687; Möller, 'Proportionality: Challenging the Critics' (n 5).

A. Marginalisation of the legitimate aim, sustainability, and necessity stages

(i) Legitimate Aim and Suitability

In mainstream literature, the first and the second stages of legitimate aim and suitability respectively are described and merely treated as threshold stages that the state can easily pass.[36] However, this does not have to be a *fait accompli* as these stages can be examined in a manner that maximises their potential by requiring the state to offer a more cogent justification. This examination can set the stage for, and even enrich the analysis at the later stages.[37] For instance, at the stage of suitability, the main inquiry is whether the measure at hand is rationally connected to the state's legitimate goal. This does not, however, tell us anything about the nature of the rational connection vis-à-vis the measure and the goal. There is a need to go beyond a mere 'means and ends' analysis to an analysis of any value-based addition offered by the state's measure.[38] We should expand the scope of our inquiry and ask, for example, to what extent the measure furthers the state's aim, whether it has a real or an illusory contribution to its purported goals, or whether the state's measure can have any parallel counter effects which would hinder its achievement of its goals.[39] By conducting inquiries like these, amongst others, the court will not only compel the state to offer more substantive reasoning for its actions at this stage, but will also assist itself in understanding the design of the state's measure and its potential to fulfil the legitimate purpose.[40] These insights will be crucial for finding suitable alternatives at the stage of necessity. Furthermore, understanding the impact and the design of the measure will help create a factual context to guide the balancing process.

Similarly, the legitimate aim stage can be examined to maximise its potential to meet the two above-mentioned purposes—to weed out unworthy goals and to set the tone for the latter stages. This can be done by requiring the state to provide concrete and well-defined goals, instead of vague or abstract goals, and by examining both the state's objective and subjective purpose.[41] These inquiries will root out any disguised unworthy goals, and having a well-defined goal will help the court in examining the other stages as well.[42] To offer an example, having a

[36] Lazarus (n 2) 91; Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights? A Rejoinder to Madhav Khosla' (2010) 8 International Journal of Constitutional Law 307, 308; Stone Sweet and Mathews (n 1) 76; Barak (n 10) 246–47, 315–17; Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 Cambridge Law Journal 174, 195–98.

[37] Kremnitzer, Steiner, and Lang (n 2) 564–568, 573–576; Mordechai Kremnitzer, 'Constitutional Proportionality: (Appropriate) Guidelines?' in Gideon Sapir, Daphne Barak-Erez, and Aharon Barak (eds), *Israeli Constitutional Law in the Making* (Hart Publishing, 2013).

[38] Kremnitzer, Steiner, and Lang (n 2) 574.

[39] ibid 574–75.

[40] ibid.

[41] ibid 567.

[42] ibid.

concrete goal will help the court at the stage of suitability, where it has to determine if the impugned measure adopted by the state contributes to the realisation of the purported worthy purpose.[43] If the goal is generalised, it is more difficult to decide if the measure contributes to the goal.[44] For instance, consider a situation where the state cites national security or a threat of terrorism as a reason for a limitation without explaining the exact interest or threat that necessitated the measure. In this case, without understanding the exact goal of the state, it would be difficult to evaluate whether, and if so to what extent, the state measure contributes to the realisation of the aim. I will carry out a more in-depth analysis of how these two stages can be reformed in Sections III and IV, but it is evident from this discussion that these stages do not have to be merely threshold stages. If examined well, they can carry more weight in the test, and they can augment the quality of reasoning at the rest of the stages, thereby further promoting the culture of justification.

(ii) Necessity

Moving on to the third limb of the test, the work of Blitchz demonstrates that the stage of necessity is otiose under the traditional proportionality test because it is exceedingly difficult to find an alternative that would achieve the state's goals to the same extent.[45] This limitation, he rightly points out, significantly weakens the test.[46] In Germany, where the traditional proportionality test is followed at the necessity stage, empirical data supports Blitchz's assertion about necessity becoming otiose and highlights the dominance of the final stage of the test. In 84% of the reviewed cases, the impugned measure failed at the fourth stage, and it was only in 14% of the cases that the measure failed at the necessity stage.[47] Further, in 44% of the cases, the German Federal Constitutional Court ('German FCC') either skipped the necessity standard entirely or only glanced over it briefly.[48] Overall, the traditional proportionality test makes it difficult for the courts to find a viable alternative measure, making it virtually impossible for a measure to fail at this stage unless the court deviates from the set standard. Indeed, in certain cases where the state's measure failed at the stage of necessity, it was because the German FCC deviated from the traditional test of necessity.[49] All this shows is that the potential of the necessity stage to promote a culture of justification is rather limited because of the way it has generally been applied. Moreover, the rigour of the current test is limited, as the current design of the traditional necessity test works in a way that the most intrusive options—such as a blanket ban—would pass the test

[43] ibid.
[44] ibid.
[45] Lazarus (n 2) 42.
[46] ibid 49–51.
[47] Kremnitzer, Steiner, and Lang (n 2) 44, 580–81; Petersen (n 11) 84–98.
[48] Kremnitzer, Steiner, and Lang (n 2) 46–47.
[49] ibid 581.

because the state gets to determine the level of protection desired, and, by extension, the means necessary to achieve that level of protection. Consequently, the courts are led to endorse the most intrusive options, such as a blanket ban, because it would likely be the most effective option to achieve the level of protection desired. This issue is best highlighted by the *Adalah* decision of the Israeli Supreme Court.[50] In this case, the Israeli government had imposed a blanket ban on the unification of families where one spouse was an Israeli and the other was residing in the West Bank or the Gaza Strip. The Israeli Supreme Court found that this measure passed the necessity test because less intrusive targeted measures would not have been as effective.[51] Finally, the culture of justification is undermined as the data from Germany indicates that once it is shown that the traditional necessity stage cannot be met, examining it merely becomes a mechanical ritual for the court, entailing that it is thereby marginalised.[52] This takes the burden away from the executive and legislature to put in the effort to come up with and evaluate possible alternatives as part of their decision-making process.

B. Issues with marginalising these stages

As discussed above, because of how the test is designed and applied in practice, the last stage (balancing) carries the predominant weight in the test. This raises three concerns. First, marginalising the first three stages can impact the quality of reasoning at the stage of balancing itself, as all stages feed into the last stage, as noted above. If the other stages are examined well, the insights from those stages can help a judge gain a concrete understanding of the two competing interests in question and the relevant factors that must go into the balancing process.

Second, the balancing exercise is complex and an arduous process as it requires the balancing of potentially incommensurable constitutional values.[53] The relative worth of these values may not be capable of measurement on a set scale.[54] Assessing the competing interests of (for example) privacy and national security, the process is like comparing the length of lines to the weight of stones. Because of this issue of incommensurability, balancing cannot be carried out by quantifying

[50] HCJ 7052/03 *Adalah Legal Centre for Arab Minority Rights v Minister of Interior* [2006] IsrSC 61(2) (Israeli High Court of Justice) 2022; HCJ 8091/14 *Centre for the Defence of the Individual v Minister of Defence* (Israeli High Court of Justice, 31 December 2014, Israeli High Court of Justice), available in English at <http://versa.cardozo.yu.edu/opinions/hamoked-center-defense-individual-v-minister-defense> accessed 30 Aug 2022.

[51] *Adalah Legal Centre* (n 50) [89].

[52] Kremnitzer, Steiner, and Lang (n 2) 588.

[53] Möller, 'Proportionality: Challenging the Critics' (n 5) 719–24, 727–30; Francisco J Urbina, *A Critique of Proportionality and Balancing* (Cambridge University Press 2017) 172–75; Petersen (n 11) 40–49; Klatt (n 7) 58–64.

[54] *Bendix Autolite v Midwesco Enterprises* 486 US 888 (1988). Judge Scalia in his dictum asserted that balancing competing constitutional values is like evaluating 'whether a particular line is longer than a particular rock is heavy'.

constitutional values, as some have suggested.[55] Instead, these values can only be balanced by fashioning normative moral arguments to decide which of the values should triumph over the other in light of the circumstances of the case.[56] Even proponents of the test agree that the structure of the proportionality test provides no comprehensible guidance to aid this process.[57] This is what inspires the 'impressionistic' balancing objection, according to which under the test, no rational standards or considerations are placed that would guide how the balancing would be conducted.[58] Möller, one of the most ardent supporters of the test, agrees with this objection and explains that as a matter of moral reasoning, why a value should triumph over another can only be satisfactorily answered by creating a general and substantive moral theory of balancing that would guide this determination.[59] In the absence of a general account or a theory of rights, Möller explains that 'all of us, including judges, have no choice but to rely to some extent on our intuitions when striking a balance between a right and a competing value'.[60] Therefore, one can at the minimum conclude that the process of balancing is complex. It is inherently subjective, and it may be influenced by the value preferences of the judge and the times.[61]

In the Indian context, the Indian SC has never provided a general account of a right or substantive moral theory of balancing that would help guide the process of conducting the proportionality analysis. The judgment of the Indian SC in *Bachan Singh v State of Punjab* illustrates this point clearly. In this case, the Indian SC held that in deciding whether to impose the death penalty, a balancing exercise considering the mitigating and aggravating circumstances was to be followed.[62] However, in subsequent cases, many benches of the SC have come to different conclusions in similar circumstances, and its jurisprudence has been termed inconsistent and arbitrary.[63] This inconsistency in the process of balancing, it is argued, arises out of the difference in the value preferences of the judges adjudicating these cases.[64] In contrast to balancing, the other stages of the traditional

[55] ibid.
[56] Möller, 'Proportionality: Challenging the Critics' (n 5) 722; Urbina (n 35) 176–179.
[57] Möller, 'Balancing as Reasoning' (n 7) 223.
[58] Tsakyrakis (n 35) 482; Grégoire Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge University Press 2009) 89; Lazarus (n 2) 70–71.
[59] Möller, 'Proportionality: Challenging the Critics' (n 5) 728–29.
[60] ibid 728.
[61] *State of Rajasthan v Union of India* (1977) 3 SCC 592, 648: 'it is an accepted fact of constitutional interpretation that the content of justiciability changes according to how the Judge's value preferences respond to the multi-dimensional problems of the day' (Chandrachud J).
[62] *Bachan Singh v State of Punjab* AIR 1980 SC 898.
[63] Law Commission of India, 'The Death Penalty' (Report No 262, Aug 2015) <https://lawcommissionofindia.nic.in/reports/report262.pdf> accessed 29 Aug 2022; Preeti Pratishruti Dash, Neetika Vishwanath, and Anup Surendranath, 'The Enduring Gaps and Errors in Capital Sentencing in India' (*Project 39a*, September 2020) <https://www.project39a.com/op-eds/the-enduring-gaps-and-errors-in-capital-sentencing-in-india> accessed 29 Aug 2022.
[64] Law Commission of India (n 63); *Bachan Singh v State of Punjab* AIR 1980 SC 898 (Dissent J Bhagwati) [73], [76].

proportionality test are more limited and clinical in scope and are often more objective. Consequently, placing more reliance on other stages of the test will ensure that the adjudicatory process carried out by the Indian courts is more foreseeable, predictable, and consistent.

Third, in placing predominant weight on the stage of balancing, the traditional proportionality test creates an issue of separation of powers.[65] The stage of balancing allows the court to reassess and impose its considerations over the political choices made by an elected body which is supposedly better suited to understand public preferences.[66] As discussed above, judges may, while carrying out balancing, decide cases based on their value preferences and intuitions.[67] Replacing decisions made by elected leaders with a judge's personal value preferences is even more unsettling.[68] The separation of powers objection can be tempered if the balancing stage did not carry the predominant weight and if other stages, which do not raise the same concerns as balancing, carried greater weight in the test. Unlike balancing, the other stages of the test do not re-examine the balance reached by the legislature between different values. A legitimate aim and suitability are only established if the state's purpose is valid and if the measure advances the state's alleged goals. Similarly, the stage of necessity only questions whether the state could have achieved the same goal by an alternative, less intrusive means. It questions the design and the choice of the measure, and not the wisdom of the measure adopted by the legislature itself.

C. Conclusion: foundational guiding principles for redesigning the traditional proportionality test

Two insights emerge from the foregoing discussion: first, the traditional proportionality test marginalises all stages before balancing; and second, the balancing exercise raises a range of serious theoretical issues. These issues directly put into doubt the alleged potential of the traditional four-stage proportionality test to promote a culture of justification and substantive reasoning. There is, accordingly, an urgent need for the traditional proportionality test to be redesigned in a manner that would address or mitigate these concerns, given the prominence of the test in rights adjudication. In line with the work of Kremnitzer, Steiner, and Lang, the test should be designed and applied with an approach that maximises the potential of each stage instead of marginalising any stage, so to ensure that no one stage carries the predominant weight in the test.[69] Maximising the potential of

[65] Lazarus (n 2) 68–69; Tsakyrakis (n 35) 470; Klatt (n 7) 75–77; T Alexander Aleinikoff, 'Constitutional Law in the Age of Balancing' (1987) 96 Yale Law Journal 943, 984–86; Norman Siebrasse, 'The Oakes Test: An Old Ghost Impending Bold New Initiatives' (1991) 23 Ottawa Law Review 99, 107.
[66] ibid.
[67] ibid.
[68] ibid.
[69] Kremnitzer, Steiner, and Lang (n 2) 588.

each stage is important as each stage has unique contributions to make, contributions that are also critical for the analysis at the later stages.[70] That said, I do not advocate for the removal of the balancing stage, as some authors do. Rather, my only objection is with it carrying the predominant weight. The balancing process should be conducted as a last resort, to reject infringements that pass other stages of the test. The ability of the balancing process to do so is what makes the proportionality test a more rigorous standard of review than others—such as the 'strict scrutiny' standard—at times.[71] In a liberal constitutional democracy like India, the position given to fundamental rights should be paramount, and therefore the balancing exercise should be conducted despite the concerns raised. As is discussed further in Section VI, the balancing exercise can be conducted in such a manner as to address certain criticisms raised against it.

In the sections that follow, I will explain how the proportionality standard can be modelled along the lines of the broad design principles laid out above. The standard proposed below is one that would require the state to offer better justifications, and it will be stricter than the traditional proportionality test, thereby offering greater protection to fundamental rights.

III. Legitimate Aim

Under the traditional proportionality test, at this stage, the state's measure should have a legitimate purpose.[72] The Indian Constitution does not explicitly list legitimate goals under each article. For instance, under articles 14 and 21, the Constitution's text does not express legitimate goals; rather, they have been read via judicial practice, and legitimate aims have only been listed for article 19.[73]

Chandra's empirical work on the standard of review used by the Indian SC has found that the Indian SC almost always engages in the analysis of valid purpose and that this sets the stage for subsequent analysis.[74] As Chandra notes, '[t]he general balancing stage, in particular, draws heavily on the purpose inquiry, since the purpose inquiry clarifies the interests that the state is pursuing' and if a state fails to demonstrate that its measure pursues a proper aim it will probably fail.[75] Even

[70] ibid.

[71] Kamil, 'Right to Privacy in India: Existence, Scope and Challenges' (n 9); Kamil, 'The Aadhaar Judgment and the Constitution – II: On Proportionality' (n 9). ('As part of strict scrutiny, the Court answers the following two questions: 1) Is the State pursuing a 'compelling' State aim? 2) Is the State pursuing the least intrusive means of achieving its compelling objective?').

[72] Möller, 'Proportionality: Challenging the Critics' (n 5) 711–712; Barak (n 11) 245–246.

[73] Kremnitzer, Steiner, and Lang (n 2) 471.

[74] ibid 505.

[75] ibid.

recent cases that have dealt with the structured test of proportionality have included legitimate purpose as part of their test.[76]

Under extant literature, the legitimate purpose stage, as well as the suitability stage, are understood to be threshold stages that are easily passed and that have a limited contribution to make to the determination of the outcome of the proportionality analysis.[77] This is reflected even in the practice of states such as Canada, Israel, and Germany.[78] It is posited, however, that these elements of the test should not be marginalised. Rather, the unique contribution of these stages of the test (which is detailed in Section II.A) need to be maximised. If examined well, these two stages can set the tone for the rest of the analysis. For making this stage more robust and to maximise its potential, two proposals for Indian courts are provided below.

A. CONCRETELY DEFINED GOAL

Courts should ensure that the legitimate aim offered is well-defined in the sense that it is concrete and specific instead of being general, abstract, or vague.[79] In line with this, the UN Special Rapporteur Frank LaRue has noted the need for clear and precise grounds for limitations rather than 'vague and unspecified' grounds, such as broadly defined terms like 'national security' and 'terrorism'.[80] This is because broad, undefined terms might be used by the state to justify targeting vulnerable groups such as human rights defenders, journalists, or activists.[81] The concerns raised by the Special Rapporteur are exemplified in India's anti-terrorism law, the Unlawful Activities Prevention Act, 1967 (UAPA).[82] For instance, in section 15, the Act defines terrorism broadly: it does not, as best practice would dictate, limit the section to acts carried out intentionally; nor does it limit the section to certain kinds of acts. Rather, it loosely proclaims that 'acts' that threaten or are 'likely to threaten' India's unity, integrity, sovereignty, security, or economic security can be punished as terrorism.[83] Along with this, section 18 punishes not only 'inciting or conspiring the commission' of these vaguely defined terrorist acts, but goes as far as to punish people for the preparation of a

[76] Chandra (n 9); *Central Public Information Officer, Supreme Court of India v Subhash Chandra Agarwal* (2019) 8 MLJ 222 (SC) [42], [131]; *Joseph Shine v Union of India* (2019) 3 SCC 39 [279]; *Anuradha Bhasin v Union of India* (2020) 3 SCC 637 [78]–[80]; *Internet and Mobile Association of India v Reserve Bank of India* (2020) 10 SCC 274 [272]; *Akshay N Patel v Reserve Bank of India* (2022) 3 SCC 694 [32].

[77] Lazarus (n 2); Tsakyrakis (n 36); Stone Sweet and Mathews (n 1); Barak (n 10); Rivers (n 36).

[78] Kremnitzer, Steiner, and Lang (n 2) 557, 564.

[79] Kremnitzer, Steiner, and Lang (n 2) 567; Kremnitzer (n 37) 229.

[80] Frank La Rue, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (Report 23rd Session, 17 April 2013) A/HRC/23/40 <https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/23/40> accessed 30 Aug 2022, para 58.

[81] ibid [60].

[82] Abhinav Sekhri, 'How the UAPA Repackages Ideas as Crimes' (*Article 14*, 21 April 2020) <https://www.article-14.com/post/how-the-uapa-repackages-ideas-as-crimes> accessed 29 Aug 2022.

[83] ibid.

crime. These overly broad provisions cast the net very wide: they can punish even harmless conduct.[84] For instance, the charge sheet against Sharjeel Imam, an activist, primarily relied on his possession of 'radical' literature (such as Leo Tolstoy's *War and Peace* and Christophe Jaffrelot's *Hindu Nationalism*) and his thesis as evidence for the UAPA charge.[85] Given these issues, amongst others, the UAPA has been regularly abused.[86] There is therefore a critical need to ensure that the state justifies its measures by demonstrating in a specific and individualised fashion the precise nature of the threat by offering concrete goals to limit the possibility of abuse.

Indeed, transparency will be promoted if the state offers concrete goals, as this makes it easier for courts to determine the sincerity of the state's goal; conversely, it is often easier for a state to pursue unworthy goals under the disguise of a generalised and broad valid goal.[87] Moreover, having well-defined goals can also help us understand the relative importance of that goal by a comparative analysis of other values at stake.

Further, having a concrete goal is important for the meaningful analysis of the measure at the latter stages of the traditional four-stage test. For instance, at the stage of suitability, the issue becomes whether the specific restriction adopted by the state or the means in question contribute to the realisation of the goal.[88] It is difficult to determine whether, and if so to what extent, certain means contribute towards a generalised goal, as explained in Section II.A. At the stage of necessity, the judge has to determine if the restriction over a right is more than necessary to realise the legitimate goal pursued by the state.[89] This evaluation, which is clinical in nature, is not possible until the goal at hand is specified. How can alternatives that would achieve the state's aim to the same extent be evaluated when the exact aim of the state is unclear? Likewise, at the stage of balancing (the fourth stage), the two values at hand need to be balanced in light of the concrete circumstances of the case.[90] Again, courts would likely be disabled from carrying out this balancing well if one of the values that need to be compared is left amorphous. The key point here is the concrete and detailed circumstances of the case must be considered. In the absence of such circumstances, impressionistic balancing could result. Therefore, I posit that courts ought to ensure the state's goal in question is concretely defined.

[84] ibid.
[85] Bismee Taskin, 'The Books Used as Evidence for Sedition Charges Against Sharjeel Imam, Akhil Gogoi & Others' (*The Print*, 27 September 2020) <https://theprint.in/india/the-books-used-as-evidence-for-sedition-charges-against-sharjeel-imam-akhil-gogoi-others/510728/> accessed 21 January 2013.
[86] Abhinav Sekhri, 'How the UAPA is Perverting the Idea of Justice' (*Article 14*, 16 July 2020) <https://article-14.com/post/how-the-uapa-is-perverting-india-s-justice-system> accessed 29 August 2022.
[87] Kremnitzer, Steiner, and Lang (n 2) 567; Kremnitzer (n 37) 229.
[88] Barak (n 11) 303.
[89] ibid 317–318.
[90] Möller, 'Proportionality: Challenging the Critics' (n 5) 715.

B. Objective and subjective prupose of a law

The objective purpose is the declared purpose of a law, and the subjective purpose of the law is determined by examining the motives of the lawmakers at the time of passing the law.[91] I argue that both the objective and the subjective purpose must be legitimate for a law to be valid and pass this stage.

The subjective test is important to ensure that legislators only pass a law with a proper purpose.[92] This test would help tackle a situation where the legislators have adopted a law that pursues an unworthy purpose, but they aim to disguise the law under the garb of a worthy purpose—facially content neutral laws, for example.[93] For instance, the Indian SC, in the *Anuj Garg* decision, struck down a piece of state legislation that banned women from working in any establishment in which liquor or other intoxicating substances were being consumed under the 'objective purpose' of ensuring the security of women.[94] A law such as the one in *Anuj Garg* should be struck down on the basis that the 'subjective purpose' of the law was antithetical to the idea of equality, as it victimised women by binding them to traditional cultural norms and stereotypes about morality and distinctions between the sexes under the garb of ensuring the security of women.[95]

IV. Suitability

Under the traditional proportionality test, at this stage, the means adopted by the state should have a rational connection to the state's legitimate purpose, or in other words, the means adopted should advance the purported purpose even if to a small extent.[96]

In relation to alleged violations of the right to equality, the Indian SC has a long history of applying the logic of the suitability test in the form of the 'rational nexus' standard, whereby the court has to determine whether the impugned measure indeed advances the stated purpose.[97] Even in cases involving the structured test of proportionality, suitability has constantly been part of the proposed model.[98] Chandra, in her empirical work on the standard of review adopted by the Indian SC, highlights how in almost all cases involving suitability the Indian SC decides if there is a rational nexus based on an abstract, logical connection and commonsensical reasoning rather than on concrete evidence.'[99] Accordingly, despite its

[91] Barak (n 11) 286–287.
[92] ibid 299–300.
[93] ibid.
[94] *Anuj Garg v Hotels Association of India* (2008) 3 SCC 1.
[95] ibid.
[96] Barak (n 11) 303.
[97] Kremnitzer, Steiner, and Lang (n 2) 518–519.
[98] Chandra (n 19); *Anuradha Bhasin v Union of India* (2020) 3 SCC 637 [78]–[80]; *Internet and Mobile Association of India v Reserve Bank of India* (2020) 10 SCC 274 [272]; *Akshay N Patel v Reserve Bank of India* (2022) 3 SCC 694 [32].
[99] Kremnitzer, Steiner, and Lang (n 2) 521.

strong theoretical underpinning, this stage imposes a low threshold for the state to pass in practice.

Interestingly, even with this low threshold, the government's measures often fail at this stage, thus indicating that the government does not pay sufficient attention to potential constitutional issues of particular measures.[100] Thus, in India, while the rational nexus test has contributed significantly to constitutional adjudication when the failure rate at this stage is examined; at the same time, this stage imposes a low threshold for the state, in part because the Indian SC often provides a high degree of deference to the state at this stage.[101]

The low level of the threshold and the scrutiny at this stage reflects how this stage is portrayed in the literature—namely as merely a threshold stage that is easily passed and has limited contribution to the determination of the outcome of the analysis.[102] The main purpose of the test at this stage, it is said, is to establish a relationship between means and ends. As noted in Section II.A, however, both the requirements of legitimate aim and suitability, if analysed well, can produce insights that could aid the courts in meaningfully conducting the proportionality analysis. I will now offer four ways to strengthen the suitability standard, which will also increase the possibility of a failure rate at the stage, thus furthering weight sharing between the stages.

A. Nature of analysis

The suitability stage should be used to determine whether there is a direct and not remote connection between the state's means and the concrete goals the court has identified at the first stage.[103] This stage should not be used as a mere analysis of means and ends.[104] Rather, the court should use this stage to understand the value-based addition of the state's measure to the goal.[105] A court should understand if, and to what extent, the state's measure can be effective to advance a specific and concrete goal and the factors upon which such effectiveness is dependent. The extent of the contribution of a measure should be decided on a case-to-case basis. However, this contribution should be real and not illusory.[106]

Evaluating the measure's contribution or effectiveness should allow for a more meaningful and value-based analysis. For instance, in the *Puttaswamy II* case, if the Indian SC had opted to engage with the effectiveness of the AADHAR

[100] ibid 523–524
[101] ibid 520–524
[102] Lazarus (n 2); Tsakyrakis (n 36); Stone Sweet and Mathews (n 1); Barak (n 10); Rivers (n 36).
[103] Kremnitzer, Steiner, and Lang (n 2) 754.
[104] ibid.
[105] ibid.
[106] The important question of whether the state's choice of means has to actually contribute to the goals, or whether they should have merely the potential for contribution is beyond the scope of this paper as it does not address the issue of the evidential standards regarding proportionality.

scheme in realising its alleged goals, there would have been a much more substantive discussion at the stage of suitability.[107] In that case, the Indian government had introduced the AADHAR scheme, which it alleged would aid the effective disbursement of government benefits by using a biometric authentication system, which would limit leakages from the system. The majority held that the AADHAR scheme passed the suitability analysis, and uncritically accepted the state's argument that the biometric authentication provided a unique identity that would eliminate any chance of duplication.[108] This argument, however, had been strongly contested by the petitioners, who provided evidence that under the AADHAR scheme, there was a large number of false positives and the possibility of a substantial failure rate, with the consequence that many people would not have access to benefits.[109] Had the majority in *Puttaswamy II* scrupulously examined the effectiveness of the AADHAR scheme, they would have had to engage with the evidence presented by the petitioners. After such an engagement, even if the measure did pass the stage, it would only have done so after significant examination, which would have required the state to offer more cogent reasons.

B. *EX ANTE* AND *EX POST*

Similar to observations that a law must have a legitimate aim at the time of its passing (*ex ante*) as well as throughout its lifetime (*ex post*), I postulate that the state's measure in question should have a rational connection with the specific goal in question throughout the entire time of its existence.[110]

The necessity of ensuring that the law is rationally connected to the goals *ex post* is highlighted by the case of *The Movement for Quality in Government* of the Israeli Supreme Court.[111] A mandatory draft was in effect imposed for everyone above 18 years of age in Israel. An exception was created for those students who devoted their lives to the study of the Torah (primarily the Haredi community). This law was aimed to encourage those students deferring military service to enlist in another form of national service or go into the workforce. This exception was challenged for violating the right to equality.[112] It was first examined three years

[107] Chandra (n 9) 77–78; Kamil, 'Right to Privacy in India: Existence, Scope and Challenges' (n 9); Anand Venkat, 'The Aadhaar Judgment and Reality – I: On Uniqueness' (*Indian Constitutional Law and Philosophy*, 27 September 2018) <https://indconlawphil.word press.com/2018/09/27/guest-post-the-aadhaar-judgment-and-reality-i-on-uniqueness/> accessed 30 Aug 2022; Anand Venkat, 'The Aadhaar Judgment and Reality – II: On Fallibility' (*Indian Constitutional Law and Philosophy*, 30 September 2018) <https://indconlawphil.wordpress.com/2018/09/30/the-aadhaar-judgment-and-reality-ii-on-fallibility/> accessed 30 Aug 2022.

[108] ibid.

[109] ibid.

[110] Barak (n 11) 312–315; Kremnitzer, Steiner, and Lang (n 2) 754.

[111] HCJ 6427/02 *The Movement for Quality Government v Knesset* [2006] IsrSC 61(1) 610 (Israeli High Court of Justice); also see David Ellenson, 'The Supreme Court, Yeshiva Students, and Military Conscription: Judicial Review, the Grunis Dissent, and its Implications for Israeli Democracy and Law' (2018) 23 Israel Studies 197.

[112] ibid.

after the legislature had passed it, and the Israeli Supreme Court held that the data highlighted the lack of rational connection between the means and the purported goal—to increase Haredi participation in the national service or the workforce.[113] The Court categorically held that when a measure is reviewed *ex post* such an 'examination should be done, in this context, not as a theoretical exercise but as a practical matter, tested by its actual results'.[114] Thus, an *ex post* review should be rooted in evidence about the effectiveness of the means.[115] The policy was not immediately struck down as the Israeli Supreme Court accepted the state's argument that a broader frame of reference was required for the effectiveness of the measure. Nevertheless, the second round of review was conducted 10 years after the measure was introduced, and this time the data again pointed to the lack of rational connection as there was no major change at the ground level and thus the exemption was struck down.[116] All this shows that if an *ex post* review is not conducted, even those measures that are ineffective or have no rational connection to the goal at hand may be treated as legitimate.

C. Overinclusive means

Third, at this stage, state measures that go overboard should be struck down. 'Overboard' here refers to those measures where it is possible to differentiate between the parts of the measure that further the legitimate goal and the parts of the measure that are not rationally connected to the goal and consequently, will not contribute to the achievement of the goal ('over-inclusive means'). In such circumstances, the parts of the measure that have no rational connection should be struck down. The rationale for this is that at this stage the means and the goal should be in conflict (so that further evaluation at the balancing stage is necessary), and when there is no connection, there is no conflict.[117]

An example of this approach is seen in the decision of the Court of Justice of the European Union in the *Digital Rights Ireland* case, where it struck down a directive that allowed for the blanket retention of data for the legitimate aim of combating 'serious crime'.[118] The Court struck down the overinclusive measure, noting that the blanket ban was 'an interference with the fundamental rights of practically the entire European population, including 'persons for whom there is no evidence capable of suggesting that their conduct might have a link, even an indirect or remote one, with serious crime'.[119]

[113] ibid.
[114] ibid 63–64.
[115] The question of whether the measure should have real or likelihood of effectiveness both at the stages of *ex post facto* review and *ex ante* review is beyond the scope of this paper.
[116] HCJ 1877/14 *The Movement for Quality Government v Knesset* (Israeli High Court of Justice, 12 September 2017).
[117] Möller, 'Proportionality: Challenging the Critics' (n 5) 713.
[118] Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources* EU:C:2014:238, [2015] QB 127.
[119] ibid paras 29–39.

An objection may be raised against this proposal, in that the issue of overinclusive means should be left to the necessity stage.[120] Of course, overinclusive measures can be struck down at the necessity stage. However, examining overinclusive means at the stage of suitability can provide this stage with more bite and can potentially increase the failure rate at the stage. It gives the suitability stage meaningful weight and incentivises courts to examine it properly. Conversely, when a single element is dominant in the proportionality analysis, courts tend to focus on that stage and conduct the analysis of other stages cursorily. Finally, for a court to decide if a measure is overboard, they would need to examine the design of the measure and the extent to which it meets the measure's goal, and this is evidently best done at the suitability stage. These insights are also valuable information that would help in the latter stages, as explained above.

D. Counterproductiveness

Fourth, courts should evaluate not only the effectiveness of the impugned measure, but also consider its counterproductiveness.[121] This requires judges to examine whether the rights-infringing measure has a parallel effect that could hinder the achievement of its declared goal.[122] A rational connection cannot merely concern the effectiveness of the state's measure to advance the declared goal. It should, rather, also try to determine if the measure is suitable in the sense that it would not have a counterproductive impact on the legitimate goal in question. The need is to shift from a means and ends analysis to a value-addition-based analysis.

Two examples illustrate this point: the S*tate of Maharashtra v Indian Hotels and Restaurants Association* decision of the Indian SC and the *Centre for the Defence of the Individual* decision of the Israeli Supreme Court. In both these cases, the state's measure had a counterproductive impact on the state's purported aim, and was therefore not rationally connected to the worthy purpose in question.

In *State of Maharashtra v Indian Hotels and Restaurants Association*, the Indian SC struck down a state law that barred dance performances in bars and restaurants.[123] The law was aimed at protecting women from exploitative and derogatory practices in the entertainment industry. The Court emphasised that the law had led to the unemployment of around 75,000 women, many of whom had to undertake sex work to sustain themselves.[124] In *Centre for the Defence of the Individual*, the Israeli Supreme Court highlighted that a decision to destroy the houses of innocent family members of terrorists, rather than having a deterrent effect, would

[120] Möller, 'Proportionality: Challenging the Critics' (n 5) 713; Barak (n 11) 335–337.
[121] Kremnitzer (n 37) 233.
[122] ibid.
[123] *State of Maharashtra v Indian Hotels and Restaurants Association* (2013) 8 SCC 519.
[124] ibid.

instead reaffirm any motivations to carry out acts of terror, thereby frustrating the very purpose of the measure.[125]

An objection may be raised against the introduction of the element of counterproductiveness at the stage of suitability, in that doing so could introduce balancing at the stage. The proponents of the traditional proportionality test may argue that balancing should be left for the last stage, and that an assessment of counterproductiveness would conflate the second and fourth stages, and indeed lead to the expansion of the proportionality *stricto sensu* stage (which I argued against in Section II above). It is, however, important to note that even though some form of balancing is being introduced at the stage of suitability under this proposal, the nature of this balancing is qualitatively different from the balancing carried out at the stage of proportionality *stricto sensu* and the difference means that they do not pose the same issues. Importantly, an evaluation of the trade-off between a value's positive and negative impact does not warrant the same criticism as the balancing of two competing incommensurable values. This is because the positive and negative impacts of a measure on a particular value can be assessed by reference to a single scale—that is, whether or not the value is enhanced. For instance, a conception of the right to privacy is itself sufficient for us to balance the potential positive and negative impact of a measure on the right in particular circumstances.[126] Therefore, the objection is unmerited and in fact, making the stage of suitability stricter would ensure that it carries more weight, in turn limiting the role of the proportionality *stricto sensu* stage.

V. Necessity

Under the traditional proportionality test, the necessity limb requires that the least intrusive option should be chosen amongst those that fulfil the state's objective to the same extent.[127] The Indian SC has not adopted a consistent understanding of the necessity element in its case law. It rarely applies the necessity element, and it seldom even examines if there are alternatives to the state's means because it is unwilling to second guess executive or/and legislative choices.[128] In cases where the necessity inquiry was carried out, different approaches have been taken in different judgments and by different judges. For instance, the majority in the *Puttaswamy II* case adopted Blitchz's understanding of necessity ('Blitchz standard'),[129] which is detailed below in Section V.A. On the other hand, in his dissent Justice Chandrachud adopted the necessity test as expressed in the traditional four-stage proportionality test.[130] In *Anuradha Bhasin v Union of India*, *Internet and*

[125] HCJ 8091/14 *Centre for the Defence of the Individual v Minister of Defence* (Israeli High Court of Justice, 31 December 2014).
[126] David E Pozen, 'Privacy-Privacy Tradeoffs' (2015) 83 University of Chicago Law Review 221.
[127] Barak (n 11) 317–18.
[128] Kremnitzer, Steiner, and Lang (n 2) 529–530.
[129] Kamil, 'Right to Privacy in India: Existence, Scope and Challenges' (n 9).
[130] *Justice KS Puttaswamy v Union of India* (2019) 1 SCC 1 (Chandrachud J) [653]ff.

Mobile Association of India v Reserve Bank of India and *Akshay N Patel v Reserve Bank of India*, the Court examined if there was an alternative, but it did not clarify to what extent an alternative had to achieve the state's aim.[131] Finally, in Justice Chandrachud's opinion in *Puttaswamy I*, which has been cited and followed in some cases, the necessity query was absent altogether.[132]

Thus, the primary need is for the Indian SC to adopt a clear and consistent understanding of this limb of the test. The standard that the courts adopt should be in line with the special value accorded to fundamental rights and should promote public reason-giving.

It is not suitable for the Indian courts to adopt the standard of necessity under the traditional proportionality test, for the reasons discussed in Section II.B. As argued above, the test of necessity is otiose under the traditional proportionality test as it is often very difficult to find alternatives that meet that state's aim to the same extent. This impacts the potential of the stage to promote reasons giving and reduces the rigour of the test. To address this issue raised by the necessity under the traditional proportionality test, Blitchz offers an alternative standard of necessity. This section first will explain why this alternative standard is also not the appropriate test for the Indian courts to apply. It then offers a third alternative that fixes the issues of the necessity stage under the traditional proportionality test and the Blitchz standard of necessity.

A. THE BLITCHZ STANDARD OF NECESSITY

According to Blitchz, there are four components (or limbs) of necessity under the traditional proportionality test, with this being a conception that should be reformed so to address the issues with the necessity stage.[133] The first limb is 'possibility', according to which the entire range of possible alternative measures which could achieve the government's objective had to be identified.[134] For Blitchz, this was not suitable at the stage of necessity as a wide range of measures, which may not even be practical, could be imagined.[135] Blitchz instead argues that at this stage, only those alternatives that are practically feasible need to be identified as a choice against the government's impugned measure.[136] The second limb is the instrumentality of identified alternatives, in that only those which are 'equally effective' in realising the state's objective should be retained for the purposes of comparison.[137] As explained in Section II.A , according to Blitchz, at the stage of

[131] *Anuradha Bhasin v Union of India* (2020) 3 SCC 637 [78]–[80]; *Internet and Mobile Association of India v Reserve Bank of India* (2020) 10 SCC 274 [272]; *Akshay N Patel v Reserve Bank of India* (2022) 3 SCC 694 [50].
[132] Chandra (n 9) 70–72; *Central Public Information Officer, Supreme Court of India v Subhash Chandra Agarwal* (2019) 8 MLJ 222 (SC) [42], [131]; *Joseph Shine v Union of India* (2019) 3 SCC 39 [279].
[133] Lazarus (n 2); Kamil, 'Right to Privacy in India: Existence, Scope and Challenges' (n 9).
[134] Lazarus (n 2) 51–53; Kamil, 'Right to Privacy in India: Existence, Scope and Challenges' (n 9).
[135] ibid.
[136] ibid.
[137] Lazarus (n 2) 51, 53–55; Kamil, 'Right to Privacy in India: Existence, Scope and Challenges' (n 9).

necessity, it is difficult for potential alternatives to be identified as it is difficult to find alternatives that meet the state's legitimate aim to the same extent. Blitchz notes that this problem can make the entire inquiry meaningless.[138] As an alternative, Blitchz proposes that at this stage concerning identified alternatives, only those alternatives that realise the government's aim in a 'real and substantial' manner are to be retained.[139] The third limb is impact.[140] Here, 'the differing impact upon fundamental rights of the measure and the alternatives identified' must be examined.[141] The final limb is the comparative component.[142] At this limb, building upon the findings of the second and the third limbs, the least restrictive measure that achieves the state's aim equally effectively should be selected. Blitchz argues that instead, at this stage the need is to select the 'best possible' alternative and this decision is to be made considering two factors: how the alternative realises the objective and its impact on fundamental rights.[143]

The major problem with the standard advanced by Blitchz is the design of the last limb of his model. At the last limb, the Blitchz model introduces balancing (which Blitchz agrees with) at the stage of necessity, yet doing so raises important theoretical issues as discussed in Section II.B.[144] The nature of the balancing that the Blitchz standard introduces is much closer to the stage of proportionality *stricto sensu* as it requires the degree of achievement and degree of impact to be balanced (these being the two factors one balances at proportionality *stricto sensu*).[145] This then raises an issue about the role of the stage of proportionality *stricto sensu*: when balancing is being carried out at the stage of necessity, then what is the scope and role of proportionality *stricto sensu*? The Blitchz standard, therefore, conflates the third and fourth stages of the traditional proportionality test.[146] Further, the standard is in direct conflict with the fourth stage of the test laid down by the Indian SC in the *Puttaswamy II* judgement, which is discussed further in the next section.[147]

Instead, I postulate that at the stage of necessity, the formulation provided by the Canadian Supreme Court in *Alberta v Hutterian Brethren of Wilson Company* should be followed. According to this approach, at the stage of necessity, any less restrictive alternative that achieves the state's aim to a 'real and substantial degree'

[138] ibid.
[139] ibid.
[140] Lazarus (n 2) 51, 55–56; Kamil, 'Right to Privacy in India: Existence, Scope and Challenges' (n 9).
[141] ibid.
[142] Lazarus (n 2) 51, 56–57; Kamil, 'Right to Privacy in India: Existence, Scope and Challenges' (n 9).
[143] ibid.
[144] Kamil, 'Right to Privacy in India: Existence, Scope and Challenges' (n 9).
[145] Lazarus (n 2) 56; Kamil, 'Right to Privacy in India: Existence, Scope and Challenges' (n 9).
[146] Kamil, 'Right to Privacy in India: Existence, Scope and Challenges' (n 9).
[147] ibid. For an alternative opinion see Lazarus (n 2); Petersen (n 11) ch 2.

should be adopted ('*Hutterian* model of necessity').[148] The *Hutterian* model of necessity would resolve the primary issues highlighted in the traditional proportionality test. Allowing those alternatives that achieve the state's aim to a substantial extent to be considered reduces the strictness of the necessity stage, and it would help operationalise the stage by making potential alternatives available for a court to examine.

Further, the *Hutterian* model of necessity offers two advantages over the Blitchz standard: it keeps the necessity and balancing stages separate and does not conflate them, and makes the test more rigorous. This is because the Blitchz standard does not require the least restrictive means that would achieve the state's objective in a real and substantial manner to be adopted in every case. Remodelling the necessity test in this way resolves the issue of the test being too weak by allowing real and meaningful alternatives to be considered. There are also other benefits of the necessity stage being robust, such as that meaningful engagement at this stage will provide insights that are critical for the balancing stage even if the measure passes the necessity stage. A robust necessity stage would allow the analytical burden of the proportionality test to be shared more equally between different stages and limit the role of the balancing stage. However, importantly, it does not completely devour the stage of balancing. Even if the state measure was the least restrictive and therefore compliant with necessity, it can still fail at the stage of balancing if the result is morally unjustifiable within the state's constitutional scheme. For instance, even if torture is the only way for the state to foil a terrorist plan and therefore necessary for national security and the prevention of terrorism, it would nevertheless be impermissible—because as the Indian SC held in *Francis Coralie Mullin v Union Administrator*, torture or cruel, inhuman, or degrading treatment can never be reasonable under articles 14 and 21 of the Indian Constitution.

VI. PROPORTIONALITY *STRICTO SENSU* AND BALANCING

Finally, we come to the stage of balancing. At this stage, the question becomes 'whether the interference with the right is justified considering the gain in the protection for the competing right or interest'. To this end, the two values have to be 'balanced' against each other.[149] This stage allows for those disproportionate

[148] *Alberta v Hutterian Brethren of Wilson Colony* [2009] 2 SCR 567 [55]. An objection can be raised against the adoption of the standard laid down by the Canadian Supreme Court as in Canada the literature suggests that the necessity stage carries the predominant weight and the other stages are marginalised. This could make necessity (instead of balancing) the dominant stage of the test which devours the other stages. This would lead to similar issues of a single element becoming the dominant one, as discussed above. However, none of the literature which argues that the Canadian test makes the necessity stage the predominant stage under the test applies to the *Hutterian* model of necessity, as this formation was first laid down by the Canadian Supreme Court in 2009. This formulation has only been used in five cases after that. Therefore, it is not the reason why the necessity stage devours the fourth stage in the Canadian jurisdiction.

[149] Möller, 'Proportionality: Challenging the Critics' (n 5) 715.

infringements that pass through the earlier stages to be stuck down. It is because of this that at times proportionality is, at times, a more rigorous standard of review than others, such as strict scrutiny.[150]

Thinking of the four stages as part of the same inquiry helps us understand how the balancing is enriched by the analysis of the previous stages (if done well, as I have argued in the previous sections). The earlier stages would help the court gain a concrete understanding of the two competing interests in question, the importance and the sincerity of the state's goal, the design of the measure, the actual contribution and the extent of the impact of the state's measure, and the possible alternatives and their effectiveness. These insights would then guide the judges by offering a cogent understanding of the relevant factors that should be articulated in the process of balancing.

The jurisprudence of the Indian SC has been inconsistent regarding the place of proportionality *stricto sensu*. In *Modern Dental College* and *Internet and Mobile Association*, the Indian SC adopted proportionality *stricto sensu* as the last element of the test;[151] in the *Puttaswamy II* case, the Indian SC adopted the model laid down by von Bernstorff for the last stage, (more on this in Section VI.B);[152] and in most other cases either proportionality *stricto sensu* was absent[153] or it was unclear if it was part of the test.[154] As with the stage of necessity, there is an urgent need for the Indian SC to lay down a clear standard for this stage.

This section is divided into two parts. The first explains how the analysis should be carried out at the stage of balancing and the second flags concerns with the fourth stage of the test as understood by the Indian SC in the *Puttaswamy II* case.

A. Nature of analysis

There are two broad forms of balancing that courts can conduct: the first is 'interest balancing' and the second is 'balancing as reasoning'.[155] Interest balancing is useful when the objects to be compared exist on the same scale. Interest balancing can help us decide whether we should buy apples for shop A, which sells them for 10 INR, or shop B, which sells them for 15 INR. However, it cannot help us decide whether we should buy apples or oranges if both have the same price. This is because their two objects are incommensurable. They do not exist on a common

[150] Kamil, 'The Aadhaar Judgment and the Constitution – II: On Proportionality' (n 9).
[151] *Modern Dental College and Research Centre v State of Madhya Pradesh* (2016) 7 SCC 353 [65]; *Internet and Mobile Association of India v Reserve Bank of India* (2020) 10 SCC 274 [272].
[152] Kamil, 'Right to Privacy in India: Existence, Scope and Challenges' (n 9).
[153] *Anuradha Bhasin v Union of India* (2020) 3 SCC 637 [78]–[80].
[154] Kamil, 'Puttaswamy: Jury Still Out on Some Privacy Concerns?' (n 9) 197–201 (There was a lack of clarity over the element of balancing in J Chandrachud's plurality opinion in *Puttaswamy I* which has been adopted in Joseph Shine and Subhash Chandra Agarwal decision by the Indian SC; *Justice KS Puttaswamy v Union of India* (2019) 1 SCC 1 (Chandrachud J) [653]ff.
[155] Möller, 'Proportionality: Challenging the Critics' (n 5) 715–716; Kai Möller, *The Global Model of Constitutional Rights* (Oxford University Press 2012) ch 6.

scale. As mentioned earlier, constitutional values and interests are incommensurable, and thus interest balancing cannot be applied.[156] This issue can be resolved by creating a relation between the two incommensurable objects to compare them. One might decide whether to buy oranges or apples with the same price based on the utility they will derive out of them. Similarly, to compare incommensurable constitutional values, 'balancing as reasoning'—which requires us to 'make a moral argument as to which of the competing interests takes priority in the case at hand' taking all relevant moral and practical considerations into account—is required.[157] Similarly, Kumm advocates for open-ended practical reasoning at the stage of balancing.[158] Kumm further explains that this form of reasoning requires us to assess 'whether a public action can be demonstrably justified by reasons that are appropriate in a liberal democracy'.[159] In other words, at this stage judges need to decide cases by creating a moral argument to decide which of the incommensurable values should be favoured in light of the circumstances of the case.

However, as discussed above, it is difficult to answer whether a value should be valued over another satisfactorily in the absence of a general account of right or a theory of right.[160] Examples of such general accounts lie in Möller's work, which argues that dignitarian principles such as intrinsic value, moral autonomy, and fundamental equality form the foundation for most conditional rights protection.[161] Accordingly, at the stage of balancing, when two constitutional interests need to be balanced, a theoretical foundation (that aligns with India's constitutional framework) of the interests in question ought to be developed. A coherent and meaningful account of interests would help us understand the values at stake and the values that are central to our constitutional regime. Such a framework would assist the Indian SC in the process of balancing.

B. *PUTTASWAMY II*: THE HYBRID MODEL OF PROPORTIONALITY

The Indian SC in *Puttaswamy II* adopted what Kamil calls the 'hybrid' model of proportionality—that is, the traditional proportionality test with the Blitchz standard at the stage of necessity and von Bernstorff's proposal at the last stage.[162]

[156] Möller, 'Proportionality: Challenging the Critics' (n 5) 719–724; Niels Petersen, 'How to Compare the Length of Lines to the Weight of Stones: Balancing and the Resolution of Value Conflicts in Constitutional Law' (2019) 14 German Law Journal 1387, 1389–1392; Urbina (n 35) 172–175.

[157] Möller, 'Proportionality: Challenging the Critics' (n 5) 715–16; Urbina (n 35) 176–179.

[158] Kumm (n 7) 146–47, 150.

[159] ibid 150.

[160] Möller, 'Proportionality: Challenging the Critics' (n 5) 728–29; In the sphere of public international law in the context of admissibility of evidence see Abhijeet Shrivastava, 'Two Shades of Impunity? The Balancing of Sovereign Interests in Admitting Illegally Obtained Evidence' (2023) 6 De Lege Ferenda (forthcoming).

[161] Kai Möller, 'Beyond Reasonableness: The Dignitarian Structure of Human and Constitutional Rights' (2021) 34 Canadian Journal of Law & Jurisprudence 341; Möller, *The Global Model of Constitutional Rights* (n 155).

[162] Kamil, 'Right to Privacy in India: Existence, Scope and Challenges' (n 9); *Puttaswamy v Union of India* (2019) 1 SCC 1.

This model of proportionality has not yet been adopted by any of the succeeding cases dealing with proportionality.[163] However, if this model is adopted, certain concerns with it need to be addressed.[164] The Indian SC would need to provide better justifications about why this model is appropriate and what benefits it offers over proportionality *stricto sensu*.[165]

First, as Kamil explains, there is an inherent contradiction in the work of Blitchz and von Bernstorff that makes the hybrid model of proportionality inoperable.[166] As discussed in Section V.A, the Blitchz model introduces balancing that is akin (to an extent) to the balancing process at the stage of proportionality *stricto sensu*, as it requires the degree of achievement and degree of impact of different alternatives to be balanced.[167] On the other hand, for von Bernstorff the main issue with the traditional proportionality test is with the stage of balancing which he argues should be rejected altogether.[168] Von Bernstorff argues that only the first three stages of the traditional proportionality test should be used in most cases.[169] In certain cases, such as when there is a serious infringement of rights, the fourth stage is to be replaced with categorical rules (bright lines).[170] Therefore, balancing is to be replaced with categorical reasoning. Categorical reasoning is premised on the idea that rights are rules instead of principles. This requires the creation of standards or bright lines which determine how a specific situation is decided in every case, instead of carrying out balancing every time.[171] An example of this would be if the court decided that a property right cannot trump the right to life. Thus, life could never be deprived to protect private property by law enforcement irrespective of the degree of the threat to private property. For von Bernstorff, these bright-line rules are to be constructed by the Court by a 'reference to the "essence", "substance" or "core" of a particular right *ex negativo* for specific groups of case scenarios, or by other generalisable tests or "intervention thresholds", such as the famous Brandenburg test of the US Supreme Court'.[172] Consequently, the work of Blitchz and von Bernstorff are contradictory.[173] The Indian SC's uncritical acceptance of the hybrid model of proportionality is therefore problematic.[174]

Second, apart from the inherent contradiction at the third and fourth stages of the hybrid model of proportionality, there is a lack of clarity about how the balancing stage is to be applied. This is because, with respect, the Indian SC has adopted von Bernstorff's work without in fact understanding von Bernstorff's

[163] Kamil, 'Right to Privacy in India: Existence, Scope and Challenges' (n 9).
[164] ibid.
[165] ibid.
[166] ibid.
[167] ibid.
[168] Lazarus (n 2); Kamil, 'Right to Privacy in India: Existence, Scope and Challenges' (n 9).
[169] ibid.
[170] ibid.
[171] ibid.
[172] ibid.
[173] Kamil, 'Right to Privacy in India: Existence, Scope and Challenges' (n 9).
[174] ibid.

work.[175] In *Puttaswamy II*, the Indian SC held that the process of balancing was to be conducted following bright-line rules which were either to be established or needed to be evolved.[176] The establishment of such bright-line rules was to guide the process of balancing to ensure that balancing is not conducted impressionistically.[177] Yet, von Bernstorff does not conceptualise bright-line rules as guidelines; rather, they are supposed to promote categorical reasoning.[178] This misunderstanding of von Bernstorff's work further raises issues about how the last stage is to operate.[179] Moreover, the majority in *Puttaswamy II* did not explain what the proposed bright-line rules were or how they were to be created, adding to the confusion.[180] Perhaps it is because of this issue that the *Puttaswamy II* standard has not been used in any subsequent case.[181]

Third, it is unclear if adopting von Bernstorff's work at the last stage would offer any advantage over proportionality *stricto sensu*. Von Bernstorff's main reason for promoting categorical reasoning is that it reduces the possibility of uncertainty, whereas the traditional proportionality test promotes ad hoc reasoning.[182] The courts need to consider whether legal certainty is an ontological value worth pursuing at the cost of adjudication that attempts to provide just and fair results by taking concrete circumstances into account.[183] Categorical rules are necessarily inflexible, and can therefore become over- and under-inclusive over time or produce sub-optimal results when they are applied outside the specific context in which they were created.[184] The courts would need to decide if this trade-off is acceptable.

In this regard, predictability is an important value, but it cannot devour the fairness of adjudication that should be central in a liberal constitutional democracy. The Constitution ought to be treated as a living instrument, and thus cases should be decided in the light of present-day circumstances. This might, at first blush, reduce predictability. But a level of uncertainty is arguably a warranted trade-off in return for flexible and just decision-making on the basis of unique factors and circumstances. It might also be said that the consideration of present-day circumstances also leads to a degree of certainty.

[175] ibid.
[176] Kamil, 'Right to Privacy in India: Existence, Scope and Challenges' (n 9); *Puttaswamy v Union of India* (2019) 1 SCC 1.
[177] ibid.
[178] Lazarus (n 2) 67, 83–84.
[179] Kamil, 'Right to Privacy in India: Existence, Scope and Challenges' (n 9).
[180] ibid.
[181] ibid.
[182] Lazarus (n 2) 67, 83–84.
[183] Klatt (n 7) 49–51; Petersen (n 11) 54–58; Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and Life* (Clarendon Press 1993) 140.
[184] Schauer (n 183).

Further, it must be emphasised that there is only a level of uncertainty; it is not the case that each case is decided in an ad hoc manner, as critics suggest. Balancing does not exclude reliance on precedents.[185] Under balancing, it is only when factors and circumstances differ would a precedent be distinguished. For instance, the South African Constitutional Court had to decide on the issue of the constitutionality of reverse onus clauses in several cases. Only in the first case, *S v Mbatha,* did the Court rely on the proportionality test; in subsequent cases, they merely cited *S v Mbatha*.[186]

Moreover, removing the last stage from the traditional proportionality test will, in most cases, reduce its rigour. As argued above, the last stage can be used to reject measures that pass the other stages of the test. Von Bernstorff's proposal to remove the proportionality *stricto sensu* stage—which, as discussed, carries the most weight under the traditional model—from the proportionality test would significantly lower the strictness of the test. In a liberal democracy where rights are fundamental, rights should be protected as far as possible.

VII. Conclusion

This paper has attempted to contribute to the emerging stream of literature, the basic assumption of which is that 'proportionality is a valuable doctrine' and should be viewed in the best light by focusing 'on the way it operates or ought to operate in practice, in the actual resolution of cases'.[187] This article has attempted to elaborate on how the traditional understanding of proportionality can be redesigned and applied in a manner that best promotes a 'culture of justification'.[188] I have argued that the test should be designed, and adjudication should take place, in a manner that maximises the justification potential of each stage and limits the role played by the last stage—that is, proportionality *stricto sensu* or balancing.[189] Based on this broad architectural principle, this article has provided certain recommendations to Indian courts regarding how each stage of the test can be redesigned. As the Indian courts have only started applying the proportionality test relatively recently and do not have the same experience as other jurisdictions, this guidance will hopefully prove helpful.

This work and the broader discourse is especially important in the Indian context as the Indian SC has failed to lay down a coherent standard of proportionality and has repeatedly failed to apply the standard scrupulously.[190] The Indian SC has so far followed a 'business as usual' approach regarding proportionality,

[185] Klatt (n 7) 49–51; Petersen (n 11) 56–57.
[186] *S v Mbatha, S v Prinsloo* (CCT19/95, CCT35/95) [1996] ZACC 1; *S v Ntsele* (CCT25/97) [1997] ZACC 14; *S v Mello* (CCT5/98) [1998] ZACC 7.
[187] Lazarus (n 2) 32–33.
[188] ibid.
[189] Kremnitzer, Steiner, and Lang (n 2).
[190] ibid.

and has refused to unsettle or disrupt 'pre-existing configurations of relations between citizens and the State as mediated through rights' through the adoption of the proportionality test.[191]

The current Chief Justice of India, in his now famous opinion in the 2018 case of *Puttaswamy v Union of India*, declared that proportionality reflected a bridge from a culture of authority to a culture of justification.[192] Unfortunately, this declaration is still far from being materialised in concrete cases where the liberty of citizens is at stake.[193] To ensure that proportionality does not turn into a 'bridge to nowhere',[194] it is imperative that the courts lay down a cogent standard of proportionality which best captures the ethos of the culture of justification.

[191] Chandra (n 9) 86; Rudraksh Lakra, 'Melancholy Takeaways on Proportionality from the Demonetisation Case' (*Indian Constitutional Law and Philosophy*, 26 Jan 2023) <https://indconlawphil.wordpress.com/2023/01/26/guest-post-business-as-usual-melancholy-takeaways-on-proportionality-from-the-demonetisation-case/> accessed 4 February 2023.

[192] *Justice KS Puttaswamy v Union of India* (2019) 1 SCC 1, 814 (Chandrachud J).

[193] Chandra (n 9); Kamil, 'Right to Privacy in India: Existence, Scope and Challenges' (n 9); Kamil, 'The Aadhaar Judgment and the Constitution – II: On Proportionality' (n 9).

[194] Chandra (n 9) 86.