PROPORTIONALITY AND BURDEN OF PROOF: CONSTITUTIONAL REVIEW IN INDIA

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Abstract

The proportionality test after originating in German administrative law and in Canada, has received enormous success the world over in the area of constitutional rights adjudication. Burden of proof, is an important aspect of any area of law, as it has a decisive effect on the outcome of cases. Under constitutional law, as a part of the proportionality principle, it impacts the protection of constitutional rights. This paper seeks to examine the role of the principle of proportionality both in doctrinal discussion and in sceptical accounts of the Supreme Court of India's emphasis on the principle specifically from the perspective of burden of proof. I scrutinize Justice Barak's analysis of burden of proof as a part of the *necessity* stage of the proportionality test, and then illustrate the divergence in court practice in India. I conclude that although the Supreme Court recognises proportionality as the new standard of review, the inconsistency in its application, specifically on burden of proof, and the attitude of deference to the State, results in insufficient protection against rights violations.

1. Introduction

Fritz Fleiner, while summarising the law of proportionality in 1982, rightly advised, 'you should never use a cannon to kill a sparrow'.[1] The use of certain means should fit the purpose. If the purpose can be served by the use of less limiting means, it should be done. After all, there is no sense in using a hammer when all you need is a nutcracker.[2] The proportionality test after originating in German administrative law and in Canada (in its post-Charter jurisprudence)[3], has received enormous success the world over in the area of constitutional rights adjudication.[4]

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[1] Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (CUP 2012) 179.

[2] W. van Gerven, 'The Effect of Proportionality on the Actions of Member States of the European Community: National Viewpoints from Continental Europe' in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart Publishing 1999) 37, 61.

[3] Vicki C. Jackson & Mark Tushnet 'Introduction' in Vicki C. Jackson & Mark Tushnet (eds), Proportionality: New Frontiers, New Challenges (CUP 2017) 1.

[4] There is substantial evidence of the usage of the proportionality test across the world. Robert Alexy, *A Theory of Constitutional Rights* (OUP 2002); D. Beatty, *The Ultimate Rule of Law* (OUP 2004); G. Webber, *The*

It has been adopted and adapted by domestic courts in 'Europe, South Africa, Israel, New Zealand',[5] as well as India[6]. From being categorised as the 'gold standard for adjudicating the validity of limitations on fundamental rights'[7] to the global move towards an 'age of proportionality'[8], the scholars of law have willingly 'embraced proportionality, as a principle or doctrine in their constitutional jurisprudence'.[9]

Burden of proof is an important aspect of any area of law since it has a decisive effect on the outcome of all cases. Under constitutional law, it impacts the protection of constitutional rights as a part of the proportionality principle. This paper seeks to examine the role of the principle of proportionality both in doctrinal discussion and in sceptical accounts of the Supreme Court of India's emphasis on the principle, specifically from the perspective of burden of proof. I scrutinize Justice Barak's analysis of burden of proof as a part of the *necessity* stage of the proportionality test, and then illustrate the divergence in court practice in India. I conclude that although the Supreme Court recognises proportionality as the new standard of review, the inconsistency in its application, specifically with regards to burden of proof, and the attitude of deference to the State, results in insufficient protection against rights violations.

2. Proportionality: Examining the Validity of Limitations on Fundamental Rights

The courts in India can declare statutes that *improperly limit* fundamental rights guaranteed under the Constitution of India, as unconstitutional.[10] While he constitution does not provide for a general limitation clause, there are specific limitations provided under different fundamental rights, which contain the grounds on which reasonable restrictions may be imposed.[11] Though the Supreme court did not mention the word 'proportionality', it had concluded very early on after the commencement of the constitution that factors similar to

Negotiable Constitution (CUP 2009); Barak (n 1); M. Klatt and M. Meister, *The Constitutional Structure of Proportionality* (OUP 2012); M. Cohen-Eliya and I. Porat, *Proportionality and Constitutional Culture* (CUP 2013). A. Stone Sweet and J. Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 Col. J. Trans. L. 72.

[5] Dimitrios Kyritsis, 'Whatever Works: Proportionality as a Constitutional Doctrine' (2014) 34(2) Oxford J. L. S. 395, 396.

[6] Aparna Chandra, 'Proportionality in India: A Bridge to Nowhere?' (2020) 3(2) U of OxHRH J 55.

[7] Sweet and Mathews (n 4) 161; Beatty (n 4) 159-88; David Law, 'Generic Constitutional Law' (2005) 89 Minnesota L. R. 652.

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

[9] Jacco Bomhoff, 'Beyond Proportionality: Thinking Comparatively about Constitutional Review and Punitiveness' in Jackson & Tushnet (n 3) 148.

[10] Constitution of India, 1950, art. 13(1) (emphasis added).

[11] *See* ibid Part III (arts. 12–35). Specifically, restrictions are provided under art. 19(2) to (6).

proportionality would be considered to determine the validity of the limitations.[12] In the late 1990s, the Supreme Court specifically provided that the constitutionality of administrative action limiting a fundamental right shall be viewed through the lens of proportionality.[13] More recently, a constitution bench of the Supreme Court in *Modern Dental College and Research Centre v. State of Madhya Pradesh* held the doctrine to be an inherent part of Art.19.[14]

It is primarily the responsibility of the legislature to enact laws that are compatible with rights, and of the executive to implement those laws in accordance with the constitutional scheme of values.[15] The courts must oversee this process as guardians of fundamental rights, where any rights violation is taken seriously. Proportionality as a test, allows the courts to determine whether a measure limiting rights was legitimate, suitable, necessary and balanced. Where the courts routinely apply the proportionality analysis against rights' infringements, the State is constrained to work within its boundaries.[16]

2.1 *The Structure of Proportionality Analysis*

Robert Alexy, a major proponent of the proportionality principle, perceives fundamental rights as principles and the proportionality principle as a consequence of the principled quality of fundamental rights.[17] Consequently, fundamental rights express values and require optimization of the values they express. In the process, sometimes fundamental rights battle with other fundamental rights[18] and sometimes they struggle with the principles that guide the State in pursuing its objectives. The effort is to find the optimum balance in the process.

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[12] In *Chintaman Rao v State of MP*, AIR 1951 SC 118 [6], the Supreme Court held that, '[T]he limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word "reasonable" implies intelligent care and deliberation, that is, the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in article 19 (1)(g) and the social control permitted by clause (6) of article 19, it must be held to be wanting in that quality.'
In *V.G. Row v State of Madras,* AIR 1952 SC 196 [15], the Court held that, 'in examining the reasonableness of restrictions on fundamental rights [t]he nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time should all enter into the judicial verdict.'
[13] *Union of India v. G. Ganayutham*, AIR 1997 SC 3387.
[14] (2016) 7 SCC 353.
[15] Julian Rivers, 'The Presumption of Proportionality' (2014) 77(3) The Modern L. R. 409, 410.
[16] Sweet and Mathews (n 4) 112-113.
[17] Robert Alexy, 'Balancing, Constitutional Review, and Representation' (2005) 3 Intl. J. Const. L. 572.
[18] This conflict is visible in the *Aadhaar* case where the right to privacy is in conflict with the right to development, an aspect of right to dignity. The State's endeavour to promote different welfare and economic benefit schemes, which strive to provide a dignified life to a citizen, intrudes into certain aspects of personal autonomy of the same citizen.

Since most fundamental rights are relative, there exists a justification for not realising their full extent.[19] According to Justice Barak, the criterion for measuring the justification for the limitation on the constitutional right which determines the extent of its protection or realisation, is that of proportionality.[20] Consequently, 'proportionality can be defined as a set of rules determining the necessary and sufficient conditions for a limitation of a constitutionally protected right by a law to be constitutionally permissible'.[21] The constitution bench in *Modern Dental College* explained the proportionality doctrine as,

> [T]hus, while examining as to whether the impugned provisions of the statute and rules amount to reasonable restrictions and are brought out in the interest of the general public, the exercise that is required to be undertaken is the balancing of fundamental right to carry on occupation on the one hand and the restrictions imposed on the other hand. This is what is known as "*doctrine of proportionality*".[22]

While delivering the majority judgment, Justice Sikri relied on the test given by Justice Aharon Barak of Israel and the Canadian test as laid down by Dickson, C.J. of Canada in *R.* v. *Oakes*[23]. The *Oakes* case, and the proportionality test articulated by it, have been cited around the world, and has had a profound impact on comparative constitutional law.[24] According to Justice Barak, proportionality is made up of four components: 'proper purpose, rational connection, necessary means, and a proper relation between the benefit gained by realizing the proper purpose and the harm caused to the constitutional right (the last component is also called "proportionality *stricto sensu*" (balancing)'.[25] According to the four sub-components of proportionality, a limitation of a constitutional right will be constitutionally permissible if

> (i) it is designated for a proper purpose (*legitimacy*);

[19] As far as constitutional rights are concerned, it is more or less accepted that there are no absolute constitutional rights. Though some experts still claim that there are certain rights, albeit very few, which can still be treated as "absolute" like right to human dignity; right not to be subjected to torture or to inhuman or degrading treatment or punishment. However, even in respect of these rights, it is thought, that in the larger public interest, the extent of their protection can be restricted. See *Modern Dental College* (n 14).
[20] Barak (n 1) 131.
[21] A.K. Sikri, 'Proportionality as a Tool for Advancing Rule of Law' (2019) 3 SCC J-1, J-14.
[22] *Modern Dental College* (n 14) [60].
[23] *R.* v. *Oakes,* 1986 SCC OnLine Can SC 6. There exist differences in doctrinal terms and applications among different countries in the structure of the proportionality principle. The test is articulated and applied differently in Israel and Canada.
[24] As per S. Choudhry, courts in Australia, Fiji, Hong Kong, Ireland, Israel, Jamaica, Namibia, South Africa, the UK, Vanuatu and Antigua have all cited the case. S. Choudhry, 'So What Is the Real Legacy of Oakes? Two Decades of Proportionality Analysis under the Canadian Charter's Section 1' (2006) 34 S.C.L.R. (2d) 501, 502.
[25] Barak (n 1) 131.

(ii) the measures undertaken to effectuate such a limitation are rationally connected to the fulfilment of that purpose (*rationality*);

(iii) the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation (*necessity*); and

(iv) there needs to be a proper relation ("proportionality *stricto sensu*") between the importance of achieving the proper purpose and the social importance of preventing the limitation on the constitutional right (*balancing*).[26]

Whenever limitations are imposed on rights, courts must be satisfied on the balance of probabilities by sufficient and cogent reasons provided by the State that each stage of the proportionality analysis is satisfied.[27]

2.2 *The Necessity Test: "Heart and Soul" of Proportionality*

Out of the four prongs of the proportionality analysis, the *necessity* test in the third stage, is considered to be the most significant one, particularly under the Canadian jurisprudence. As Peter Hogg notes, 'The requirement of least drastic means has turned out to be the heart and soul of Section 1 justification'.[28] Given the several alternate means, the necessity test chooses that measure which least limits the fundamental right. It requires the legislator to choose from amongst the available measures, the one that would cause the least infringement of a constitutional right. Accordingly, judicial discretion in such matters is limited. The court's responsibility is to examine the existence of an alternative which would satisfy the legislative purpose to the same extent, albeit one that is less likely to limit the constitutional right.[29] Although there exist differences in application of the proportionality doctrine in different jurisdictions, the paper focuses on the necessity test and the consequent question of burden of proof as analysed extensively by Justice Barak. I will now examine the specific question, on whom does the burden of proof lie, to produce the 'least restrictive measure'.

3. Burden of Proof: Constitutional Foundations

[26] ibid 3.
[27] Rivers (n 15) 410.
[28] Hogg makes this statement in the context of the Canadian Charter of Rights and Freedoms. P. W. Hogg, *Constitutional Law of Canada*, (5th edn, vol. II, Carswell 2007) 146.
[29] Barak (n 1) 412.

The problem of burden of proof in proportionality has so far received scant attention. This may be on account of the thought that the whole purpose of protection of fundamental rights, 'is to create a presumption of non-interference and a duty of justification on public authorities'.[30] However, each time a statute places a limitation on a constitutional right, it requires a justification. The question therefore arises, on whom does the burden of proof of such justification fall. Who bears the burden of proving that a constitutional right was disproportionally limited by law?[31]

Burden of proof is an extremely important element with respect to the standard of review, as it has the potential to decide the outcome of any given case, and reflects the default constitutional balance between protecting rights and favouring the interests of the State.[32] Placing the burden of proof on the intrusive or restrictive agency of the State strengthens fundamental rights and freedoms.[33] However this is relatively a minor problem as compared to when the legislature intrudes or restricts a fundamental right. Schlink questions the justification of placing the burden of proof on both the legislature and the citizen. After all, should the legislature, 'subject only to the constitution and legitimised by election', not enjoy a certain margin of appreciation or discretion in deciding whether a statute is a necessary means to a legitimate end?[34] On the other hand, asking the citizen to justify his exercise of the freedom goes against the very basis of the freedom. In certain jurisdictions, it is thought that establishing the law's lack of justification is a tougher ordeal for the citizens if the burden rested on them.[35] Justice Barak comes up with a solution to this confusion through an extremely nuanced argument that the burden should lie on both the citizen and the State.[36]

3.1 *Burden of Persuasion and Burden of Producing Evidence*

Justice Barak divides the 'burden of proof' or the 'onus of proof' into two separate burdens: the burden of persuasion and the burden of producing evidence. Whereas the burden of persuasion is the onus on a party to prove a claim to a right against the other party, the burden of producing evidence may shift from one to the other party during the judicial process. The burden of persuasion is where one party has to persuade the court that they are entitled to a

[30] ibid 411.
[31] ibid 435.
[32] David Kenny, 'Proportionality, The Burden of Proof, and some Signs of Reconsideration' (2014) 52 Irish Jurist 141, 147.
[33] Bernhard Schlink, 'Proportionality (1)' in Michel Rosenfeld & Andras Sajo (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2013) 733.
[34] ibid.
[35] Kenny (n 32) 147.
[36] See Barak (n 1) Chp. 16.

right against the other party on the presentation of certain facts. In contrast, the burden of producing evidence may shift; "this is the burden of producing the facts and presenting them to the court."[37] In other words, at the initial stage, the burden of proof lies with the party arguing that a limitation has been placed on the constitutional right. In the second stage of such constitutional examination, the burden is shifted onto the party who says that there is a justification for the limitation, i.e., that such a limitation is proportional.[38]

3.2 *Constitutional Review: First Stage*

In the first stage, the limitation on the constitutional right is examined. The question is, whether the enacted law has limited a constitutional right? Has the owner of the right been unable to exercise his right to the fullest extent? The burden of proof in the first stage lies with the party claiming the occurrence of a limitation on his right. Justice Ackerman, of the South African Constitutional Court, notes, 'the task of interpreting … fundamental rights rests, of course, with the courts, but it is for the applicants to prove the facts upon which they rely for their claim of infringement of a particular right in question'.[39] This is based on the *presumption* that the legislative provision is constitutional. The principle of presumption of constitutionality applies to laws enacted in India.[40] Such presumption places the burden of proof on the party arguing that the limitation of their constitutional right exists.

3.3 *Constitutional Review: Second Stage*

The second stage requires the examination of the *justification for the limitation* on the constitutional right [Emphasis added]. The limitation of a right may be constitutional only if it has a legal justification. The legal justification lies in the rules of proportionality. Consequently, the question is, who bears the burden of proving the different components of proportionality. Justice Barak asserts that the burden of proof (both the burden of persuasion and the burden of producing evidence) lies with the party arguing for the justification.[41] He arrives at this conclusion after a comparative analysis of various jurisdictions, with the focus being on Canada.

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[37] ibid 437.
[38] ibid 435, 437.
[39] CCT 23/95 *Ferreira v. Levin NO*, 1996 (1) SA 984 (CC). See M. Chaskalson, G. Marcus, and M. Bishop, 'Constitutional Litigation' in S. Woolman, M. Bishop, and J. Brickhill (eds), *Constitutional Law of South Africa* (Juta Law Publishers 2002) 3–7.
[40] The principle of Presumption of Constitutionality was enunciated by a constitution bench in *Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar,* 1958 AIR 538, 'That there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles.'
[41] Barak (n 1) 439.

In Canada, a petitioner is required to prove that his or her rights have been infringed in the first instance. Once that is established, the burden of proving that the infringement was justified rests entirely on the State.[42] Dickson C.J. in the *Oakes* case stated that the entire weight of this test would be put on the State. Citing the term "demonstrably justified" in S.1, he held:

> [T]he onus of proving that a limit on a right or freedom guaranteed by the Charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. It is clear from the text of s.1 that limits on the rights and freedoms enumerated in the Charter are exceptions to their general guarantee. The presumption is that the rights and freedoms are guaranteed unless the party invoking s. 1 can bring itself within the exceptional criteria which justify their being limited.[43]

This statement rests the burden on the State which is to be met with clear evidence, 'Where evidence is required in order to prove the constituent elements of a S. 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit'.[44] The same approach is followed in New Zealand[45] and South Africa.[46] Even British scholars, commenting on the Human Rights Act 1998, have asserted that the burden of justifying limitations of rights rests on the public authority.[47]

i) *Burden of Persuasion*

On whom does the burden of persuasion lie with respect to the justification of a limitation of constitutional rights? The key factor in this decision is the concept of 'protection of fundamental rights', as democracies are designed to protect these rights.[48] It is the function of a constitution to ensure the protection of fundamental rights. The manner to ensure such protection is to impose the burden of persuasion of justifying the limitation of a constitutional

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[42] Kenny (n 32) 141.
[43] *Oakes* (n 23) [66].
[44] ibid [68].
[45] *Police v. Curran* [1992] 3 NZLR 260 (CA); *Minister of Transport v. Noort* [1992] 3 NZLR 260, 283 (CA); P. Rishworth, G. Huscrot, S. Optican and R. Mahoney, *The New Zealand Bill of Rights* (OUP 2003) 68; A. S. Butler, 'Limiting Rights' (2002) 33 Victoria U. Wellington L. Rev. 113, 116.
[46] *S. v. Makwanyane*, 1995 (3) SA 391 § 102: '[I]t is for the legislature, or the party relying on the legislation, to establish this justification, and not for the party challenging it to show that it was not justified'.
[47] R. Clayton and H. Tomlinson, *The Law of Human Rights* (2nd edn, OUP 2009) 6.187— 6.190.
[48] Barak points out that the 'notion of democracy' has many meanings. Every constitution provides the notion of democracy with a meaning that best captures its purpose as appearing in that legal system. Most constitutions are based upon the fundamental concept of free democracy which are the democratic values of human dignity, equality, and freedom. Barak (n 1) 218-219.

right on the party proposing the justification. Consequently, when the scales are balanced both for and against a justification, the ruling should be against the limitation of the constitutional right and not in its favour.

ii) *Burden of Producing Evidence*

During the second stage of constitutional review, there is no need of separating the burden of persuasion from the burden of producing evidence as both burdens lie with the same party. This is on account of the fact that fundamental or constitutional rights enjoy a central status under the constitution and also because the State has the advantage of access to empirical and factual data. Cora Chan also endorses Justice Barak's view when she says that imposing a burden on the claimant does not take sufficient account of the '*superior intelligence-gathering abilities'* of the State especially when it comes to evaluating alternative measures.[49] Therefore, it is the State which should bear the burden of proof in the *necessity* stage.

The third prong of the proportionality review i.e. the *necessity test* is a fact-based test as the court has to examine the various alternative measures that can be adopted to achieve the intended goal of the state. Upon such examination, it falls upon the courts to determine the *least restrictive* measure to achieve the intended goal of the State.[50] Justice Barak, here, advocates distinguishing between the *burden to make a claim* (the burden of pleading) and the *burden to produce evidence* to validate the claim.[51] Therefore, the party claiming the existence of a particular alternative, should point out specific and viable alternatives. However, the burden of producing the evidence against the alternative measures must lie with the party arguing that such alternative measures do not advance the purpose to the same extent. This consequently falls on the State as it has already examined the validity of alternatives, at the times of enactment of the legislation.[52] Further in public law disputes, since the State owes to its citizens a general duty of fairness (or a higher level of good faith)[53], the burden to justify the limitation, by producing adequate evidence, falls on the State.

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[49] Cora Chan, 'Proportionality and Invariable Baseline Intensity of Review' (2013) 33(1) Legal Studies 1, 14.
[50] Ankush Rai, 'Proportionality in Application-An Analysis if the "Least restrictive Measure"' in Gautam Bhatia, (*Indian Constitutional Law and Philosophy Blog,* 8 May, 2020) <https://indconlawphil.wordpress.com/2020/05/08/guest-post-proportionality-in-application-an-analysis-of-the-least-restrictive-measure/> accessed 10 January 2021 (emphasis added). Every court does not require the 'less restrictive measure' to be equally efficacious, especially not the Canadian courts.
[51] Barak (n 1) 449 (emphasis added). Also *see* F. James, 'Burdens of Proof' (1961) 47 Va. L. Rev. 51, 59; R. Belton, 'Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice' (1981) 34 Vand. L. Rev. 1205.
[52] Barak (n 1) 449.
[53] ibid 450-51.

4. Burden of Proof: The Indian Experience

The proportionality test as applied by the courts in India to assess fundamental rights and limitations, has been reviewed by different authors. With the objective of examining the question, on whom does the burden of proof lie, I will now scrutinize four important judgments of the Supreme Court of India on this issue.

4.1 *K.S. Puttaswamy v. Union of India (II)* [The Aadhaar Judgment]

The majority of the five-judge bench in *K.S. Puttaswamy v. Union of India (II)*,[54] held that the provisions of the Aadhaar Act, 2016 must be tested on the touchstone of proportionality, basing their application of the proportionality standard on David Bilchitz's formulation of the 'necessity' stage of the proportionality test.[55] In the present case, the object of enacting the Aadhaar Actwas to provide for a unique identity for purposes of delivery of benefits, subsidies and services to the eligible beneficiaries and to ward off misappropriation of benefits and subsidies, and deprivation of eligible beneficiaries. According to the State, the failure to establish the identity of beneficiaries of various welfare programmes was leading to a lot of leakage and corruption, and was causing a hindrance to their successful implementation.[56] To this end, Section 7 of the Aadhaar Act required that any individual wanting to avail subsidies, benefits or services, had to produce their Aadhaar number.[57] Section 8 made Aadhaar based authentication of identity mandatory for the availing such subsidies, benefits or services.[58]

The petitioners fulfilled the burden of proof by establishing that the State had made providing Aadhaar details (biometric information) *de jure* or *de facto* mandatory for availing various services from the State or from private entities, which was violative of the fundamental right to privacy under Article 21. Further, the petitioners suggested certain less intrusive alternative measures as required under the necessity stage of the proportionality test, such as smart cards etc., which were borne out by the written submissions of Mr. K.V. Viswanathan:[59]

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[54] (2019) 1 SCC 1.
[55] David Bilchitz, *Necessity and Proportionality: Towards a Balanced Approach?* (Hart Publishing 2016). Also see ibid 318.
[56] ibid 207
[57] ibid 211
[58] ibid 211-212.
[59] Written submissions on behalf of Mr. K. V. Viswanathan, Sr. Advocate <https://scobserver-production.s3.amazonaws.com/uploads/case_document/document_upload/63/Written_Submission_of_KVV.pdf > accessed 12 January, 2020.

> [I]t is the State's burden to show that Aadhaar is both necessary and proportionate, i.e. there exist no other alternatives that could have achieved their stated goals, using a less intrusive method [See Peck v UK, (2003) ECHR 44, ¶¶76-87 and Modern Dental College & Research Centre v State of MP, (2016) 7 SCC 353, ¶¶60-65]. As a matter of fact, there exist less-invasive alternatives such as Smart Cards and social audits that have been included in sec. 12 of the NFSA and can help reduce diversion/leakages. In fact, these Smart Cards (using hologram, RFID chip, or OTP) have helped eliminate barriers of distance or location to avail entitlements, such as in Chhattisgarh. Other alternatives such as food coupons, digitisation of records, doorstep delivery, SMS alerts, social audits, and toll-free helplines have also helped. … The very fact that the State has not examined such alternatives itself is enough to show that they have not discharged their burden under Art. 21.

Surprisingly, despite the suggestions made by the petitioners, the majority in the case observed that the petitioners had in fact, failed to suggest alternatives,

> [T]he manner in which malpractices have been committed in the past leaves us to hold that apart from the system of unique identity in Aadhaar and authentication of the real beneficiaries, there is no alternative measure with lesser degree of limitation which can achieve the same purpose. In fact, on repeated query by this Court, *even the petitioners could not suggest any such method*.[60]

On the other hand, Justice Bhushan, acknowledged the alternatives suggested by the petitioners, but refused to examine them,

> [A]t this juncture, we may also notice one submission raised by the petitioners that the Aadhaar Act could have devised a less intrusive measure/means. It was suggested that for identity purpose, the Government could have devised issuance of a smart card, which may have contained a biometric information and retain it in the card itself, which would not have begged the question of sharing or transfer of the data. We have to examine the Aadhaar Act as it exists. *It is not the Court's arena to enter into the issue as to debate on any alternative mechanism, which according to the petitioners would have been better.*[61]

[60] *Puttaswamy (II)* (n 54) [334] (emphasis added).
[61] ibid [715] (emphasis added).

The concept of burden of proof is lost in the confusion between the difference in the opinions in the judgment. The court both denies that alternatives have been proposed and also refuses to discuss them. The majority makes no mention of where the burden of proof lies.[62] In the entire discussion, there is no mention of the evidentiary burden of the State except in Justice Chandrachud's dissent, who states that because it is the State that is infringing rights, the State bears the burden of showing that the alternatives do not satisfy the State's goal.[63]

In the analysis of the necessity test, the court places the burden on the petitioners to suggest alternative measures. However, it does not thereafter place the evidentiary burden on the State to justify the imposed limitations on the fundamental right, but simply accepts the government's stance when it states that it has rejected the idea of 'smart cards' and other alternative models after 'due deliberations'.[64] There is no engagement whatsoever by the Court on the issue of the State's onus of proof to justify the effectiveness of the alternative measures or the impact of Aadhar on the right to privacy. Therefore while the State is able to persuade the court that it is entitled to implement the Aadhar Act (burden of persuasion), it does not satisfy the burden of evidence.

4.2 *Anuradha Bhasin v. Union of India* [Kashmir Internet Ban case]

The case of *Anuradha Bhasin v. Union of India*[65], concerned the internet and movement restrictions imposed in Jammu and Kashmir on 4th Aug., 2019, to allegedly protect public order. The court while deciding the matter on 10th Jan. 2020, did not lift the restrictions on the internet, but directed the government to review the shutdown orders against the tests highlighted in the judgment. In the two-part judgment, the Supreme Court held that accessing information through the internet was a fundamental right. Drawing on past domestic and foreign jurisprudence, the Court endorsed the proportionality standard to be the appropriate standard of review of communication shutdown orders. It reiterated its stance that the government while imposing restrictions on the fundamental rights to freedom of speech and expression and freedom to carry on business, trade etc. should adopt the 'least restrictive' method, supported by sufficient material,

[62] Gautam Bhatia, 'The Aadhaar Judgment and the Constitution-I: Doctrinal Inconsistencies and a Constitutionalism of Convenience' (*Indian Constitutional Law and Philosophy Blog*, 28 Sept., 2018) <https://indconlawphil.wordpress.com/2018/09/28/the-aadhaar-judgment-and-the-constitution-i-doctrinal-inconsistencies-and-a-constitutionalism-of-convenience/> accessed 14 January 2020.
[63] *Puttaswamy (II)* (n 54) [1382].
[64] ibid [295]. Also see Chandra (n 6) 78-79.
[65] (2020) 3 SCC 637

> [H]owever, before settling on the aforesaid measure, the authorities must assess the existence of any alternative mechanism in furtherance of the aforesaid goal. The appropriateness of such a measure depends on its implication upon the fundamental rights and the necessity of such measure. It is undeniable from the aforesaid holding that *only the least restrictive measure can be resorted to by the State*, taking into consideration the facts and circumstances.[66]

On behalf of the petitioners, Mr. Kapil Sibal suggested the use of less restrictive measures like restricting selective websites as opposed to a complete ban,

> [T]herefore, a less restrictive measure, such as *restricting only social media websites* like Facebook and WhatsApp, should and could have been passed, as has been done in India while prohibiting human trafficking and child pornography websites. The learned Senior Counsel pointed to orders passed in Bihar, and in Jammu and Kashmir in 2017, restricting only social media websites, and submitted that the same could have been followed in this case as well.[67]

However, without analysing the alternate measures as suggested, the court simply accepted the State's argument that it couldn't selectively block websites because of lack of technology. The court merely ordered that 'any order suspending internet issued under the Suspension Rules, must adhere to the principle of proportionality and must not extend beyond necessary duration'.[68]

The petitioners satisfied the components of burden of proof, that the internet ban was a violation of their fundamental right to freedom of expression. However, the State could only persuade the court that they were justified in imposing such ban (burden of persuasion), but failed to satisfy the evidentiary burden. The order failed to conform to the *necessity* test, that the objective could not be achieved through less restrictive means. The State could have resorted to blocking certain specific websites, if the intention was to prevent incitement of violence.[69] Moreover the evidentiary burden of analysing the less restrictive measures, was not imposed

[66] ibid [78] (emphasis added).
[67] ibid [10.8] (emphasis added).
[68] ibid [160.4].
[69] Suhrith Parthasarthy, 'The Kashmir Internet Ban - What's at Stake?' in Gautam Bhatia (*Indian Constitutional Law and Philosophy Blog*, 25 December, 2019) <https://indconlawphil.wordpress.com/2019/12/25/guest-post-the-kashmir-internet-ban-whats-at-stake/> accessed 14 January, 2020.

by the court on the State. In fact, subsequently, the State passed orders[70] allowing for selective access to the internet by indulging in selective white-listing and black-listing of websites, which proves the existence of less restrictive measures.[71] However, this analysis of the evidentiary burden on the State under the *necessity* stage of the proportionality test was never explored in *Anuradha Bhasin*.

4.3 *Internet and Mobile Association of India (IMAI) v. Reserve Bank of India* [The Cryptocurrency case]

In *Anuradha Bhasin,* the Supreme Court invoked the doctrine of proportionality, but failed to apply it to the facts of the case. In *Internet and Mobile Association of India v. Reserve Bank of India*[72], the court went beyond simply talking about proportionality, and placed the burden on the Reserve Bank of India (RBI) to examine the 'least restrictive measure'. Although the RBI had been issuing warnings since 2013 regarding the potential risk in the use of cryptocurrencies, their use had never been banned. In April 2018, RBI issued a circular banning regulated financial institutions from providing services to businesses dealing in exchange/trading of cryptocurrencies. This created a turmoil in the entire Indian cryptocurrency trading industry and the validity of the circular was challenged and struck down by the Supreme Court.

According to the petitioners, the circular had resulted in the choking of exchange of virtual currencies (VC), which infringed their right to carry on any occupation, trade or business under Article 19(1)(g). Although the court invoked the doctrine of proportionality, it did not examine the four stages of the doctrine separately, and whether they were met by the RBI circular. It, however, relied on the UK Supreme Court's decision in *Bank Mellat v. HM Treasury (No. 2).*[73] This concerned an order issued by the Treasury under the Counter Terrorism Act of 2008,

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[70] On 14th Jan. 2020, the government directed, *inter alia*, for provisions of broadband services to institutions providing essential services, 2G mobile connectivity in certain districts, and the installation of internet firewalls and a set of "white-listed websites" that could be accessed by internet users [Govt. Order No.-Home 03(TSTS) of 2020: <http://jkhome.nic.in/03(TSTS)%202020.pdf> accessed 14 January, 2020]. On 18th Jan. 2020, second order was passed under the exercise of review powers under the Telecom Suspension Rules. This order directed restoration of Voice and SMS facilities on pre-paid SIMS, and extended 2G internet to a few more districts. In addition, it provided a specific list of 153 "white-listed" websites, from Blue Dart to Zomato to Amazon Prime – which could be accessed [Govt. Order No.-Home 04(TSTS) of 2020: <http://jkhome.nic.in/Temporary%20suspension%20of%20Telecom%20services_0001.pdf> accessed 14 January, 2020].

[71] *See* Gautam Bhatia, 'The Kashmir Internet Ban: "Restoration", White-Listing and Proportionality' (*Indian Constitutional Law and Philosophy Blog,* 25 January, 2020) <https://indconlawphil.wordpress.com/2020/01/25/the-kashmir-internet-ban-restoration-white-listing-and-proportionality/> accessed 14 January, 2020.

[72] (2020) 10 SCC 274.

[73] *Bank Mellat v. HM Treasury (No. 2),* (2013) UKSC 39: (2013) 3 WLR 179.

wherein persons operating in the UK's financial sector were directed to discontinue any transaction or business relationship with the Bank, with immediate effect. The order was struck down as it was arbitrary, disproportionate and irrational. Lord Sumption found that the order did not arise out of a matter of necessity when there were less drastic measures in existence.[74]

In the *IMAI* case the court examined the circular, not on the basis of the four stages of proportionality, but whether the RBI had considered alternative and less intrusive measures. The petitioners dispensed with the obligation of proving a violation of the fundamental right under Article 19(1)(g) and also the onus of suggesting various alternate and less restrictive measures including the suggestion made by the EU Parliament: a report that examined an outright ban on cryptocurrencies, recommended that no such ban was necessary as long as safeguards were in place:

> [W]e are not in favour of general bans on cryptocurrencies or barring the interaction between cryptocurrency business and the formal financial sector as a whole, such as is the case in China for example. That would go too far in our opinion. As long as good safeguards are in place protecting the formal financial sector and more in general society as a whole, such as rules combating money-laundering, terrorist financing, tax evasion and maybe a more comprehensive set of rules aiming at protecting legitimate users (such as ordinary consumers and investors), that should be sufficient.[75]

The court held that the RBI had failed to consider such alternatives prior to issuing the circular. However, it did so later on, in the rebuttals to the contentions raised by the petitioners. Accordingly, the court noted that the RBI had applied its mind to such measures and there was no further need to examine them, 'While exercising the power of judicial review we may not scan the response of RBI in greater detail to find out if the response to the additional safeguards suggested by the petitioners was just imaginary'.[76]

The court which initially started with the aim of examining less intrusive measures, however, left the job unfinished. By not insisting that the State should satisfy the evidentiary burden of examining the alternate and less intrusive measures, it left this requirement of the *necessity* stage, as emphasised by Justice Barak, unfulfilled. The State should have been asked to prove that the eventual measure adopted for regulating VC was in fact the least restrictive one. Here

[74] *IMAI* (n 73) [211].
[75] ibid [214].
[76] ibid [217].

again the State did not satisfy the evidentiary burden of being able to justify the imposition of limitation on the fundamental right.

4.4 *Gujarat Mazdoor Sabha v. State of Gujarat*

A three-judge bench of the Supreme Court in *Gujarat Mazdoor Sabha v. State of Gujarat*,[77] quashed two notifications of the Gujarat government issued during the pandemic lockdown, under S.5, Factories Act, 1948 which sought to exempt factories in Gujarat from following the worker's rights guaranteed under the Act. The effect of the notification was to increase the upper limit of working hours from nine to twelve per day and forty-eight to seventy-two per week, shorten rest intervals, and halve overtime pay.

The court discussed the need to protect the worker, due to the unequal bargaining power between him and his employer which has been recognised by the Directive Principles under the Constitution. Accordingly, the court held the denial of 'humane working conditions and overtime wages provided by law' as a violation of the 'worker's right to life and right against forced labour' secured by Articles 21 and 23 of the Constitution.[78] Noting that any restriction on the fundamental right would have to pass the test of proportionality, the court concluded that the doctrine of proportionality had been violated,

> [T]he impugned notifications do not serve any purpose, apart from reducing the overhead costs of all factories in the State, without regard to the nature of their manufactured products. … However, a blanket notification of exemption to all factories, irrespective of the manufactured product, while denying overtime to the workers, is indicative of the intention to capitalise on the pandemic to force an already worn-down class of society, into the chains of servitude.[79]

The petitioners were able to prove a violation of their fundamental rights, but it did not burden either the petitioners or the State for any alternate measures, nor did it enter into an examination of discovering the 'least restrictive measure' in the situation. Though the court found that the State action failed to meet the test of proportionality, it did so without applying the four prongs of the test and without specifically placing the burden of proof on the State. The resulting determination was the outcome of the court's own understanding of the situation.

[77] (2020) 10 SCC 459.
[78] ibid [48].
[79] ibid [38].

Hence, in the *Aadhaar* case, although the court entered into an examination of the four prongs of the proportionality test, it refuses to acknowledge the alternatives suggested by the petitioners. Thereafter, it does not impose the burden of proof on the State, to examine whether the limitation imposed on the right to privacy is the 'least restrictive measure'. In *Anuradha Bhasin*, the court again does not enter into an examination of the alternate measures suggested by the petitioners, and simply defers to the State's stand that it cannot selectively block websites. Interestingly, the State proceeds to selectively block websites immediately after the judgment, which proves that the court's lack of insistence on the State's evidentiary burden, can lead to an anomalous judgment. In the *IMAI* case, the court examines the less intrusive measures suggested by the petitioners, however, it leaves the job unfinished by not burdening the State to produce evidence that the eventual measure adopted is the 'least restrictive' one. Lastly, in the *Gujarat Mazdoor* case, though the court reaches the correct decision and it believes that the notifications issued by the government should satisfy the proportionality test, but it does not attempt to hold the State responsible for satisfying the requirements of burden of proof.

Clearly, even though the Supreme Court relies on Justice Barak's formulation of the proportionality test, it does so half-heartedly, thereby missing the utility of such an exercise and an opportunity to clarify the confused state of law. In none of the cases examined above, has the evidentiary burden of proof been imposed on the State in the manner suggested by Justice Barak. Ankush Rai while reviewing cases decided by the Supreme Court, from the angle of burden of proof, reaches a conclusion that the court keeps shifting the burden between the petitioner and the State.[80] However, as analysed above, it is clear that though the court understands that the burden of suggesting less restrictive measures lies with the petitioner, but it fails to critically engage with the evidentiary burden of the State in the second stage of the constitutional review.

5. Conclusion

Julian Rivers in his article on *The Presumption of Proportionality* has challenged the assumption that the burden of demonstrating that a limitation of a fundamental right is proportionate rests on the public authority.[81] Since the government faces practical difficulties

[80] Rai (n 50).
[81] Rivers (n 15).

in proving that a measure is no more than necessary and overall balanced, Rivers believes that the court should recognise a presumption of proportionality in certain circumstances. This presumption transfers the burden of proof in respect of the final two stages of proportionality analysis back to the claimant.[82] However, Cora Chan, defends the position that the State should always bear the burden of proving that a prima facie limitation of right passes all stages of the proportionality enquiry.[83] Basing her argument on the shift in culture, from authority to justification, Chan states that 'legitimacy for the state's coercive actions must be earned rather than presumed'.[84] The burden of proof rule as proposed by Justice Barak is the best tool to avoid any inconsistency in the *necessity* stage of the proportionality test.

Evidently, the Supreme Court of India follows a relaxed intensity of review, wherein sometimes it bypasses certain stages of the proportionality test and sometimes it merges all stages of the enquiry into one general question of whether the measure is reasonable or justified. The court's deferential attitude towards the State means that it does not place adequate evidential burdens on it, which 'severely restricts the ability of the doctrine to re-shape legal culture'.[85] Simply paying lip service to the doctrine of proportionality, will not lead to a better rights review standard. It is the responsibility of the courts as the guardian of fundamental rights, to check that a *prima facie* limitation of qualified rights passes the four-stage proportionality test. The courts must insist on following the rule of burden of proof along with the substantive proportionality standard for effectively supervising a democracy based on rights.

The courts' deference to the State's policies is sometimes sought to be justified on the basic conception of a democracy and the rule of the majority. However, this longstanding concern that judges declare laws unconstitutional that were enacted by legislators who represent the will of the majority is unfounded. Dworkin's defence of the independence and the role of judges is validated by his belief that, 'when constitutions declare limits on the majority's power, this democratic assumption is displaced: decisions are not supposed to reflect the will of the majority then'.[86] But this is an issue for another day.

[82] Rivers (n 15) 412.
[83] Cora Chan, 'The Burden of Proof under the Human Rights Act' (2014) 19 Judicial Review 46.
[84] ibid 48.
[85] Chandra (n 6) 86.
[86] Ronald Dworkin, 'Equality, Democracy, and Constitution: We the People in Court' (1990) 28 Alta. L. Rev. 324, 325.