Proportionality in Action:

A Comparative Empirical Analysis of the Judicial Practice

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Proportionality is widely accepted as one of the most important constitutional principles of our time, but despite the immense normative literature on the doctrine, there has been nearly no comprehensive empirical analysis of its application. This study presents a first empirical exploration of the doctrine, and the preliminary findings demonstrate aspects in which the practice of proportionality deviates from assumptions in the theoretical literature and several previously unrecognized variations between jurisdictions.

The proportionality doctrine serves as the definitive reasoning framework in cases presenting conflicts between human rights and other public interests in a constantly growing number of countries around the globe. Its popularity is such that it has been said that "to speak of rights is to speak of proportionality".[1] Proportionality is often cited as a premiere example of the migration of constitutional ideas and one of the defining features of global constitutionalism, due to the "viral quality" with which it has spread across the globe: originating in German jurisprudence, it has been adopted as a central constitutional feature in Canada and South Africa, and continued to countries across Europe, and from Asia to South America, with yet more countries joining in every year.[2]

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[1] Grant Huscroft, Bradley W. Miller and Gregoire Webber (eds.),PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, JUSTIFICATION, REASONING (Cambridge University Press, 2014) 2

[2] Lorrain Weinrib, "*The Post-War Paradigm and American Exceptionalism*", in: THE MIGRATION OF CONSTITUTIONAL IDEAS 84 (Choudhry ed. 2007); Alec Stone Sweet and Jud Matthews, "*Proportionality, Balancing and Global Constitutionalism*", 47 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 72, 113 (2008). One of the most recent countries to have adopted the proportionality framework is Australia, see: Anne Carter, 'Proportionality in Australian Constitutional Law: Towards Transnationalism' ZaöRV 76 (2016), 951-966; As for the recent process of adoption proportionality in India, see elaboration below, footnote 28.

Proportionality is a judicially-developed doctrine, and although a single common formulation of the doctrine does not exist, it does share a basic structure across countries. Proportionality carries a sequential structure comprised of a series of subtests, typically including four elements: the worthy purpose requirement, according to which the right limitation must be for the sake of promoting a legitimate public interest; the suitability test establishing rationally connection between the means and the public goal pursued; the necessity test inquiring whether the goal can be attained using a less rights-restricting means; and the strict proportionality test, weighing the benefit of the public policy relative to the harm caused to the right.[3]

Proportionality in Academic Literature – The Central Conventions about the Doctrine

Considering its prominent status in constitutional law around the globe, proportionality has triggered immense scholarly interest. To date, the vast majority of literature on proportionality is normative, and generally speaking fervently divided between supporters and objectors. The heated debate over proportionality relates primarily to the relationship between proportionality and theories of rights and whether it ensures sufficient protection for rights, and the institutional ramifications for judicial authority when adopting proportionality as the standard for judicial review.[4]

Surprisingly perhaps, the theoretical underpinnings of the doctrine are far from clear or agreed upon. A recent characterization has articulated two differing theoretical accounts of proportionality, roughly categorizing them as first and second generation justifications.[5] According to the first, proportionality at its core is an optimizing exercise between rights and the other values with which they come into conflict, which flows

[3] Klatt and Meister, THE CONSTITUTIONAL STRUCTURE OF PROPORTIONALITY (2012); Alec Stone Sweet and Jud Matthews, "*Proportionality, Balancing and Global Constitutionalism*", 47 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 72, 76 (2008).

[4] See, for example: DAVID BEATTY, THE ULTIMATE RULE OF LAW (Oxford University Press, 2004); GREGOIRE WEBBER, THE NEGOTIABLE CONSTITUTION: ON THE LIMITATION OF RIGHTS (Cambridge University Press, 2009); Stavros Tsakiyaris, "*Proportionality: An Assault on Human Rights?*" 7 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 468 (2009); Kai Moller, "*Proportionality: Challenging the Critics*", 10 ICON (2012) 709; Klatt and Meister, *Proportionality – a Benefit to Human Rights? Remarks on the ICON Controversy*, 10 ICON 687 (2012).

[5] FRANCISCO URBINA A CRITIQUE OF PROPORTIONALITY AND BALANCING (Cambridge University Press, 2017). Also see, similarly: Julian Rivers, "*Proportionality and Variable Intensity of Review*", 65 CAMBRIDGE LAW JOURNAL 174 (2006).

from the nature of rights themselves.[6] According to the second account, proportionality is essentially a practice of logical reasoning, strengthening a culture of justification in which the state is required to publicly justify rights-restricting policy so that the logic and force of the justification can be tested.[7] This distinction remains largely theoretical, and the practical ramifications of the different approaches for the actual practice of proportionality have not been significantly developed.

The intricate normative debate over proportionality is speckled with assumptions and assertions pertaining to how the doctrine functions in practice. However, these seemingly factual statements are nearly never empirically grounded, but rather overwhelmingly based on a small number of well-known decisions selectively chosen to support the normative claim being made. In the proportionality literature there is often not a clear distinction between the "is" and the "ought": there are those who do not seem to distinguish between the two, perhaps assuming that the theory and practice of proportionality are perfectly aligned. Some focus on critiquing the way the doctrine is applied in particular cases,[8] while others respond to such criticism with the claim that misapplications of the doctrine do not put the principle, as such, into question.[9]

In the following paragraphs we will present an assembly of some of the central assumptions that can be extracted from the normative literature about proportionality's function in practice. This will construct the basis upon which we will present our research questions and against which our findings can then be discussed.

One of the central features of proportionality is the doctrine's structured and sequential nature: the doctrine is comprised of a number of different stages, each posing a specific and defined question, and together they amount to all the required conditions for justifying a right limitation. A court conducting proportionality analysis proceeds, by order, from one question to the next, continuing only once the previous step has been successfully passed. As a consequence, the final stage of proportionality in the strict

[6] ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS (translated by Julian Rivers, Oxford University Press, 2002); Robert Alexy, "*Balancing, Constitutional Review and Representation*", 3 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW (2005) 572.

[7] Mattias Kumm, "*The Idea of Socratic Contestation and the Right to Justification: The Point of Rights Based Proportionality Review*", 4 LAW & ETHICS OF HUMAN RIGHTS (2010) 142; Moshe Cohen-Eliya and Iddo Porat, *Proportionality and the Culture of Justification* 59 AMERICAN JOURNAL OF COMPARATIVE LAW 463 (2011).

[8] Stravos Tsakyrakis, *Proportionality: an Assault on Human Rights?* 7 ICON 468 (2009).

[9] Kai Moller, "*Proportionality: Challenging the Critics*", 10 ICON (2012).

sense which is the apex of the analysis is reached only once a measure has successfully passed all previous stages; a measure that has failed any of the previous tests is by definition unconstitutional and therefore no further discussion is needed. [10]

This structured and sequential characteristic is viewed by several supporters of the doctrine as one of its central virtues: proportionality provides the judicial decision with structure, guiding judges through the decision process and ensuring that all relevant elements are considered in the appropriate order and context. Thus, proportionality allows "judges to be analytical, by breaking one complex question into several sub questions that can be analyzed separately". [11]

An additional fundamental element in the perception of the proportionality doctrine is the centrality of balancing to proportionality, subject to the fact that the concept of balancing is itself open to varying interpretations. The centrality of balancing is so significant that in some accounts proportionality and balancing are treated as one and the same.[12] Some of the most prominent theorists of proportionality see the balancing component, as reflected in the final stage of proportionality in the strict sense, as the essence, heart and core of the doctrine. Some point to the fact that balancing is an expression of the nature of rights themselves.[13] Others view balancing as the format through which courts can engage with the morally relevant considerations for the

[10] Alec Stone Sweet and Jud Matthews, "*Proportionality, Balancing and Global Constitutionalism*", 47 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 72, 76 (2008): "if the government's measure fails on suitability or necessity the act is *per se disproportionate*; it is outweighed by the pleaded right and therefore unconstitutional… If the measure under review passes the first three tests, the judge proceeds to balancing *stricto senso*."

[11] Kai Moller, "*Proportionality: Challenging the Critics*", 10 ICON (2012) 709, 727. See also: Mattias Kumm, '*Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice*' 2 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 574, 579 (2004); Denise Reaume, "*Limitation on Constitutional Rights: The Logic of Proportionality*" (2009) 26 OXFORD LEGAL RESEARCH PAPER SERIES 1; Charles-Maxime Panaccio, 'In Defence of the Two-Step Balancing and Proportionality in Rights Adjudication' (2011) I CANADIAN JOURNAL OF LAW & JURISPRUDENCE 109, 118, referring to proportionality as a "heuristic tool for practical-moral reasoning"; Aharon Barak, 'Proportionality', in: Michel Rosenfeld and Andras Sajo (eds.) THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW (2012); Aharon Barak, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS (Hebrew edition page numbers) 558-561 (Cambridge: Cambridge University Press, 2012); David Beatty, The Ultimate Rule of Law.

[12] Stavros Tsakiyaris, "*Proportionality: An Assault on Human Rights?*" 7 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 468 (2009); GREGOIRE WEBBER, THE NEGOTIABLE CONSTITUTION: ON THE LIMITATION OF RIGHTS 55-86 (Cambridge University Press, 2009).

[13] ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS (translated by Julian Rivers, Oxford University Press, 2002); Aharon Barak, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS (Cambridge: Cambridge University Press, 2012);

decision.[14] The general assumption is that cases are ultimately decided at this, final stage.[15]

Critics of proportionality also focus on the centrality of balancing, which they see as the most problematic aspect of the doctrine. The critique of balancing can stem from objection to its ramifications for the status of rights – since balancing leads to them being treated on the same plane as other considerations, thus robbing them of their preferential status and allowing them to be balanced away.[16] Alternatively, critique of balancing can be due to its unstructured and non-constraining nature, which undermines the concept of rule of law and provides courts with unlimited discretion.[17]

As a consequence of the general consensus shared by most critics and supporters that balancing is at the center of proportionality, the opening stages of the analysis - particularly the worthy purpose and suitability requirements – are overwhelmingly perceived as threshold tests targeted at weeding out extreme outlier cases that only rarely result in failure. Although legal scholars agree that limitation analysis should not be conducted in cases in which the goal of the limitation cannot even on its face justify limitation,[18] it seems to be almost taken for granted that such cases only rarely occur, perhaps based on the assumption that policy makers generally promote legitimate public interests, and therefore such cases are objectively rare. As for the suitability requirement, references to this stage in the literature consider the bar to be met at this stage as very low, requiring merely a theoretical demonstration that the measure is capable of

[14] Kai Moller, "*Proportionality: Challenging the Critics*", 10 ICON (2012) 709; Alec Stone Sweet and Jud Matthews, "*Proportionality, Balancing and Global Constitutionalism*", 47 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 72, 87-92 (2008).

[15] Jochen von Bernstorff, "*Proportionality without Balancing: why Judicial Ad Hoc Balancing in Unnecessary and Potentially Detrimental to the Realization of Individual and Collective Self Determination*", in: REASONING RIGHTS, 72-73, "Courts which make use of the third step (ad hoc balancing) extensively tend to decide cases at this balancing stage… for these courts justice is supposed to be done at the third stage".

[16] Gregoire Webber, *On the Loss of Rights*, IN: PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, JUSTIFICAITON, REASONING 123 (CAMBRIDGE, 2014); Stavros Tsakiyaris, "*Proportionality: An Assault on Human Rights?*" 7 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 468 (2009).

[17] FRANCISCO URBINA A CRITIQUE OF PROPORTIONALITY AND BALANCING (2017) 150-154; Fredrick Schauer, "*Balancing, Subsumption and the Constraining Role of the Legal Text*" in: Mattias Klatt (ed.), INSTITUTIONAL REASON: THE JURISPRUDENCE OF ROBERT ALEXY 307 (Oxford University Press, 2012); Grant Huscroft, "*Proportionality and Pretense*" 29 Constitutional Commentary 229 (2014).

[18] These are often termed "exclusionary reasons". Mattias Kumm, *"Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement"*, in: Paulsen et. al. (eds.) LAW, RIGHTS, DISCOURSE: THEMES OF THE WORK OF ROBERT ALEXY (Hart, 2007) 131; Klatt and Meister, *Proportionality – a Benefit to Human Rights? Remarks on the ICON Controversy*, 10 ICON 687 (2012); Iddo Porat, *The Dual Model of Balancing: A Model for the Proper scope of Balancing in Constitutional Law*, 27 CARDOZO LAW REVIEW 1393 (2006).

promoting the goal to some degree, and therefore it is assumed that measures would rarely fail such a basic requirement. All in all, the two threshold stages are viewed as primarily setting the stage for the next tests in which the "real" analysis takes place. [19]

Most disagreements over the proper application of the doctrine relate to the relationship between the last two components, the necessity test and proportionality in the strict sense. This is also one of the central points in which the literature acknowledges the existence of variation between jurisdictions, in terms of which of the two is the dominant element, carrying the main burden in justifying the outcome. It has been pointed out that in the UK proportionality is applied without a distinct balancing stage, instead culminating with the necessity test, and similarly in Canada the less-restricting means test is the dominant component, leaving the final stage almost meaningless. In contrast, in German jurisprudence the majority of the significant judicial deliberation is conducted at the final, balancing stage.[20]

In light of these differences, some discussion has addressed the possible underlying causes as well as the desirability of one approach over the other. One commonly cited claim is that the Canadian model reflects a hiding or masks of balancing considerations within the necessity stage, for legitimacy purposes, as opposed to an alternate, transparent approach to balancing, [21] while others have expressed support for an

[19] For example: Paul Yowell, "*Proportionality in US Constitutional Law*", in Liora Lazarus, Christopher McCrudden, Niels Bowels (eds.) REASONING RIGHTS: COMPARATIVE JUDICIAL ENGAGEMENT (Hart, 2014): *"the tests of legitimacy and suitability are – to the extent that they are separately addressed in a case – usually treated in a cursory fashion. It is very rare for a court to hold that the means are unsuitable for reaching that aim.";* Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights? A Rejoinder to Madhav Khosla', 8 ICON 307, 308 (2010): "*although judges… pay lip service to the first two subtests, they really don't attribute much significance to them*"; Alec Stone Sweet and Jud Matthews, "*Proportionality, Balancing and Global Constitutionalism*", 47 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 72, 76 (2008) (when surveying the structure of the doctrine present worthy purpose and suitability, and then when arriving upon the necessity test state that it is "has more bite", meaning that the previous two tests do not). Also see: Julian Rivers, "*Proportionality and Variable Intensity of Review*", 65 CAMBRIDGE LAW JOURNAL 174, 195-198 (2006); Aharon Barak, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS (Cambridge: Cambridge University Press, 2012); Denise Reaume, "*Limitation on Constitutional Rights: The Logic of Proportionality*" (2009) OXFORD LEGAL RESEARCH PAPER SERIES 1, 9-11.

[20] Julian Rivers, "*Proportionality and Variable Intensity of Review*", 65 CAMBRIDGE LAW JOURNAL 174, 177-179 (2006); Dieter Grimm, "*Proportionality in Canadian and German Constitutional Jurisprudence*" (2007) 57 UNIVERSITY OF TORONTO LAW JOURNAL 383; Stone Sweet and Mathews.

[21] Guy Davidov,"*Separating Minimal Impairment from Balancing: A Comment on R. v. Sharpe*", 5 REV. CONST. STUD. (2000) 195; Dieter Grimm, "*Proportionality in Canadian and German Constitutional Jurisprudence*" (2007) 57 UNIVERSITY OF TORONTO LAW JOURNAL 383, 395-397; Aharon Barak, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS (Cambridge: Cambridge University Press, 2012)

approach to proportionality that avoids the final stage when possible.[22] What is common to both sides in the debate is that they both conceive of the doctrine as having a single dominant component, and the application of the doctrine dichotomously follows one model or the other, resulting in either the necessity test swallowing the strict-proportionality test, leaving it with no added value, or the necessity test being effectively emptied, collapsing into the strict-proportionality test.[23]

Beyond this limited debate over which of the last two stages is the dominant element in the analysis, the academic literature on proportionality has not significantly engaged with the broader question of variance in the application between countries.[24] In the vast majority of the writing on proportionality the very existence of variance is most typically ignored or glossed over, and when it is anecdotally mentioned it is treated as "a mystery worth exploring".[25] At the other extreme, a very recent claim has been made that that the application of proportionality is so radically different in every jurisdiction and so dramatically altered by local factors that any talk of a common global standard is entirely meaningless.[26]

Empirical Analysis of the Application of the Proportionality Doctrine: Research Questions, Methodology and Research Design

As demonstrated above, the extended normative debate over proportionality is infused with assumptions regarding the practical application of the doctrine but lacks sound empirical grounding. The current research is a first attempt to empirically and

[22] Jochen von Bernstorff, "*Proportionality without Balancing: why Judicial Ad Hoc Balancing in Unnecessary and Potentially Detrimental to the Realization of Individual and Collective Self Determination*", in: REASONING RIGHTS; Bernhard Schlink, "*Proportionality*" in: Michel Rosenfeld and Andras Sajo (eds.) THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW (Oxford, 2012) 718.

[23] See David Bilchitz "*Necessity and Proportionality: Towards a Balanced Approach*" in: REASONING RIGHTS, 41.

[24] For a very recent exception, see David Kenny, "*Proportionality and the Inevitability of the Local: A Comparative Localist Analysis of Canada and Ireland*" AJCL (Forthcoming, 2019), comparing proportionality in Canada and Ireland, and claiming that local implementation of the tests makes it dramatically different to the point where practically meaningless to talk about a global doctrine.

[25] Alec Stone Sweet and Jud Matthews, "*Proportionality, Balancing and Global Constitutionalism*", 47 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 72, 164 (2008)

[26] David Kenny, "*Proportionality and the Inevitability of the Local: A Comparative Localist Analysis of Canada and Ireland*" AJCL (Forthcoming, 2019).

comparatively analyze the application of the proportionality doctrine in practice across a considerable number of jurisdictions.[27]

The research engages with two levels of comparison: the first level is the comparison between proportionality in theory and proportionality in practice, focusing on the extent to which the application of the doctrine follows or deviates from theoretical accounts. This comparison can serve to evaluate the extent to which the normative debate over proportionality is aligned with or disconnected from the actual practice of proportionality.

The second level is the comparison of the practice of proportionality between jurisdictions. Locating and characterizing variance in the application of the doctrine can help expose some of the forces effecting the application of the doctrine which have not been accounted for in the literature. In addition, the comparative perspective can expand the theoretical imagination regarding the potential application of the doctrine and reveal what specific jurisdictions may have to offer in terms of effective engagement with the doctrine, as well as shine a light on common shortcomings.

The particular focus in this paper is on the function of the doctrine's internal mechanism, namely the relationship and division of labor between the subtests and the function of the multi-stage doctrine as a whole. At the quantitative level, this translates into the role each stage plays in justifying the result, particularly with regard to justifying the striking down of means. At the qualitative level, this includes the understanding of the content that has been introduced into the individual tests, the courts' engagement with each stage and its contribution to the final outcome.

The research was designed as a combination of quantitative and qualitative comparative analysis. This mixed methodological approach was chosen in order to accommodate both the need for meaningful engagement with the substance of the decisions in order to capture the rich context of the application of proportionality, and the benefits of

[27] For an empirical analyses of proportionality in a single jurisdiction (Canada), see L.E Trakman, W. Cole-Hamilton & S. Gatien "*R v. Oakes 1986-1998: Back to the Drawing Board*" (1998) 36 O.H.L.J. 83; For a comparison of three jurisdictions, Canada, Germany and South Africa, that does not strictly follow the proportionality doctrine but rather justifications for striking down measures more broadly, see NIELS PETERSEN, PROPORTIONALITY AND JUDICIAL ACTIVISM (Cambridge: Cambridge University Press 2017); For a qualitative comparison of the application of the doctrine in two jurisdictions, see David Kenny, "*Proportionality and the Inevitability of the Local: A Comparative Localist Analysis of Canada and Ireland*" AJCL (Forthcoming, 2019); Dieter Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57 U. Tor L.J. 383.

quantifiable and comparable measures as a basis for systemic comparative analysis. The result is a combination of quantitative measures, contextualized and nuanced with qualitative insights, producing a comparable and systemic description of the judicial practice.

The analysis draws on a database of proportionality cases from apex courts, some specialized constitutional courts and some supreme courts, in six jurisdictions: Canada, Germany, Israel, Poland, South Africa and India. The first five are countries in which proportionality is a dominant constitutional principle, but diverse in terms of political backgrounds, democratic histories and legal cultures, including both old democracies and new post-communist democracies, as well as western and non-western countries. We have also chosen to include India, a country that appears to be in the process of adopting the proportionality framework. Although the Indian Supreme Court has not yet officially embraced proportionality as the general doctrine for adjudicating cases of right limitation, its method of analysis mirrors that of proportionality analysis, and the court has recently adopted the proportionality framework in the specific context of the right to privacy.[28] The practice of limitation analysis in India provides an illuminating reference point for contrast and comparison.

In each country, a case law database was created by a local researcher.[29] In Germany, Israel and India the cases were selected in a two stage process: first a textual search was conducted on the relevant case law database within a limited timeframe. In the case of Israel and Germany the search was for the term proportionality and its conjugations, and in India the search was for specific constitutional rights articles. The resulting cases were then read and screened for those fulfilling the criteria of application of the proportionality framework, or limitation analysis more broadly in India.[30] In Canada,

[28] See *Justice Puttaswamy v. Union of India* (September 26th, 2018). Generally, see Aparna Chandra, Limitation Analysis in Indian Case Law (August, 2018, on file with author); Abhinav Chandrachud, '*Wednesbury* Reformulated: Proportionality and the Supreme Court of India' (2013) 13(1) OUCLJ 191; Ashish Chugh, 'Is the Supreme Court Disproportionately Applying the Proportionality Principle?' (2004) 8 SCC (J) 33.

[29] In Canada, by Lorian Hardcastle; In Germany by Andrej Lang; In India by Aparna Chandra; In Israel by Talya Steiner; In Poland by Anna Slezdinska-Simon; and in South Africa by Richard Stacey.

[30] The **German** sample began with a search of FCC First or the Second Senate decisions (eight judges as opposed to Chamber decisions with only three judges) that contain a variation of the term "proportionality" in German, as well as the German terms "Übermaß" and "Untermaß", which are sometimes used synonymously with proportionality, in the 2000-2012 timeframe. The 368 results of the search were then read to locate those which applied the proportionality doctrine. FCC chamber decisions were excluded, due to the combination of their vast quantity and their limited decision-making authority.

Poland and South Africa the cases were selected based on a case-by-case evaluation of all cases handed down in the relevant timeframe to locate those that qualify for the criteria of applying the proportionality framework.[31] The specific timeframe was tailored per-country, primarily based on the overall volume of decisions given by the court. Thus, for courts with a low annual volume, such as Canada and South Africa, the timeframe chosen was quite long, encompassing all cases of application of proportionality since the adoption of the framework in 1986 and 1995 respectfully. However, in courts with a high annual volume, including Israel, India, Germany and Poland, the selected timespan was shorter (between 4 and 18 years), focusing on the more recent period.

The cases included in the database were then coded for the subject matter and rights invoked, as well as the outcome of each of the stages of the proportionality analysis and the final outcome.[32] The cases were also qualitatively analyzed based on a common questionnaire, covering the formulation of the tests and the way in which each stage of

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The **Israeli** sample began with a search of the "Nevo" database for the term "proportional" (מידתי), including morphological conjugations in the 2006-2015 timeframe. The 2,698 results were reviewed individually to locate those in which the outcome was based upon multi-stage proportionality analysis.

Since the Indian case law has not officially adopted the proportionality doctrine, the **Indian** sample is comprised of all cases where the Supreme Court analyzed whether there has been a limitation of one of the three most important fundamental rights: the right to equality (Article 14), fundamental freedoms (Article 19) and life and personal liberty (Article 21), and if found to be limited, whether the limitation was valid. The cases were selected using a combination of two complementary selection methods, meant to create an overall representative portrait of Indian Supreme Court limitation analysis. The database includes all Constitution Bench (5 or more judges) decisions regarding these rights from the years 2004-2013 (21 decisions out of 89 constitutional bench decisions in this time period), and all decisions regarding these rights regardless of bench size from the years 2014-2016 (77 decisions out of the 506 cases tagged as relating to these rights in the case reporter Supreme Court Cases). This twin method was employed because while Constitution Bench decisions hold the highest precedential value as to the constitutional requirements of a rights analysis, the smaller bench decisions represent the more "run of the mill" fundamental rights cases, and therefore showcase how the Court conducts rights analysis more generally.

[31] The **Canadian** sample includes all Supreme Court cases conducted a proportionality analysis since the *R v Oakes* in 1986 until the end of 2017, not including cases in which the courts borrows from the *Oakes* test but do not apply the test in the same manner (i.e. in the adjudication of aboriginal rights or claims under human rights laws). The dataset was arrived at by reading the headnote of all Supreme Court of Canada cases (2,688) from the Court's official website during this 31-year period to determine which involved the adjudication of a charter right and the application of the *Oakes* test.

The **Polish** sample includes all judgments rendered in the time period of 2010-2015 in which the Constitutional Tribunal applied the proportionality test as part of its decision, either using the word "proportionality" (or its modalities) or explicitly referred to the general limitation clause (Article 31(3) of the Constitution). The selection of the cases was based on a case-by-case study of all judgments in the defined timeframe (329 cases).

The **South African** sample includes all Supreme Court cases in which the court both found that some government conduct limited constitutional rights and went on to consider whether the limitation was justifiable in terms of section 33 of the interim Constitution or section 36 of the 1996 Constitution, beginning with the *S v Makwanyane* decision of 1995. The sample was reached based on an initial reading of all decisions (703) handed down by the Constitutional Court in the relevant time period.

[32] The coding was based on the majority of justices on the panel. Aggregating for majority of justices, as well as stage in which there were multiple decisions.

the analysis was applied, as well as general themes such as burden of proof and introduction of evidence.

Overall, the database includes 745 decisions, ranging from 98 to 172 cases per jurisdiction. Table 1 below presents the number of cases and their timeframe per jurisdiction.

Table 1: Aspects of the Case Sample in the Database per Jurisdiction

Court	**Number of cases**	**Number of Failure Cases (Measure Struck Down)**	**Years**
Supreme court of Canada	172	80 (46.5%)	1986-2017 (31 years)
Constitutional Court of South Africa	100	82 (82%)	1995-2017 (22 years)
Supreme Court of Israel	161	43 (27%)	2006-2015 (10 years)
Federal Constitutional Court of Germany	114	58 (51%)	2000-2017 (18 years)
Constitutional Tribunal of Poland	100	59 (59%)	2010-2015 (4.5 years)
Supreme Court of India	98	55 (56%)	2004-2016 (13 years)
Total	**745**		

Findings

This paper will focus on two central findings: the significance of the threshold stages of worthy purpose and suitability, and the relationship between the last two tests of necessity and strict proportionality.

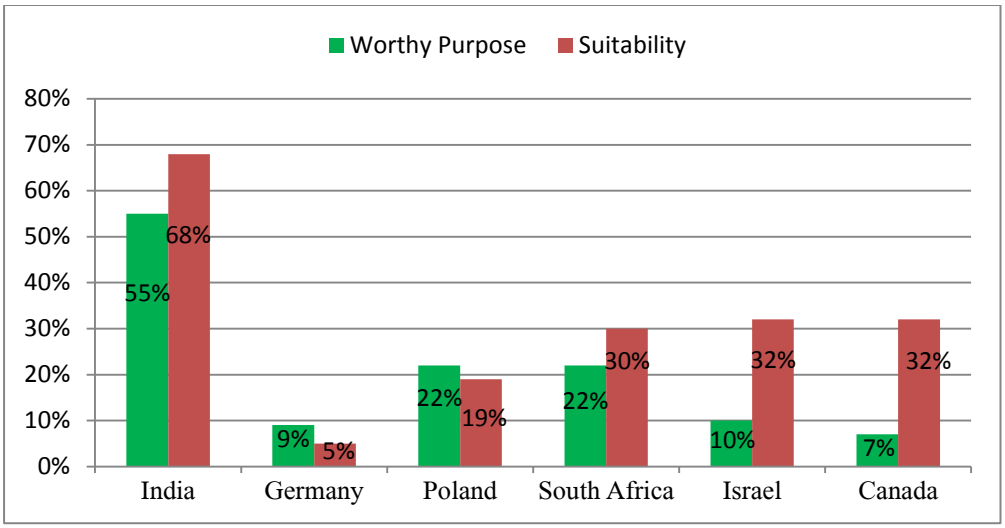
The Significance of the Threshold Stages: Worthy Purpose and Suitability

As mentioned above, the first two stages of the doctrine are considered threshold stages that only rarely result in failure, and therefore primarily function as defining the relevant elements at play and setting the stage for the subsequent analysis. Given the overall

consensus on the marginality of these stages our expectation would be that these two stages exhibit very low failure rates across all jurisdictions.

We use the failure rate at each stage out of the overall number of failure cases in which the analysis resulted in the court striking down a measure as a quantitative indicator for the centrality of a particular test in the doctrine. Figure 1 below presents the frequency of failure of measures at the two opening stages per country analyzed.

Figure 1: Comparative Failure Rates at the Worthy Purpose and Suitability Stages



Worthy Purpose

The data affirms that in several of the jurisdictions the failure rates at the worthy purpose stage are low. In Canada and Israel this is the stage with the lowest failure rate (7 and 10 percent respectively), and in Germany the rate is similarly low (9 percent). However, in South Africa and Poland the failure rate at the worthy purpose stage is surprisingly significant, amounting in both countries to 22 percent, over a fifth of all failure cases. India stands out as a distinct outlier, emphasizing a clear difference between analysis that is strongly rooted in a tradition of reasonableness review, and analysis that has transitioned to the proportionality standard.

The qualitative analysis sheds some light on the unexpected finding of significant failure rates at the worthy purpose stage in South Africa and Poland. Despite the similar quantitative failure rates, we find qualitatively that the two courts demonstrate very different approaches to this stage: while in South Africa this stage is often explicitly value oriented and serves to denounce illegitimate goals at the very opening of the

analysis, in Poland a combination of more formalistic requirements have been introduced into this stage, which emphasize its function as an outlet for striking down measures on a preliminary basis, so as to avoid the explicit evaluation of the policy content itself.

A unique factor found to contribute to the significant failure rates in South Africa is the review of apartheid-era legislation. The majority of cases (12 out of the 18.5) in which a South African measure failed at the worthy purpose stage were cases that reviewed pre-1994 legislation. In such cases, the judicial review is explicitly targeted towards delegitimizing the premises underlying legislation from the previous regime, and the Court emphasizes in its decision that legislation pursuing apartheid-era commitments to social segregation and differentiation can never provide justification for right limitations.[33] In this unique situation, part of the court's core mandate is to critique legislative goals, and it enjoys the ultimate level of legitimacy in doing so. The South African case exhibits the rare quality of actually having an external and consensual measure against which to evaluate the legitimacy of policy goals, and therefor the court is fully empowered to send an unequivocal message the kind of which is sent by failure at the worthy purpose test.

Despite being much rarer, such situations can be found in other jurisdictions as well. In reviewing antique legislation, or in cases in which there has been a significant change in society or reality, the Court seems to enjoy a high level of legitimacy, allowing it to hold that the goals and values reflected by the law are no longer considered legitimate.[34]

Although the Polish Constitutional Tribunal could be viewed as being positioned similarly to the South African Constitutional Court in the sense of practicing constitutional review following a regime change, and although it regularly reviews Communist-era policy, its approach to this category differs from that of the South African Court. A significant legacy of the communist-era were limitations of individual

[33] See, for example: *Bhe and Others v Khayelitsha Magistrate and Others* 2005 (1) SA 580 (CC); M*oseneke & Others v The Master & Another* 2001 (2) SA 18 (CC); *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC).

[34] In **Canada** this can be found in the review of very old criminal offences, as well as in the context of sexual orientation in which social change positioned the court as capable of affirming the lack of all worthy purpose. *R v Zundel* [1992] 2 SCR 713; *R v Daviault* [1994]; *Vriend v Alberta*, [1998] 1 SCR 493; *Canada v Hislop* [2007] SCC 10. In **Germany** such cases can be found in the areas of family law and professional conduct, with regard to legislation seeking to protect antiquated moral standards or outdated professional rules. See: BVerfGE 7, 377 at 410ff; BVerfGE 25, 1 at 12; BVerfGE 39, 210 at 225; BVerfGE 36, 146. In **India** this can be found with regard to colonial-era legislation or other very old legislation. See: *John Vallamattom v Union of India*, (2003) 6 SCC 611; *Malpe Vishwanath Acharya v State of Maharashtra* (1998) 2 SCC 1.

rights in executive acts, internal circulars or instructions, often issued without statutory authorization and without official publication. One of the central tools with which the Tribunal deals with this communist legacy is through the principle of "rule of law", requiring that limitations of fundamental rights be explicitly enshrined in statue.[35] Such cases most often do not even reach the worthy purpose stage, since they fail to meet this preliminary, formal requirement.[36]

Several other factors, if so, contribute to the significant failure rate at the worthy purpose stage in Poland. One such factor is the text of the limitation clause in the Polish constitution. Article 31(3) of the Polish Constitution contains a closed list of constitutional values that can be considered as legitimate grounds for limitations of constitutional rights or freedoms. The catalogue includes: security of the state; public order; natural environment; health; public morals; and constitutional rights and freedoms of other persons. While in other jurisdictions the question of whether the particular goal promoted by the policy is worthy is an open-ended question to be filled with content by the Court in light of constitutional values, the Polish Constitutional Tribunal has a more formal process of reviewing at the worthy purpose stage whether the goal pursued by the legislature fits one of the enumerated goals of Article 31(3), regardless of whether the goal might be a legitimate goal in and of itself. Although in most cases the Tribunal interprets the listed goals quite broadly and thereby manages to include most public interests under one of them, this structure of the limitation clause does lead the Tribunal at times to fail a measure at the worthy purpose test since it fails to meet one of the enumerated goals, without making a confrontational statement that the legislature's goals

[35] Case no. P 2/87 (admission to medical schools); Case no. K 25/97; Case no. U 1/86.

[36] Such cases were not included in the Polish Database, since its focus was on the courts engagement with proportionality. However, in the process of establishing the database data was collected on this point, pointing to the existence of 9 cases in the year 2013 alone (13 percent of all judgements handed down that year) in which the Tribunal reviewed normative acts issued by the executive without required statutory authorization, 7 of which concerned limitations of constitutional rights. See Case no. K 38/12 (lack of statutory regulation determining conditions for admission to public kindergartens and schools); Case no. U 2/11 (ministerial regulation determining conditions of medical examination of persons accused or suspected of crime); Case no. K 11/12 (lack of statutory regulation determining conditions of use of force by prison guards and functionaries of the Government Protection Office); Case no. P 53/11 (statutory authorization to determine payment for annual leave and cash equivalent for the period of unused leave); Case no. U 5/12 (ministerial regulation determining conditions of exercising the profession of medical physicist); Case no. K 35/12 (statutory authorization to determine conditions and method of evaluation, classification and promotion of school children and conditions of school examinations); Case no. U 7/12 (ministerial regulation determining conditions for detention of migrants).

are *per se* illegitimate. This type of outcome is more formalistically anchored in the constitutional text, and therefore its rhetoric is much less explicitly value-based.[37]

This practice of finding the goal pursued not fit the goals enumerated in the constitution, even though it is not necessarily an illegitimate goal, can be found in India as well. Article 19 of the Indian constitution includes six fundamental freedoms, including the rights to free speech and expression, peaceful assembly, association, movement, residence, and professional occupation. Each of these rights has its own specific limitation provision, stating that the State can impose "reasonable restrictions" on the right in order to meet specifically listed goals, which differ from right to right.[38] When analyzing rights limitation under Article 19, the Court begins by investigating whether the state action furthers a specified goal in the relevant limitation clause associated with that right. In several cases the Court held that the grounds for a right limitation, while not necessarily an illegitimate goal *per se*, did not match any of the expressly stated grounds for limiting the particular right.[39]

Additional failures at the worthy purpose stage in Poland concerned situations in which rights-restricting-legislation completely failed to provide any legal outlet or remedy for the individuals to whom the law applied, and the court held that such complete denial of rights without any procedural opening could not be justified by any worthy purpose.[40] Finally, the Polish tribunal has at times introduced the principle of specificity in legislative language as a requirement at the worthy purpose stage. Thus, the tribunal has held that vagueness in the wording of the law does not allow it to precisely ascertain the

[37] See, for example: Case no. K 9/11 (electoral code); Case no. K 26/96 and Case no. K 14/12 (abortion cases).

[38] Constitution of India, art. 19(2)- 19(6).

[39] See for example: *Ramesh Thapar v State of Madras* AIR 1950 SC 124, a law regulating the circulation, sale and distribution of documents, which was sought to be justified on the ground of securing 'public safety' or maintaining 'public order.' Since neither were expressly stated grounds for limiting the freedom of speech, the Court found the impugned measure invalid. Another example is *State of Karnataka v Associated Management of (Government Recognised-Unaided-English Medium) Primary and Secondary Schools* (2014) 9 SCC 485, involving the State mandating educating a child only in her mother tongue in primary and early secondary schooling, for the sake of protecting local languages and cultures, "in the larger interest of the nation." The Court held that the measure, however necessary or important, did not relate to any of the specified grounds for limiting freedom of speech, and was therefore invalid. Also see *Shreya Singhal v. Union of India* (2015) 5 SCC 1.

[40] Case no. SK 48/13 (dismissal from service; right to payment in lieu of holiday days); Case no. P 33/12 (possibility of denial of fatherhood after death of child); Case no. SK 22/11 (rejection of the cassation without the letter of formal notice); Case no. K 25/11 (communication between a person in a temporary arrest and the defense lawyer); Case no. K 21/11 (access to a court in disciplinary matters); Case no. SK 20/11 (appeal against a decision of a court of second instance on the reimbursement of costs of legal aid).

legislative goal, thus preventing the ability to evaluate whether it meets one of the enumerated goals.[41] These two additional practices of the Polish Tribunal similarly reflect a relatively formalistic, or rule-like approach to the worthy purpose test, pointing to flaws in the legislative design that deem the legislation unworthy on a preliminary basis.

The low failure rates at the worthy purpose stage in Israel, Germany and Canada generally correspond to the expectation in the literature. The qualitative analysis reveals that in a large portion of cases in these countries the scrutinized policy unquestionably promotes a legitimate purpose and the judicial analysis at this stage is therefore justifiably brief. In a subset of cases, however, the legitimacy of the policy goal is far from obvious. In such cases, the constitutional and supreme courts overwhelmingly chose to avoid failing the measure at the worthy purpose test, by using different avoidance tactics.

In Germany, for example, the Federal Constitutional Court will at times use this stage to weed out particular purposes as unworthy, while still passing the measure at this stage because it can still be based on a different, worthy, purpose. Thus, although failing in only 5 percent, the Court has pointed out an unworthy purpose in 21 percent, a practice which almost always leads to striking down the measure later on.[42] In Israel, difficulties with the policy goal will at times be pointed out at the worthy purpose stage, but instead of coming to a determination on the matter the stage will be passed despite the problems that have arose, or be left undecided considering the failure at a later stage. Thus, although only 10 percent of failure cases failed the worthy purpose stage in Israel, in an additional 12 percent of cases such "negative signaling" appeared at the worthy purpose stage, subsequently ending in failure.[43] Interestingly, this phenomena of avoidance of

[41] See, for example: Case no. K 26/96 and Case no. K 14/12 (abortion cases).

[42] BVerfGE 102, 197 at 215; BVerfGE 103, 1 at 12-14; BVerfGE 104, 357 at 365-67; BVerfGE 115, 276 at 307-08; BVerfGE 128, 226 at 259; BVerfGE 135, 90 at 119. In 84% of the cases in Germany (16 of 19) in which a single goal was struck down and upheld on another goal, the policy was ultimately struck down.

[43] See, for example: HCJ 7146/12 *Neget Adam v. Knesset* (September 16, 2013, unpublished); HCJ 7385/13 *Eitan Israel Migration Policy v. Government of Israel* (September 22, 2014, unpublished);. HCJ 616/11 *Students Association of Israel v. Government of Israel* (May 25, 2014, unpublished).

sensitive questions topics at the worthy purpose stage exists in South Africa and Poland as well, despite the significant failure rates there.[44]

Meaning, the extremely low failure rates at the worthy purpose stage are not conclusive evidence that rights-restrictions caused by the pursuing of problematic goals is exceptionally rare. At least partially, the low failure rates reflect choices made by courts not to engage with the question of legitimate purpose directly. In some of such cases the discussion at this stage is used to build up towards a failure at a later stage, while in others cases the court ultimately upholds the reviewed measure, without engaging with the question of the legitimacy of the goal, ignoring issues that arguably are worthy of debate.[45]

Suitability

The significant failure rates at the suitability stage are highly surprising. In all countries except for Germany this stage plays a significant role in justifying the failure of measures: 19 percent of the failure cases in Poland include a failure at the suitability stage, 30 percent in South Africa, and 32 percent in both Canada and Israel. Again India stands out as an outlier, with the rational nexus inquiry playing the most dominant role in justifying failures, with 68 percent of all failure cases failing this stage.

Qualitatively, we find that the unexpected levels of failure at the suitability stage are a result of a combination of causes. First, there are indeed cases in which the reviewed policy fails the test of rationality at the most basic level – using a common sense approach the court concludes that the means do not promote the goal, and perhaps even

[44] In South Africa this can be found with regard to legislation introduced by the current government, rather than the previous regime whose motives are easier to critique, see: *United Democratic Movement v President of the Republic of South Africa and Others* (No 2) 2003 (1) SA 495 (CC), 2002 (11) BCLR 1179 (CC); *Glenister v President of the Republic of South Africa & Others* 2009 (1) SA 287 (CC); 2009 (2) BCLR 136 (CC). In Poland avoidance at the worthy purpose test can be found in cases raising sensitive political issues, such as ban on communist symbols and the treatment of those involved in the communist regime, and the differentiation between political revenge and necessary protection of the new constitutional order. Case no. K 11/10 (totalitarian symbols ban); Case no. K 6/09 (old-age pension benefits for former security officers); Case no. K. 24/98 (lustration).

[45] In Germany see BVerfGE 135, 126; In Israel see HCJ 7052/03 *Adalah Legal Centre for Arab Minority Rights v. Minister of Interior* [2006] IsrSC 61(2) 202; HCJ 1213/10 *Eyal Nir v. Knesset Chairman* [2012] ; HCJ 2311/11 *Sabach v. Knesset* (September 17, 2014, unpublished); HCJ 3166/14 *Guttman v. Attorney General* (March 12, 2015, unpublished). In Poland see K 11/10 (totalitarian symbols ban). the measure was struck down at the balancing stage, focusing on lack of legal certainty regarding how specific elements would be interpreted, without dealing with what the actual goal was and whether it was a worthy limitation of speech; the insult of the president case, again not discussing whether there was a goal that could limit speech.

achieve the opposite.[46] In addition, several of the failures at the suitability stage can be categorized as "spillovers" from the worthy purpose stage, reflecting the unwillingness of the court to tackle an unworthy purpose head on. Instead, the court may use a claim of lack of suitability as a method for indirectly exposing the insincerity of the presented goal or proving its illegitimate nature.[47] Finally, in practice the suitability stage has often been interpreted to include the idea of extreme overbreadth. This increases the scope of cases failing under this stage to include policies so broad that they cannot be found to meet the basic standard of being rationally connected to the policy goal as pronounced, although this could be considered to fall under the necessity test.[48]

These qualitative insights into the nature of failures at the suitability test help clarify the function this stage fills in practice, and establish the suitability stage as an intermediate stage between worthy purpose and necessity, catching cases that "fell through" the worthy purpose test on the one hand, and cases that are so grossly overbroad they fail even before reaching the more refined less-restrictive means test on the other hand.

The implicit meaning of this finding, however, seems to be that the function that this stage is meant to fill by definition – investigating whether the rights-restricting means can indeed significantly promote the goal and therefore at least potentially justify a

[46] In Israel see: HCJ 2355/98 *Stamka v. Minister of Interior* [1999] IsrSC 53(2) 728; AAA 4614/05 *State of Israel v. Oren* [2006] 61(1) 211. In Poland see Case no. K 12/14 (conscience clause); Case no. SK 14/13 (costs of legal representation in cassation proceedings); Case no. P 15/12 (real estate and mortgage division). In South Africa see *Lawyers for Human Rights & Another v Minister of Home Affairs* 2004 (4) SA 125 (CC);.

[47] In **Israel** see for example: HCJ 4264/02 *Ibillin Breeders Partnership v. Ibillin Local Council* (December 12, 2006, unpublished)*;* HCJ 1030/99 *MK Haim Oron v. Knesset Chairman* [2002] IsrSC 56(3) 640; HCJ 616/11 *Students Association of Israel v. Government of Israel* (May 25, 2014, unpublished). In **Germany** see BVerfGE 17, 306. In **Poland** see Cases no. K 14/13 (access to documentation produced by internal auditors in the course of audit), and SK 7/11 (family benefits). In **South Africa** see Te*Larbi-Odam and Others v MEC for Education (North-West Province) and Others* 1998 (1) SA 745; *Minister of Home Affairs & Another v Fourie & Another* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC). In India see: *Harsora v Harsora* (2016) 10 SCC 165.
More broadly, on rationality as a technique for smoking out illegitimate motives, see Elana Kagen, "*Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine"*, 63 THE UNIVERSITY OF CHICAGO LAW REVIEW 413 (1996) ; Wojciech Sadurski, *"Searching for Illicit Motives"*, SYDNEY LAW SCHOOL LEGAL STUDIES RESEARCH PAPER 14/61 (2014) ; Richard Fallon, "*Constitutionally Forbidden Legislative Intent"*, 130 HARVARD LAW REVIEW 523 (2016); David Kenny, "*Proportionality and the Inevitability of the Local: A Comparative Localist Analysis of Canada and Ireland*" AJCL (Forthcoming, 2019).

[48] In **South Africa** see for example: *Case v Minister of Safety and Security*; *Twee Jonge Gezellen (Pty) Ltd & Another v Land and Agricultural Development Bank of South Africa t/a The Land Bank & Another* 2011 (3) SA 1 (CC). In **Poland** see the Supreme Chamber of Control case; in **Germany** see BVerfGE 17, 306; BVerfGE 55, 159; BVerfGE 100, 59; BVerfGE 79, 256. In **India** see *Shree Bhagwati Steel Rolling Mills v Commission of Central Excise* (2016) 3 SCC 643; *Ashoka Kumar Thakur v Union of India* (2008) 6 SCC 1.

limitation of rights – isn't meaningfully engaged with. Despite the relatively high failure rates at this stage, courts seem to generally refrain from enquiring after evidence to support the claim regarding the policy's capability to effectively promote the goal, instead accepting statements made by policy makers as is, even when it seems that their reasoning could perhaps be challenged. In Poland and India there is a presumption of constitutionality at this stage, thus explicitly imposing the burden on the plaintiff to prove the means unsuitable.[49] In addition, in Poland and Germany, by definition, the perspective of this test is *ex ante* – testing whether at the time of the creation the policy a reasonable legislature could have found a rational connection, and therefore the question of the actual effects of the law in practice are considered beyond the scope of this test.[50]

The South African case law seems to present a partial exception, in its relatively heightened tendency to require actual evidence of effectivity, particularly in review of policy in place for a significant amount of time, where evidence on its effectivity may be expected.[51] A number of similar examples can be found in the Israeli jurisprudence as well, in which evidence on effectivity was engaged with at the suitability stage,[52] although this is not necessarily the standard in all cases.[53]

[49] A classic example of the impact of the presumption of constitutionality in India is the case concerning the constitutionality of the death penalty. In *Bachan Singh v State of Punjab* AIR 1980 SC 898, the majority opinion held that given the presumption of constitutionality, it was on those challenging the death penalty to show that it serves no valid penal purpose and is therefore unreasonable. Since empirical evidence as well as theoretical opinion is divided on the question of whether the death penalty serves the function of deterrence, the Court held that the burden had not been discharged by the petitioners and therefore, the death penalty was constitutional.

[50] BVerfGE 30, 250 at 263; BVerfGE 39, 210 at 230; BVerfGE 30, 250 at 263; BVerfGE 118, 1 at 24; BVerfGE 67, 157 at 175; BVerfGE 25, 1 at 13; BVerfGE 30, 250 at 263. See also BVerfGE 50, 290 at 331-32; BVerfGE 113, 167 at 234; BVerfGE 123, 186 at 242.

[51] See for example: *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development & Another* 2014 (2) SA 168 (CC)*; Sandu - South African National Defence Union* 1999 (4) SA 469 (CC)*; De Lange v Smuts NO* 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC)*; S v Makwanyane & Another* 1995 (3) SA 391 (CC).

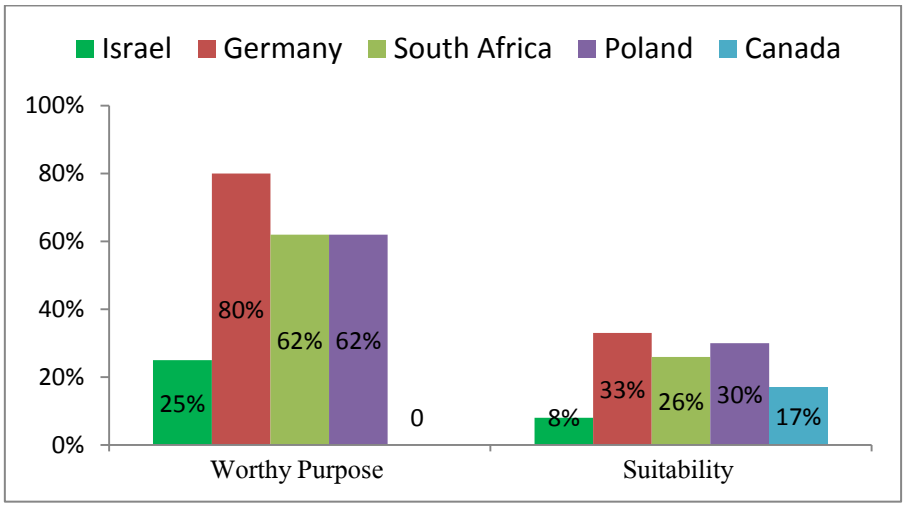
[52] See for example: HCJ 6298/07 *Ressler v. Knesset* (February 21, 2012, unpublished); HCJ 1877/14 *The Movement for Quality Government v. Knesset* (September 12, 2017, unpublished); HCJ 4542/02 *Kav Laoved v. Government of Israel* [2006] IsrSC 61(1) 346; HCJ 7146/12 *Neget Adam v. Knesset* (September 16, 2013, unpublished).

[53] In Israel, see HCJ 2605/05 *Academic Center of Law and Business v. Minister of Finance* [2009] IsrSC 63(2) 545*;* HCJ 2150/07 *Abu Safiyeh v. Minister of Defense* [2009] IsrSC 63(3) 331; HCJ 3969/06 *Dir Samet Village Council v. Commander of IDF in the West Bank* (October 22, 2009, unpublished). In addition, ongoing reluctance to require evidence on the effectivity of house demolitions for deterrence of terrorism, CJ 2006/97 *Ghanimat v. IDF Central Command* [1997] IsrSC 51(2) 651. See also HCJ 7040/15 *Hamad v. Commander of IDF in the West Bank* (November 12, 2015, unpublished), Justice Solberg, at para. 1. Although recent statement that evidence will be required in the future: HCJ 8091/14 *Centre for the Defence of the Individual v. Minister of Defence* (December 31, 2014, unpublished).

Threshold Stages and Termination Rates

A complementary quantitative measure is the rate of termination of the analysis after a failure at each stage. While the failure rates in Figure 1 measure the extent to which the two threshold tests take part in justifying the failing of the measure, the termination rates in Figure 2 show whether failure at these stages are in themselves sufficient to justify the final outcome, or whether the measure needs to fail an additional subtest to support this finding. This measure sheds further light on the role played by the worthy purpose and suitability tests in the overall structure of limitation analysis.

Figure 2: Comparative Termination Rates at Worthy Purpose and Suitability[54]



At the theoretical level, the different stages are all requirements of proportionality, and therefore a failure at one of the stages by definition should bring the analysis to an end. Figure 2 shows that the termination rates at the worthy purpose test are relatively high in South Africa, Poland and Germany. Meaning, finding the reviewed policy to fail the worthy purpose requirement is considered a blow significant enough for the analysis to come to an end. Moreover, the failure at the preliminary worthy purpose stage may be shaped deliberately for the sake of avoiding substantial limitation analysis, as has been demonstrated in some cases in Poland. Although the termination rate is not 100 percent, these finding supports the conclusion that this stages is viewed as a significant component in South African and Polish jurisprudence. In Israel and Canada in contrast, the termination rate at the worthy purpose test is surprisingly low, demonstrating that this

[54] Considering that limitation analysis in India does not currently follow the structured proportionality framework, the analysis in India is not expected a specific order and terminate after a failure, and therefore India is not included in the termination rate measure.

stage does not carry independent standing in these countries and requires a combination with at least one additional failure. Germany is unique, in the sense that failures at the worthy purpose are extremely rare, but to the extent that they occur they are considered sufficient.

As for the suitability test, Figure 2 shows that in all jurisdictions the courts overwhelmingly tend to continue their analysis after failure. The numbers are especially telling with regard to Israel and Canada: While roughly one third of the cases that fail the proportionality test include a failure at the suitability stage, the Israeli and the Canadian Supreme Court virtually never rely exclusively on the suitability test to strike down a law. Hence, the quantitative analysis shows that failures at the suitability stage are not considered to suffice to justify a judgment of disproportionality, and is hardly ever dispositive of a case on its own.

The low termination rates at the suitability stage strengthen the observations made above, regarding the nature of failures as the suitability stage. For one, they support the existence of some blurring between the suitability and necessity stages, both being based on a finding of overbreadth, will often lead to continuation of the analysis past the suitability stage, to make the point of overbreadth at the necessity stage as well, thus concluding that the overbreadth not only undermines the connection of the means to the goal, but also does not constitute a less-restricting means. An addition possibility is that courts may tend to continue the analysis after failure at the suitability stage since the necessity stage allows the court to frame its conclusion in a positive manner: although the measure as currently designed is being struck down, but an alternative, less-restricting formulation would be considering proportional. Continuing to the necessity stage can give the court some power over framing what the reaction should be and how the policy should be redesigned.

In evaluating the role played by both the worthy purpose and suitability stages within the proportionality framework, the contrast to India is illuminating. India, as detailed above, has not yet comprehensively adopted the proportionality framework, although it has stated that its analysis mirrors the elements of proportionality analysis.[55] The quantitative

[55] See eg, *Om Kumar v Union of India* (2001) 2 SCC 386; *Indian Airlines Ltd v Prabha D. Kanan* (2006) 11 SCC 67; *Teri Oat Estates (P) Ltd v UT, Chandigarh* (2004) 2 SCC 130; *Sahara India Real Estate Corporation Ltd v SEBI* (2012) 10 SCC 603; *MP Housing and Infrastructure Development*

data demonstrates that the justification of failures in India is dominated by the elements of worthy purpose and rational nexus, with failure rates of 55 and 68 percent respectively, while narrow tailoring and balancing considerations serve strictly as additional justifications rather than independent bases for failure. One possible explanation that may account for part of this significant difference is that the Indian Supreme Court may be dealing with objectively a higher proportion of cases lacking a worthy purpose or basic rationality in comparison to the other countries analyzed in this study. An alternative or complementary explanation may be that the Indian Supreme Court, coming from a UK based tradition of *Wednesbury* reasonableness standard of review in which scrutiny of purpose and rationality of the means are the core of the analysis, has a higher comfort level critically engaging with these tests and framing failures in these terms. An expectation may be that with the adoption of a more formalized structure of proportionality analysis, decisions which previously might have been framed in terms of failure at worthy purpose and rational nexus might begin to shift towards necessity and balancing type of reasoning.

The Division of Labor between Necessity and Strict Proportionality

As described above, the majority of the literature on proportionality focuses on the final, balancing stage, and treats this stage of the analysis as the core element of the doctrine. However, an alternate model of proportionality has been pointed out to exist, in which the core element is the necessity test, and different justifications have been brought for the advantages of one relative to the other model.[56] Overall, though, the approaches all seem to present a binary choice between one test and the other.

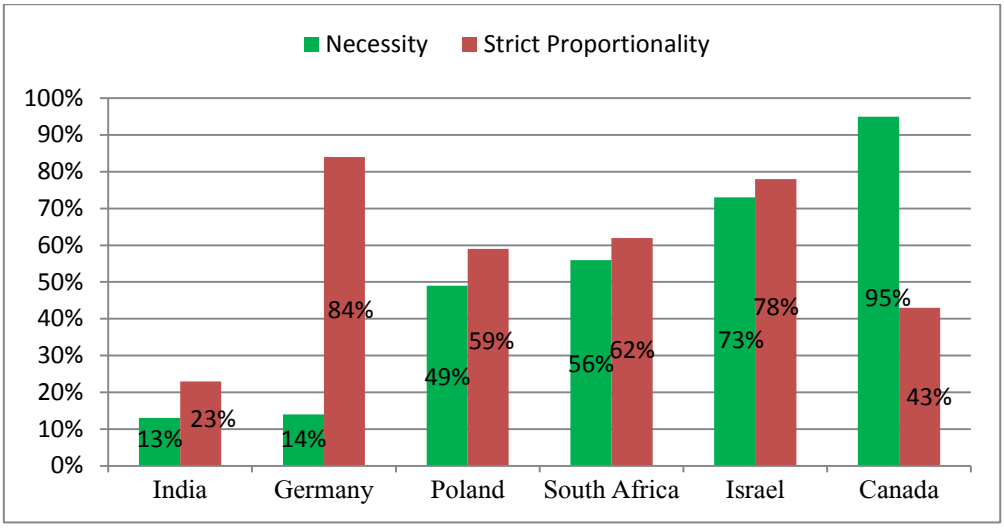
Our findings regarding Canada and Germany support the identification of two distinct models discussed in the literature. However, they also expose the existence of a third, previously unrecognized model which includes significant use of both the necessity test and the strict proportionality test, jointly. Figure 3 below presents the failure rates at the necessity and strict proportionality stages for each of the six countries analyzed.

Board v B S S Parihar (2015) 14 SCC 130; *Modern Dental College and Research Centre v State of Madhya Pradesh* (2016) 7 SCC 353.

[56] Julian Rivers, "*Proportionality and Variable Intensity of Review*", 65 CAMBRIDGE LAW JOURNAL 174 (2006); Alison Young, *Proportionality is Dead: Long Live Proportionality!*, in: Grant Huscroft, Bradley W. Miller and Gregoire Webber (eds.),PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, JUSTIFICATION, REASONING 43 (Cambridge University Press, 2014).

The German data indeed demonstrates that as expected, the majority of failure decisions (86 percent) include failure at the stage of proportionality in the strict sense, and in 65.5 percent of failure cases this is the sole basis for failure. The necessity stage does not play a significant role in these decisions, with only 14 percent of the failure cases including a failure at that stage. In contrast, in Canada the vast majority (95 percent) of failure decisions include a failure at the less impairing means test, whereas the proportionality in the strict sense stage played a significantly lesser role, with only 40 percent of the failure cases including a failure at this stage. It seems fair to say that the Supreme Court of Canada has effectively relegated the strict proportionality test to a residual stage that is never determinative of the outcome of the proportionality analysis.

Figure 3: Comparative Necessity and strict Proportionality Failure Rates

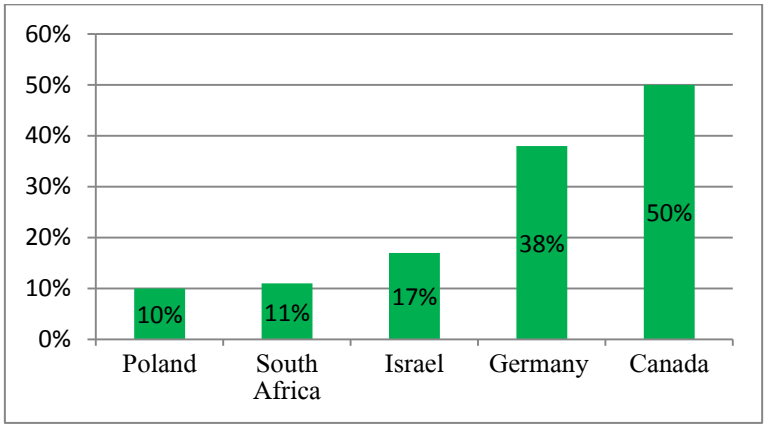


In the cases of Germany and Canada the dominance of one of the elements – necessity or strict proportionality – comes at the expense of the other element. Thus, in Canada, the centrality of the less impairing means test leads the discussion at the stage of proportionality in the strict sense to be either non-existent (this stage is not discussed in 60 percent of the failure cases), or extremely brief and repetitive, serving primarily as a conclusion of the Court's argument. On the other hand, in the German case law the necessity stage is skipped entirely in 20 percent or merely glanced over in 25 percent of all cases, and even when it is significantly analyzed it is narrowly interpreted thus essentially deflecting the discussion to the final stage of strict proportionality.

However, an unexpected finding is the existence of an integrated or interim model, which does not correspond with the two traditionally recognized models. In this third model both the necessity stage and the stage of proportionality in the strict sense play significant roles in supporting failure decisions. In the countries that can be seen as part of this model the failure rate at the necessity stage is significant, ranging from 49 percent in Poland, to 56 percent in South Africa and 73 percent in Israel. However, this significance does not translate, as it does in Canada, into a marginalization of the stage of proportionality in the strict sense, but rather the opposite – the necessity stage, with all its significance, still plays a supporting role vis-a-vis the strict proportionality test. This stage remains the final accord in the majority of failure decisions, with 60 percent failure rate in Poland, 62 percent in South Africa and 78 percent failure rate in Israel.

The termination rates further clarify the relationship between the two elements of the analysis. Figure 2 below measures whether the constitutional and supreme courts in the countries analyzed terminate their proportionality analysis after a failure at the necessity stage. It indicates the relative strength of the necessity test by showing to what extent courts are willing to exclusively base their overall judgment of disproportionality on a failure at the necessity test without continuing their analysis to the strict proportionality stage. The data in Figure 2 shows that the Israeli Supreme Court, the South African Constitutional Court, and the Polish Constitutional Tribunal rarely terminate their proportionality analysis after they deemed a measure to fail the necessity test (Poland: 10%, South Africa: 11%, Israel: 17%). Instead, they typically continue their analysis on to the strict proportionality test. This practice is contrasted by the approach of the Canadian Supreme Court in which the necessity test is generally dispositive of the overall proportionality judgment and in which the proportionality analysis ends in every other case after a failure at the necessity test.

Figure 4: Termination of Analysis after Failure at the Necessity Stage[57]



At first glance, the data in Figures 3 and 4 might seem paradoxical: On the one hand, the necessity test forms an important component of the proportionality practice of the courts in Israel, Poland, and South Africa. If a measure is deemed disproportionate, this finding will, amongst others, be based on the necessity test at least in every other case (South Africa: 56%, Poland: 49%), or in almost three out of four cases (Israel: 73%). On the other hand, a failure at the necessity stage is rarely dispositive of the overall judgment of disproportionality (Poland: 10%, South Africa: 11%, Israel: 17%). In other words, the conclusion that a measure is disproportionate will typically be based jointly on the necessity test *and* on the strict proportionality test (and to some extent on the suitability test).

This finding is significant considering that in the literature, significant failure at the necessity stage has been viewed as an attempt by the court to avoid explicit value-based balancing, for legitimacy reasons.[58] We find that in Israel, South Africa and Poland significant use is made of the necessity stage, and it cannot be explained as attempting to avoid balancing, since these courts choose to engage with balancing voluntarily, even though doctrinally-speaking they aren't required to.

The qualitative analysis of the dynamic between the stages in these countries demonstrates that the meaning of this finding may differ in Israel and South Africa as opposed to Poland. In South Africa and Israel the cases of dual use of both necessity and

[57] Considering that limitation analysis in India does not currently follow the structured proportionality framework, the analysis in India is not expected a specific order and terminate after a failure, and therefore India is not included in the termination rate measure.

[58] Dieter Grimm, "*Proportionality in Canadian and German Constitutional Jurisprudence*" (2007) 57 UNIVERSITY OF TORONTO LAW JOURNAL 383.

strict proportionality in justifying failures is generally based on a meaningful engagement with both stages, thus creating a basis of two separate rationales for these failures. The necessity stage demonstrates that the chosen policy is excessive and can be narrow tailored, that alternate measures exist in reference to other areas of law or in comparative law, or even that the existing policy can be left in place, with no need for the amendment. Nonetheless, the additional engagement with the balancing stage allows the court to go beyond a relatively factual evaluation of policy design and policy alternatives, sharing the value-based underpinnings of its decision.[59]

The finding of such an interim model is less surprising in the case of South Africa. It has been pointed out that the South African Court is known to have adopted what has been termed a "global" or "holistic" approach to proportionality analysis, according to which all elements must be taken into consideration in reaching the outcome. [60] The significance of both the necessity and strict proportionality in justifying a failure outcome could be seen as coherent with this declared approach, that the analysis should not be based on a failure at a single element. However, this South African model of application of proportionality is generally treated as a unique and outlier approach. It has even been explicitly rejected by Aharon Barak in his treatise,[61] and therefore the findings regarding Israel are unexpected, and particularly intriguing.

In contrast, in Poland, the practice of failure at both the necessity and strict proportionality stages seems to be a reflection of a different dynamic: a significant level of blurring between these two tests. In a significant number of cases the two stages seem to be interpreted by the court very similarly. The overall emphasis in Polish proportionality analysis is on the prohibition of excessiveness. Following this general idea, the most common type of reasoning pattern includes the court briefly stating at the necessity stage that the law under review goes beyond necessary to secure the policy goal, and then goes on to justify this conclusion using language of the strict

[59] In Israel see, for example: HCJ 8276/05 *Adalah Legal Centre for Arab Minority Rights v. Minister of Defence* [2006] IsrSC 62(1) 1; HCJ 4124/00 *Yekutieli v. Minister of Religious Affairs* [2010] IsrSC 64(1) 142; HCJ 2887/04 *Abu Madigam v. Israel Land Administration* [2007] IsrSC 62(2) 57; HCJ 7146/12 *Neget Adam v. Knesset* (September 16, 2013, unpublished); HCJ 2577/04 *El Khawaja v. Prime Minister* (July 19, 2007, unpublished). Need SA examples.

[60] Section 36(1) to the constitution; *S v Manamela & Another* 2000 (3) SA 1 (CC), para 32; *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC) para 18; Stu Woolman and Henk Botha, 'Limitations' in Woolman and Bishop (eds) CONSTITUTIONAL LAW OF SOUTH AFRICA (Juta, 2005, 2nd edn.) 94.

[61] Aharon Barak, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS (Hebrew edition page numbers) 172 (Cambridge: Cambridge University Press, 2012)

proportionality stage, namely that the burden imposed on individual is excessive in relation to the benefit of the law. Such cases tend to primarily deal with lack of procedural guarantees or lack of safeguards against administrative abuse. The result seems to be that the court does not significantly engage with analysis of alternatives at the necessity stage, and limits its focus on excessiveness at the strict proportionality stage as well.

Overall, the findings display a significant level of variance between countries with regard to the application of the last two stages of the doctrine, from models relying primarily on one or on the other to justify failures (such as Germany and Canada), to using both in a way that is essentially identical and therefore limits the full potential of each (Poland), as well as an additive model of using two types of reasoning to ultimately justify the result (Israel and South Africa). However, the countries do converge in the sense that it is rare that a policy is struck down solely on the basis of a failure at the strict proportionality stage, with Germany emerging as an outlier rather than the rule it is often perceived to be.

Discussion

In the following section we will offer three reflections on the findings presented above, and the ways in which they challenge some of the basic tenets regarding proportionality analysis.

The first reflection relates to the interaction between two main characteristics of proportionality analysis: its sequential nature on the one hand, and the centrality of the balancing component to proportionality on the other. Although these two elements are presented in the literature side by side, there is some tension between the two: emphasizing the sequential nature means viewing every stage as filling a distinct and meaningful role, while considering the final strict proportionality stage to reflect the doctrine's essence diminishes the significance of the earlier stages. Since the theoretical literature on proportionality overwhelmingly emphasizes the importance of the final stage, this then comes at the expense of the previous stages, which are generally viewed as merely organizing the analysis for the sake of the final resolution.[62] Our findings

[62] Aharon Barak, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS (Hebrew edition page numbers) 425 (Cambridge: Cambridge University Press, 2012); Denise Reaume, "*Limitation on Constitutional Rights: The Logic of Proportionality*" (2009) 26 OXFORD LEGAL

provide a more nuanced account of each of these characteristics separately, as well as the relationship between them.

The German practice clearly leans towards the centrality of the final strict proportionality stage, at the expense of significant engagement with the earlier stages of the analysis. This practice indeed raises doubts regarding the real significance of the doctrine being made up of four different subtests. In many cases the FCC tends to pass the reviewed measure through the different stages with little analysis, particularly at the suitability and necessity stages, which are skipped entirely in approximately one quarter of cases.

Surprisingly however, in the jurisdictions other than Germany the majority of failures are not based solely on a failure at the strict proportionality stage. This does not mean, however, that the strict proportionality stage is not central to proportionality in these jurisdictions: its significance is reflected in the strong tendency to continue the analysis to the final stage, which is exhibited in all countries with the exception of Canada. This finding generates the possibility of a new understanding of balancing's centrality to proportionality, not as the sole basis of justification, but rather as the ultimate "finishing accord" for the analysis, without which the outcome is not fully justified. This refined definition of balancing's centrality does not diminish the role of the previous stages, and does not erode the significance of the sequential structure. The nature of balancing itself is then also subsequently altered: rather than balancing standing independently after all preliminary questions have been cleared away,[63] balancing is actually often a concluding exercise, drawing heavily upon the flaws that have been previously located throughout the stages of the analysis.[64]

The doctrine's sequential structure also gains a new and refined meaning in light of the findings. Contrary to the theoretical conceptualization, in reality the stages often do not function separately: interactions take place between the stages and some blurring between them occurs. Thus, the suitability stage plays a supporting role to the question of worthy purpose; the investigation of overbreadth overlaps between suitability and necessity; necessity and strict proportionality can both involve evaluation of alternatives

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RESEARCH PAPER SERIES 1; Stavros Tsakyrakis, "*Proportionality: An Assault on Human Rights? A Rejoinder to Madhav Khosla*" 8 ICON 307, 308-309 (2010).

[63] Alec Stone Sweet and Jud Matthews, "*Proportionality, Balancing and Global Constitutionalism*", 47 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 72, 76 (2008); Reaume, ibid.

[64] And see Mattias Kumm, "*The Idea of Socratic Contestation and the Right to Justification: The Point of Rights Based Proportionality Review*", 4 LAW & ETHICS OF HUMAN RIGHTS (2010) 142;

and the idea of excessiveness; and the analysis does not tend to come to a stop mid-way after a single failure, but rather subsequent stages are still engaged with to further support the outcome. These practices point to a more holistic application of the doctrine: rather than analyzing each stage independently, bringing it to resolution and then moving it aside, each stage adds a perspective that feeds into the remaining analysis, so that analytical work done in one stage can be carried over and be resolved at a subsequent stage.

This interpretation of the sequential structure could express a more integrative understanding of the doctrine, which perhaps better captures its full potential. For example, allowing the suitability stage to serve as a supporting test for worthy purpose can significantly bolster the court's ability to "smoke out" illegitimate motives. However, this approach can also have the effect of curtailing the clarity of the judicial message, since it may be less clear what the precise nature of the flaw that led the measure to be struck down is, and therefore what type of amendment would remedy the flaw. Application of proportionality in this manner may somewhat undermine the power of the doctrine to guide future policy, which is an important function of judicial reasoning.

A final insight into the status of the balancing component arises from the findings regarding the dynamic between the last two stages, necessity and strict proportionality. While the main claim in the literature is that courts that significant base failure outcomes on the necessity stage do so as an attempt to mask balancing considerations,[65] our findings show that this cannot be the sole explanation, considering that Israel, South Africa and Poland engage significantly with the necessity test, and then go on to engage explicitly with balancing as well. The dual-failure pattern at both the necessity and strict proportionality elements may reflect the recognition of the added value of each of the stages, the flip side of which is the realization of the weaknesses of each. A decision based solely on necessity analysis risks criticism that the court lacks the institutional capacity to evaluate comparative effectiveness of policy alternatives, whereas a decision based solely on strict proportionality risks critique of the validity of the scale for determined the comparative weight of benefit and harm. Although in principle the court could end its analysis after failure at the necessity stage, the logic of the balancing stage

[65] Dieter Grimm, "*Proportionality in Canadian and German Constitutional Jurisprudence*" (2007) 57 UNIVERSITY OF TORONTO LAW JOURNAL 383; David Kenny, "*Proportionality and the Inevitability of the Local: A Comparative Localist Analysis of Canada and Ireland*" AJCL (Forthcoming, 2019).

is generally viewed as contributing to the analysis and strengthening the justification and is therefore included despite not being doctrinally required. However, notwithstanding the added power the balancing reasoning carries, the fact that the majority of the analyzed courts do not tend to base their justification solely on the balancing stage can reflect that its persuasiveness is still understood to be greater when combined with additional failures.

The insights gained from the empirical analysis regarding the actual nature of the sequential structure and the relationship of the final stage of the analysis to the previous stages can enrich the ongoing debate over the function proportionality fills. In our view, the findings demonstrate that in several jurisdictions proportionality is not practiced primarily as an optimization exercise between conflicting values, but rather as a method for evaluating the sincerity and persuasiveness of the state's justification for the right limitation.[66]

A second reflection on the findings relates to the shortcomings exposed in the operation of the threshold stages, demonstrating that courts are not always utilizing the full potential of these stages. The literature has placed significant theoretical responsibility on the worthy purpose stage as a gate keeper, preventing different types of purposes from even entering justification analysis.[67] However, the willingness to point out the unworthiness of antiquated policy or policy of a previous regime in the case of South Africa only draws attention to the avoidance techniques applied when faced with problematic or controversial contemporary policy motivations. In practice, in a significant number of cases across jurisdictions this stage is brushed over rather than being significantly engaged with. At times this reluctance can be attributed to heightened political sensitivity. In others this may be a side effect of the sequential structure: since there are three more stages to the analysis, there may not be a particular sense of

[66] Mattias Kumm, "*The Idea of Socratic Contestation and the Right to Justification: The Point of Rights Based Proportionality Review*", 4 LAW & ETHICS OF HUMAN RIGHTS (2010) 142; Moshe Cohen-Eliya and Iddo Porat, *Proportionality and the Culture of Justification* 59 AMERICAN JOURNAL OF COMPARATIVE LAW 463 (2011); NIELS PETERSEN, PROPORTIONALITY AND JUDICIAL ACTIVISM (Cambridge: Cambridge University Press 2017); Julian Rivers, "*Proportionality and Variable Intensity of Review*", 65 CAMBRIDGE LAW JOURNAL 174 (2006).

[67] Mattias Kumm, *"Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement"*, in: Paulsen et. al. (eds.) LAW, RIGHTS, DISCOURSE: THEMES OF THE WORK OF ROBERT ALEXY (Hart, 2007) 131; Klatt and Meister, *Proportionality – a Benefit to Human Rights? Remarks on the ICON Controversy*, 10 ICON 687, 690 (2012); Iddo Porat, *The Dual Model of Balancing: A Model for the Proper scope of Balancing in Constitutional Law*, 27 CARDOZO LAW REVIEW 1393 (2006).

"urgency" to conduct a rigorous analysis at the very first stage. Instead, the purpose is defined at a high level of abstraction and passed, marginalizing the contribution of this stage.

Shortcomings have also been located in the function of the suitability stage. Despite the fact that the failure rates at this stage are higher than expected, the analysis demonstrates that the suitability stage functions as an intermediate stage between worthy purpose and necessity, sharing themes from both of these stages. This can explain why despite the failure rates being significant, the termination rates are exceptionally low: this stage does not truly function as an independent test. Courts generally accept government's factual assertions regarding the function of the policy on their face, even in cases of policy that has already been deployed and for which an expectation to present actual data on its achievements could be expected. In our view, an integrative conception of proportionality in which each and every stage of the analysis is taken seriously and meaningfully engaged with while maintaining connections and feedback between the stages can improve the quality of the judicial practice and fully exploit the analytical potential inherent in proportionality analysis.

The third and final reflection relates to the nature of the interaction of the local practice with the global framework. Proportionality has been adopted by courts that are very differently situated in terms of their history and legal culture, role definition, legitimacy and power, and yet the concrete question of how these factors interact with the framework and come to play in the application has not previously received any significant attention. Different views have been voiced on the universalism versus localism divide in the legal scholarship: On the one hand, proportionality analysis is viewed as the ultimate example of global constitutional law, a commonly applied framework based on a similar structure and language.[68] On the other hand it has been recently argued that there is no global meaning of proportionality, but rather it is a

[68] Alec Stone Sweet and Jud Matthews, "*Proportionality, Balancing and Global Constitutionalism*", 47 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 72, 74-77 (2008); Nevertheless, it has been recognized that the doctrine is exceptionally flexible, thus allowing individual courts to input their local interpretations and values. See Julian Rivers, "*Proportionality and Variable Intensity of Review*", 65 CAMBRIDGE LAW JOURNAL 174, 203 (2006), Proportionality as a "flexi-principle"; Aharon Barak, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS (Hebrew edition page numbers) 210-211 (Cambridge: Cambridge University Press, 2012).

rhetoric that "links very different and divergent practices, masking the pervasive influence of local values in the guise of an international framework".[69]

Our comparative analysis provides some initial insight into the ways in which the local factors come to bear, including specific tools that individual courts gravitate towards and tools they shy away from, the type of rhetoric they are most comfortable with and justification patterns they adopt.

A most illustrative example are the different approaches exhibited at the worthy purpose stage. Three of the analyzed jurisdictions meaningfully engage with this stage, but each differs in their precise interpretation and application. While the South African court engages openly with value based evaluations of purposes, the Polish Tribunal has interpreted this stage rather formalistically focusing on matching the constitutional text or on concepts of specificity or lack of all legal safeguards, and the Indian court makes significant use of this stage in various ways. Each of these patterns of engagement can be tied to characteristics unique to the particular court, be it the special position of the South African Constitutional Court in reviewing apartheid-era legislation, the role played by the Polish tribunal in the regime transition by introducing the formal concept of rule of law which emphasized formal requirements of rulemaking over substantive requirements, or be it the UK tradition of reasonableness review in the Indian jurisprudence.[70] On the other hand, our analysis also reveals a significant level of convergence between jurisdictions: even the deviations from theory and shortcomings in application are often surprisingly similar.

These preliminary findings can open the way for a more detailed study of the nature of local interactions with the global framework, which often reveal themselves clearly only when contrasted comparatively. Such findings could allow chipping away at the currently monolithic normative debate over proportionality, without necessarily ending up at the other extreme of declaring the commonality of the framework to be meaningless. Through contextualization of the discussion, new nuance can be introduced into questions regarding the doctrine's strengths and weaknesses. By singling out factors

[69] David Kenny, "*Proportionality and the Inevitability of the Local: A Comparative Localist Analysis of Canada and Ireland*" AJCL (Forthcoming, 2019)

[70] And see Bomhoff, on differing cultural notions of balancing, in Germany and the US. Jacco Bomhoff "*Balancing the Global and the Local: Judicial Balancing as a Problematic Topic in Comparative Constitutional Law*", 31 HASTINGS INTERNATIONAL AND COMPARATIVE LAW REVIEW 555 (2008).

that increase the chances of the doctrine being applied in a certain way, the benefits versus the dangers of adopting proportionality in one court rather than another can be better ascertained.