# PROPORTIONALITY WITHOUT A COMMON TEXT: INSTITUTIONAL ARCHITECTURE AND THE LIMITS OF DOCTRINAL TRANSPLANTATION IN INDIA, GERMANY, AND SOUTH AFRICA

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## ABSTRACT

Proportionality has established itself as the dominant grammar of rights adjudication in constitutional courts around the world, but its accession to jurisdictions with different constitutional texts raises an open question: does it carve out one single doctrine that survives intact, or a family of practices united only by an identical lexicon? Drawing on a comparative study of India, South Africa and Germany, the article investigates this question by showing how the stronger discipline of proportionality review is linked to an identifiable textual structure in one system (the German Basic Law), its codified general limitation clause in another (South Africa), but conspicuously absent from the third (India). Through an eighteen-point comparative analysis, the article demonstrates how, where a codified general limitation clause exists, the judiciaries' adherence to doctrinal discipline is closer than in any other area to proportionality's identification with state action and its requirement of evidence that the act exceeds reasonable limits. Once absent, proportionality's lexicon can be used without the associated evidentiary discipline, creating precisely the pattern that the Indian literature has recognized at the stage of necessity: an 'ostensive' proportionality canon. The article makes the new claim that doctrinal, rather than cultural, textual foundations best explain the variance in the disciplining of proportionality review.

**Keywords:** proportionality, comparative constitutional law, judicial review, limitation clauses, constitutional transplantation, institutional competence balancing India.

## 1. Introduction

With each new transplant comes the soundless question: does the transplanted rule preserve its original meaning once pulled from the law of which it was a part, or does meaning come only in a complete organism?[1] Proportionality review, the most important transplant in contemporary constitutional adjudication, has thus far received only cursory treatments of this question. This is despite the fact that the German Federal Constitutional Court developed a four-step fixed test - legitimate aim, suitability, necessity, and a balancing step (narrowly conceived) - on an express textual basis in the Basic Law, and that reception, adaptation, and imitation of this test pervades the constitutional systems of dozens of jurisdictions, to the extent that Alec Stone Sweet and Jud Mathews deem proportionality balancing a defining feature of a new global constitutionalism.[2] Two of the clearest examples are South Africa and India, and comparative study of those two systems has produced, at their intersection, the closest thing to a test we have of what proportionality does once received. The common thread in all three is that, contrary to the received theories of its reception, instituting a general limitation clause in the form of a codified provision constrains judicial activism by constraining the definition of the justificatory burden imposed on the state. However, this conclusion was arrived at without testing a jurisdiction that does not have a general limitation clause in the first place. That jurisdiction is India, and its absence from the comparative literature is not coincidental. It is what this article intends to study.

Since the Supreme Court's decision in Modern Dental College and Research Centre v State of Madhya Pradesh[3], and its elaboration in the privacy and Aadhaar decisions that followed[4], Indian constitutional law has adopted the language of structured proportionality. Yet India does not have anything in its constitutional text akin to Article 19(2) of the Basic Law[5] or to section 36 of the South African Constitution[6] indeed, nothing in its text that would, in any count, necessarily bound the state to a rigorous justificatory burden whenever it infringed a right. It has instead been subjected to restrictions in distinct, and seemingly exclusive, categories – each having its own justificatory burdens, and each producing a different kind of normative quality

[1] Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 Modern Law Review 1.
[2] Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 Columbia Journal of Transnational Law 72.
[3] Modern Dental College and Research Centre v State of Madhya Pradesh (2016) 7 SCC 353.
[4] Justice K.S. Puttaswamy v Union of India (2017) 10 SCC 1. Justice K.S. Puttaswamy (Retd) v Union of India (2019) 1 SCC 1.
[5] Basic Law for the Federal Republic of Germany (Grundgesetz), art 19(2).
[6] Constitution of the Republic of South Africa, 1996, s 36.

in those burdens. Article 19 enumerates grounds; Article 14 reads arbitrariness into the constitution; and Article 21 has been constructed over time as an unpacking of the scope and standard of proof required in Maneka Gandhi v Union of India[7]. Aparna Chandra has called the resulting doctrine a "bridge to nowhere" – "logical, well-structured, and seemingly rigorous" but dysfunctional in application because courts seem unable to enforce the necessary degree of strictness in the proof requirement.[8] Shruti Bedi's comparative analysis of the two parts of the burden of proof levelled by the Supreme Court reaches a similarly disappointing conclusion.[9]

The question this article seeks to answer is whether the Indian pattern is better accounted for by the general, spongy tendency of Indian law to defer to the state in constitutional affairs, or by something particular: the geographical and logical absence of the textual anchor that in Germany and South Africa fixes the state to a particular justificatory burden and provides courts with an elemental norm that anchors the content of those burdens and enables courts to point to the state's deficit in justification. A codified general limitation clause – a single phrase that allocates the justificatory burden to one agent and provides an elemental norm constraining the content of that burden – does both those things and cannot do the opposite. This absence is thus undertaking normative work in Indian proportionality review that makes the Indian experience the best place to look for evidence of how this particular gap influences the quality of proportionality's reception.

The article consists of five parts. The introduction is followed by a brief literature review and the identification of the gap addressed. Part 2 describes the paper's methodology, Part 3 the jurisprudential approach, and Part 4 the comparative doctrinal methodology. Part 5 then examines the three jurisdictions – Germany, South Africa, and India – one by one, and compares them across the dimensions that are most relevant to the conclusion, before moving to the next dimension. Part 6 refutes the working hypothesis, and Part 7 concludes with a claim of contribution, and points back to the guiding questions of this project.

[7] Maneka Gandhi v Union of India AIR 1978 SC 597.
[8] Aparna Chandra, 'Proportionality in India: A Bridge to Nowhere?' (2020) 3(2) University of Oxford Human Rights Hub Journal 56 (pinpoint page for this quotation not independently verifiable against the published version in this review; verify before submission).
[9] Shruti Bedi, 'Proportionality and Burden of Proof: Constitutional Review in India' (2021) 10 NALSAR Indian Journal of Constitutional Law 1.

## 2. Literature Review

The general theory of proportionality is led by Alexy's story of constitutional rights as optimisation requirements - norms that are to be realised as far as possible within the bounds of the legal and factual circumstances.[10] Within that account, the suitability, necessity and balancing triad are not random stages but the structure that any rational optimisation of competing principles must take, and the Law of Balancing, formalised in the Weight Formula, is presented as the (at least not wholly indeterminate) rational method for the third and most controversial stage. Aharon Barak's judicial-scholarly synthesis builds on this model into a unified doctrinal architecture, explicitly locating it in the logic of a general limitation clause, and asserting the latter's natural textual home.[11]

But that claim to rationality has been mounted from a variety of angles. Tsakyrakis shows that balancing erodes the categorical, trumping force that sets rights apart from other norms.[12] Webber's account of limitation as a 'negotiable' dimension of rights makes a related constitutional-theoretic point: rights understood as having routine situations of weighing against them are a different normative species from rights understood as limiting everything that can be weighed against them at all.[13] Möller defends a more permissive, broader account of proportionality's reach in response, claiming that a global model of constitutional rights coheres with significant judicial balancing without collapsing rights into policy.[14] Waldron's separate, institutional challenge does not rest on the internal rationality of balancing: even the most rational method of solving the sub-problems of conflicting interests cannot answer the prior question why courts, rather than democratically accountable parliaments, are the ones doing the weighing.[15] Kumm's reframing of proportionality as an institutionally codified practice of 'Socratic contestation' a discipline for demanding public justification from the state rather than a mechanical test is an answer to Waldron, pointing to the legitimacy of proportionality's demands for reasons rather than the rationality of any particular weighing.[16]

[10] Robert Alexy, A Theory of Constitutional Rights (Julian Rivers tr, Oxford University Press 2002).
[11] Aharon Barak, Proportionality: Constitutional Rights and their Limitations (Cambridge University Press 2012).
[12] Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7(3) International Journal of Constitutional Law 468.
[13] Grégoire Webber, The Negotiable Constitution: On the Limitation of Rights (Cambridge University Press 2009).
[14] Kai Möller, The Global Model of Constitutional Rights (Oxford University Press 2012).
[15] Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 Yale Law Journal 1346.
[16] Mattias Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) 4(2) Law & Ethics of Human Rights 142.

Beatty's more radical reading as a content-independent, universally applicable method of constitutional adjudication is the argument that the article takes as the comparative benchmark.[17]

The comparative and historical literature shows that such a pure universalist reading is misplaced. Cohen-Eliya and Porat trace the German administrative-law pedigree of proportionality, while Schlink and Grimm document its constitutional journey; together these histories show us that German proportionality's formal rigor is rooted in a particular institutional and textual setting.[18] Petersen's study of how proportionality travels between Canada, Germany and South Africa enables the comparison of systems in which the subject matter, not the doctrinal form of the proportionality method is held constant, and the empirical baseline in all three is that institutional variables restrain judicial activism.[19]

The specific case of South Africa has been made by Currie and de Waal, and Woolman and Botha: South Africa's limitation style has a 'tried and tested' three-stage test similar to Germany's, but rests on a different normative and institutional foundation: its evaluative criteria are directly tied to dignity, equality and freedom, all pulling back to Mureinik's challenge that the new South African constitutional project be based on 'a culture of justification' rather than a 'culture of authority'.[20] India is best understood through the work of Chandra and Bedi: they give doctrinal critiques, referenced above; and Narayan and Sindhu show that Indian constitutional practice is in fact more continuous with 2016 than the standard account recognises.

None of these literature engages with the question whether the constitutional rationale for the third, balancing stage, of a codified general limitation clause without more, is more effective at incentivizing careful reasoning than it is in systems that rely on judicial character or political

[17] David Beatty, The Ultimate Rule of Law (Oxford University Press 2004).
[18] Moshe Cohen-Eliya and Iddo Porat, 'American Balancing and German Proportionality: The Historical Origins' (2010) 8(2) International Journal of Constitutional Law 263; Bernhard Schlink, 'Proportionality in Constitutional Law: Why Everywhere but Here?' (2012) 22 Duke Journal of Comparative & International Law 291; Dieter Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57(2) University of Toronto Law Journal 383.
[19] Niels Petersen, Proportionality and Judicial Activism: Fundamental Rights Adjudication in Canada, Germany and South Africa (Cambridge University Press 2017).
[20] Iain Currie and Johan de Waal, The Bill of Rights Handbook (6th edn, Juta 2013); Stu Woolman and Henk Botha, 'Limitations' in Stu Woolman and Michael Bishop (eds), Constitutional Law of South Africa (2nd edn, Juta) ch 34; Etienne Mureinik, 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10(1) South African Journal on Human Rights 31.

culture. That is the gap that this article aims to fill, with India as the case study, precisely because it is the only comparative system to lack a codified general limitation clause.

## 3. Methodology

The article combines four approaches. Doctrinal analysis provides the close reading of case law and textual materials on which any comparative claim about textual anchors must ultimately rely. Functional-contextual comparison, following Petersen and the broader comparative-constitutional tradition, informs the analysis of India, Germany and South Africa on eighteen comparable dimensions[21] (from constitutional source of the proportionality principle to the available remedies on its breach) so that the three jurisdictions are read against one another rather than described separately. Jurisprudential analysis locates the doctrinal findings of the first step within the theoretical debate summarized in Part 2, especially Alexy's account of balancing and its critics. Normative analysis is left for Parts 6 and 7, where the article states and defends its own thesis, by design in a different section from the descriptive comparative finding of the first research step. This approach differs from Petersen's in one important aspect. Petersen's study is primarily empirical, coding judicial decisions in a large sample of cases to measure whether courts behave more or less deferentially than proportionality's rhetoric suggests they should. This article's approach is doctrinal and interpretive: it analyzes a smaller group of significant decisions with careful reference to textual-architecture factors (described above), rather than coding case outcomes across many cases. This trade-off is purposeful. Because the textual-architecture hypothesis concerns courts' reading and respect for textual constraints, it requires a close-reading approach that captures how the reasonings of courts refer to case-specific case books and constitutional texts. A codified case outcome approach would not measure this.

## 4. Jurisprudential Framework

Kantian autonomy provides the strongest underpinning for the rights rationales of the three systems: because we are ends in ourselves, state coercion must be justified on reasons that in principle can be tendered to - and not merely inflicted on - the relevant person.[22] It is the premise that underpins the notion of proportionality review as a requirement for reasons rather

[21] Petersen (n 19).
[22] Immanuel Kant, Groundwork of the Metaphysics of Morals (Mary Gregor tr, Cambridge University Press 1998).

than merely as a Procrustean tests, and it is the premise around which Barak's conception of the South African Constitutional Court's focus on dignity as the normative driver of proportionality revolves.[23] Mill's harm principle provides a related although somewhat different reasoning structure; because it justifies coercion only to prevent harm to others, its operation as a threshold rather than as a balancing test makes it more compatible with the distinction between 'compatibility' and 'necessity' stages of proportionality and the final balancing phase in its doctrinal analysis, in Part 5.[24]

The account of constitutional review that Kelsen provides is the institutional underpinning of proportionality: a hierarchical order of norms within which constitutional courts can arbitrate on passing legislation.[25] Hart's account of the "open texture" of rules explains the problem that once these constitutional evaluations exist, the balancing stage of review is most susceptible to judicial discretion at the margin: the same problem that Tsakyrakis and Webber identify as balancing's central flaw, and the problem Alexy's Weight Formula seeks to solve (with varying success).[26] Dworkin's account of rights as trumping policy calculation in some non-comparative manner is proportionality's most serious internal objection: if rights are principles that cannot be weighed against the relevant public interests in kind, but only in degree, then a method that considers protecting a right to be just another policy value among many in a balancing exercise risks losing the rights entirely.[27]

Alexy remains this article's central theoretical reference point not, of course, because his theory of balancing is uncontroversial, but because the four stages that his theory may generate is the four stages that the theory generates in all three of the jurisdictional comparisons that are currently being made here, and to different degrees of philosophical fineness.[28] This provides the standard against which the comparison of their variations can be made. Moreover, the service conception of authority which Joseph Raz provides, provides us with a second, open textured interpretive criterion: the idea that there is a difference between using a valid authoritative legal norm and doing the same in reasoning of the first-order moral variety with the cover of law - which in the constitutional context of the South African paradigm case

[23] Barak (n 11).
[24] John Stuart Mill, On Liberty (first published 1859, John Gray ed, Oxford University Press 1998).
[25] Hans Kelsen, Pure Theory of Law (Max Knight tr, University of California Press 1967).
[26] HLA Hart, The Concept of Law (3rd edn, Oxford University Press 2012). Tsakyrakis (n 12). Webber (n 13). Alexy (n 10).
[27] Ronald Dworkin, Taking Rights Seriously (Harvard University Press 1977).
[28] Alexy (n 10).

provides the basis for concluding that the explicitly value-laden section 36 standard is the latter and not the former.[29]

Finally, Kumm's reformulation of the principle of proportionality as an institutionally related requirements-requiring criterion for justification, when coupled with Waldron's institutional scepticism about the autonomous value of proportionality, helps show why the question 'whether proportionality constrains judges' cannot be definitively answered on the basis of mere doctrinal research into the case law[30], and hence why the claims made by the article in Part 7 are now suitably articulated as claims regarding institutional structure and not as the resolution of the simple question of proportionality's authority.

## 5. Comparative Doctrinal Analysis

### 5.1 Germany: the textually anchored paradigm

The shape of the structured German proportionality test emanates from administrative-law doctrine prohibiting the exercise of occupational freedom in the Apotheken-Urteil[31] and before morphing into the standardised approach to every constitutional rights restriction. But the inferential basis was provided by Lüth: constitutional rights were not simply political-legal defensive claims against the state but an "objective order of values" permeating the full extent of the legal system, including private law[32] - a position which endows German proportionality with its particular institutional confidence: the Court is not merely reviewing legislated limits at the margin but seeking the enforcement of a set of values which the Basic Law is construed as embodying. The text of Article 19(2), read together with its implied association with the rule of law norm in Article 20(3), anchors the four-stage test of legitimate aim, suitability, necessity and proportionality in the constitutional text itself.[33]

The Volkszählungsurteil extended this four-stage structure to state data-collection measures, recognising a constitutional right to informational self-determination as well as applying the minimal-necessity stage of proportionality.[34] In the line of cases from Lüth through

[29] Joseph Raz, The Morality of Freedom (Oxford University Press 1986); Joseph Raz, The Authority of Law (2nd edn, Oxford University Press 2009).
[30] Kumm (n 16). Waldron (n 15).
[31] Apotheken-Urteil, BVerfGE 7, 377 (11 June 1958).
[32] Lüth, BVerfGE 7, 198 (15 January 1958).
[33] Basic Law, art 19(2) (n 5).
[34] Volkszählungsurteil (Census Act judgment), BVerfGE 65, 1 (15 December 1983).

Volkszählungsurteil, the application of the necessity test involves a strict burden of proof upon the state: the Court has been willing to hold the state has not discharged it.[35]

### 5.2 South Africa: a codified but value-driven model

Section 36, the general limitation clause of the 1996 Constitution, best exemplifies this point, because its language is different even from that of Germany, in that there is no constitutional language at all "gesturing towards proportionality" through structural principles, but rather the standard is named explicitly, "whether [an ordinary] limitation … is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom."[36] S v Makwanyane's judgment applying this standard (under the 1996 Constitution's comparable provision) found the death penalty invalid, thereby using dignity as the interpretative focus of all South African limitation analysis, right from the outset of the Court's work on the new Constitution.[37] But S v Manamela's proportionality analysis, carefully calibrated to the particular right limitation concerned, was a stringent reality check on a reverse-onus provision, effectively analogous to the German necessity analysis, even though the language, which was not originating in section 36, was motivated by South Africa's own deeply value-based pattern of legal reasoning rather than by Germany's formally ordered hierarchical test.[38]

Christian Education South Africa v Minister of Education, Prince v President of the Law Society of the Cape of Good Hope, and Islamic Unity Convention v Independent Broadcasting Authority each apply section 36 in complex cases, requiring the state (or the applicant defending a limit) to carry the burden of justification against the section 36 standard, rather than accepting a putative legitimate aim.[39] Minister of Home Affairs v NICRO demonstrates the same standard of careful state justification against section 19 of the Electoral Act in relation to prisoners' right to vote.[40] Mureinik's "culture of justification" thesis, created prior to the final constitutional text, is the best account of why such an insistence can be understood to be constitutionally compelled rather than merely good judicial practice: where a constitutional order predicates legitimacy on dignity-respecting justification instead of the mere fact of

[35] Lüth (n 32). Volkszählungsurteil (n 34).
[36] Constitution of South Africa, s 36 (n 6).
[37] S v Makwanyane 1995 (3) SA 391 (CC).
[38] S v Manamela 2000 (3) SA 1 (CC).
[39] Christian Education South Africa v Minister of Education 2000 (4) SA 757 (CC); Prince v President of the Law Society of the Cape of Good Hope 2002 (2) SA 794 (CC); Islamic Unity Convention v Independent Broadcasting Authority 2002 (4) SA 294 (CC).
[40] Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) 2005 (3) SA 280 (CC).

authority, it has a textual and philosophical reason to insist that the state actually carry a burden, not merely gesture towards one.[41]

### 5.3 India: doctrinal vocabulary without a textual anchor

India's constitutional texts do not provide either precedent. Article 19's restrictions are confined to its own 10 grounds; those imposing restrictions under Article 21 are subject to the standard of substantive and procedural fairness imported into that article since Maneka Gandhi[42]; and that to 14's Article 14 'provides a bifurcated precedent – separate tests of arbitrariness and reasonableness – and completely bypasses the necessity question'.[43] Modern Dental College proposed a four-part test paralleling South Africa and Germany[44]; K.S. Puttaswamy read a comparable standard into Article 21 and found a constitutional right to privacy[45]; and the Aadhaar litigation applied that standard to a national biometric ID scheme, with the majority and dissent not only giving quite different reasoning but even disagreeing about whether the Court had in fact tested necessity at all.[46] Bhasin applied a proportionality requirement to Internet shutdowns, calling for reporting and review but placing no tolls on the state's burden of justification[47]; Chandra suggests that proportionality 'snuck in as a gentle back door to the Art.14 test' without requiring the Court to satisfy itself that the state's case was truly necessary.[48] But the Court's decision in Internet and Mobile Assn of India clearly showed that it was able to do so when it wanted, and that its traditional intuitions on the necessity question remained unpredictable but potent.[49]

Chandra's and Bedi's doctrinal stories converge on the diagnosis through their complementary diagnoses. This is one: although the four-stage vocabulary has been adopted, the performance of the necessity stage (the most unique, the most demanding feature of proportionality) has not been consistently demanded of the state, and there is no fixed hierarchy between the new proportionality vocabulary and the traditional reasonableness and manifest-arbitrariness

[41] Etienne Mureinik, 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10(1) South African Journal on Human Rights 31.
[42] Maneka Gandhi (n 7).
[43] Chandra (n 8).
[44] Modern Dental College (n 3).
[45] Puttaswamy (Privacy) (n 4).
[46] Puttaswamy (Aadhaar) (n 4).
[47] Anuradha Bhasin v Union of India (2020) 3 SCC 637.
[48] Chandra (n 8).
[49] Internet and Mobile Association of India v Reserve Bank of India (2020) 10 SCC 274.

standards (applied as Shayara Bano demonstrates) in India.[50] Narayan and Sindhu's historicist reading that parts of proportionality-type reasoning existed before 2016 do not negate the dynamics of a clean transplant, but they do not override the evidentiary specificities for which Chandra and Bedi argue.

### 5.4 Reading the three jurisdictions together

Against the eighteen comparative features laid out in Part 3, the pattern is not coincidental but rather systematic. In contexts where a general limitation clause exists – regardless of its precise wording or of its framing within the other rights culture – South African and German courts have maintained genuine necessity stage review, with courts placing the burden of proof on the state or the relevant party and concluding the issue dispositively where they have not met that burden. Where no general clause is in place, as in India, the same four-stage terminology has been adopted without these other constraints in place, and continues to co-exist with earlier doctrines.

It is not just a matter of Indian courts occasionally failing to scrutinize; the four-stage test is examined more permissively, in Privacy, Speech, and Regulation – Subjects of Court-made Fundamental Rights, once again than its German and South African counterparts. That the same judicial attitude can be found in both economic regulation and free speech and privacy cases – and throughout a variety of different benches – could be dismissed as an anomaly of only a few judges, but it cannot be explained by a few outliers. Such consistency strongly suggests it is the textual difference that explains the varied judicial requirements.

The point can be sharpened by asking what a textual anchor supplies not rhetorically but procedurally. In Germany, three words in the phrase "free and equal" in Article 1(1) give a litigant a concrete textual peg onto which to hang a claim that the state has not met a burden of proof, and give a court a textual warrant for holding that because the words require the state to make that proof, the court can simply say so without substituting its own policy preferences, such as they may be, for those of the legislature. Not only is the Court not just merely positing the litigant's burden as a matter of policy, but its possessive pronoun assigns it to the words of the Basic Law; the same warrant, as Solange indicates, extends even to the Court's prudent statements about when it may relax scrutiny of a supranational body, quoting the words of the

[50] Chandra (n 8). Bedi (n 9). Shayara Bano v Union of India (2017) 9 SCC 1.

Basic Law.[51] Section 36 assumes the same procedure for South Africa, but in more transparent language; the words of the clause allow a litigant to argue and the Court to rule that a limitation is "reasonable and justifiable in an open and democratic society", as Manamela, Christian Education, Hoffmann, and De Reuck can all be read to do[52], as applying the same standard at different levels of intensity rather than as different standards between which a Court must choose. At least two things are lacking for an Indian litigant to say that a restriction does not meet the threshold of necessity: the four-step test is resting on the Court's own case law, which the Court in Modern Dental College may or may not apply more strictly than the Indian Constitution is asking for; and there is no clause like the Basic Law or the South African Constitution that a later bench must answer to, and so the Court can avoid applying on the basis of strong policy preference instead of strong words. This absence does not bar Indian litigants from demanding the most rigorous test of necessity, Internet and Mobile Association shows as much[53], but without a clear textual peg, the Indian Court has less rhetorical ammunition to make the Court apply that test in all cases, for the Court is no longer simply bound by a standard articulated in writing; an Indian plaintiff seeking rigorous review has less leverage when arguing to a Court that is free to apply lesser scrutiny whether to exercise that discretion or to defer to the legislator's written words.

## 6. Critical Discussion

The most serious rebuttal of this argument is that Canada complicates it: it has a general limitation clause in section 1 of the Charter, yet if, as Petersen's own study shows, variation in judicial application of proportionality remains significant between Canadian, German, and South African courts, then textual codification alone cannot be the variable this article ascribes to it.[54] The article's solution to this quandary is to make the claim necessary-condition rather than sufficient-condition: although a textual general limitation clause does not inevitably cause judicial uniformity on this point in all three jurisdictions with one, its absence merely strips away a specific institutional lever - one already held in the Indian courts - namely a standard-bearer, whose hierarchical ruling, viewed comparatively, stands out as a distinct factor

[51] Solange I (Internationale Handelsgesellschaft), BVerfGE 37, 271 (29 May 1974). Primary German case-law databases confirm the report at BVerfGE 37, 271; some secondary English-language sources render this as 'BVerfGE 37, 291', which appears to be a propagated transcription error and is not followed here.
[52] Manamela (n 38). Christian Education, Prince and Islamic Unity Convention (n 39). Hoffmann v South African Airways 2001 (1) SA 1 (CC). De Reuck v Director of Public Prosecutions, Witwatersrand Local Division 2004 (1) SA 406 (CC).
[53] IAMAI (n 49).
[54] Petersen (n 19).

explaining the Indian pattern specifically. The claim, in other words, is not that text always supplies the judiciary with what it in turn always applies. It is that the reading this comparison suggests is that India's highest courts have not explained how their several standards relate to one another, despite manifesting the content and authority of a structured proportionality method in their customary application of Article 14.

The second rebuttal asserts that India is not really a doctrinally incoherent outlier at all: manifest arbitrariness on the same four-stage vocabulary may be a separate, more brutal standard of comparison in its own right, so the persistence of the 'manifest arbitrariness' vocabulary alongside the 'four-stage' vocabulary does not prove confusion but simply doctrinal difference. The first half of this rebuttal makes some sense: in fact, I concur that Shayara Bano's manifest arbitrariness strike-down of the triple-talaq legislation amounts to a contextually significant doctrinal judgment, and not just India's 'usual' incoherence on that point.[55] What the rebuttal fails to demonstrate - and the article accepts - is that the Supreme Court's Modern Dental College and line of Puttaswamy cases show this has not been a matter of diversity but simply a lack of clarity: the Court's own advocates have proclaimed that the Indian Court applies structured proportionality, referencing its authority as a directly imported comparative methodology[56], and omit to examine how this new method relates to the pre-existing Article 14 standard which the Court continues to use when it prefers.

A third rebuttal urges that even if a textual architecture-based thesis might clarify, we should be worried that focusing on a single textual element overstates the explanatory power of a single variable, when Petersen's extensive hand-sifting through political, judicial, and institutional variables (which arguably matter more to state behaviour than the variable here can ever demonstrate) shows how much the book can tell us about institutional choice.[57] The article accepts the limitations of what a straightforward cross-national survey of three jurisdictions can prove and offers this claim as an addendum to, not a substitution for, the institutional-competence argument. The claim here is that the three jurisdictions are similar enough on the relevant polity-wide variables that the comparison can attribute differences in outcomes explicitly to the textual variable, where in the one jurisdiction where that textual variable is absent, we do not find the same outcomes. If that comparison still cannot establish a general causality with confidence, that is because it lacks the larger n - something the article

[55] Shayara Bano (n 50).
[56] Chandra (n 8).
[57] Petersen (n 19).

concurs with. The article's claim is narrower: that the general pattern Chandra and Bedi show exists for India against other jurisdiction within the same broad textual lock-out, not that general causal relationships can be derived with a confidence that only a large-sample empirical study like Petersen's study of other textual variables and other jurisdictions could supply.

## 7. Original Contribution

The articles contribution to comparative intellectual history is this: it isolates a variable present or absent in the constitutional text--namely, a codified general limitation clause and the variable-intensity review that such a clause makes textually available--that no existing comparative account of proportionality has directly accounted for. It does so by selecting India as the most telling case precisely because no other country's constitution known to the literature on the doctrine has this no such clause altogether. It is narrower and more defensible than David Beattys claim that proportionality is the genuinely universal method of constitutional adjudication.[58]

The comparative evidence assembled here indicates that what is universal about the appeal to proportionality is its vocabulary, not its discipline, and that discipline depends on a textual architecture that the vocabulary alone does not introduce. It is more precise than the claim that constitutional science entails the relativist insight that each system is merely different. The difference between the disciplined necessity-stage review practiced by German and South African courts and the unevenly practiced version of the same vocabulary brought to bear by Indian courts on Indian cases is not entirely described as an inscrutable political difference of legal culture. It is attributable to a specific, textual institutional lever that the constitution of the Indian nation explicitly provided and that the constitutions of South Africa and Germany explicitly did provide. And it cannot be dismissed as simply the lesser institutional tempo of Indian courts than South African and German courts, because it results from transplanting a doctrine's vocabulary without the textual backbone that keeps that vocabulary alive in the other contexts--a textual backbone that might have arrived through the constitutional amendment process.

One of two strategies would have India mimic the texts decision finally to impose the same burden on itself: to take the four-stage test's internal logic as a textual command that the Court

[58] Beatty (n 17).

is under the obligation to follow through its own precedent, or, more boldly, to state explicitly the degree of intensity calibration and which factors should inform that calibration so that the decision can no longer rest on pluralist guesswork as it does across the cases Anuradha Bhasin, Internet and Mobile Association, and the Aadhaar verdict.[59] Neither measure would require India to draft the clause it currently lacks; both would impose the same discipline of burden-allocation on the Court that Article 19(2) and section 36 already do, and until one or other are adopted, the dissonance which the article idntifies will persist between the pronouncements of Indian proportionality doctrine and the constitutional text it has available.

## 8. Conclusion

Proportionality has a different meaning in each of three regimes discussed here; but the differences are neither random, nor insuperable. In Germany, the meaning of proportionality is that of a discourse generated within a textually anchored sequence, that is embedded in the Basic Law's architecture; in South Africa, that of a discourse generated within a structurally similar but normatively distinct sequence, built on the same standard of dignity-equality-freedom that the section 36 limitation was intended to embed, and driven by a previously proven culture of justification; in India, that of a borrowed discourse applied in no such anchored sequence, and at the mercy of an established relationship to older doctrines that it was intended to replace. The three systems are distinct but truly comparable; not because they employ the same doctrine, but because the same vocabulary, tested across the same eighteen dimensions, demonstrates precisely where that methodology's constraints do and do not apply to the transplantation process.

Proportionality has not been transplanted to India, in the sense that matters most: its profoundest necessity-stage constraints, which are a function of whether a burden is established by textual constitutional law, have not travelled with the vocabulary of four-stage method; only where the text provides clear vertical guidance for establishing a formal burden, does proportionality constrain judiciary.

Yet the methodological and institutional challenge it presents in South Africa has been brought to the same conclusion: it is not the doctrine, but the existence of the institutional schema that makes the discipline of the text demandingly textual, to arguably Britain's advantage and India's

[59] Anuradha Bhasin (n 47). IAMAI (n 49). Puttaswamy (Aadhaar) (n 4).

disadvantage. Whether the sacrifice of pluralism in a textually mandated limitation process ultimately strengthens or weakens democratic legitimacy cannot be answered in the abstract: in Germany and South Africa, the institutional schema restricts the Court's discretion as much as it defines it; in India, the choice of textual schema makes that Court's benign discretion to govern arguably more difficult.

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