

Judicial Trends

HOW COURTS APPLIED THE PROPORTIONALITY TEST

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RESEARCH & WRITING

Shruti Trikanad

REVIEW & EDITING

Anubha Sinha, Amber Sinha and Yesha Tshering Paul

RESEARCH INPUTS

Satvik Mishra

DESIGN

Pooja Saxena

LAYOUT & COVER ILLUSTRATION

Akash Sheshadri



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INTRODUCTION

This is the second in a series of essays aimed at studying the different ways in which apex courts have evaluated national biometric digital ID programs of their countries. In this essay, we focus on the core privacy challenge of the cases, and the standard of judicial review against which the ID programs were tested. We found that the legal tests applied by the courts were largely similar across cases, but small variations in their applications led to ultimately different decisions and outcomes. This essay will highlight some key differences and misapplications of the legal tests, and show how these potentially impacted the final outcome. The four cases discussed are the Aadhaar case in India,¹ the Huduma Namba case in Kenya,² the Robinson case in Jamaica,³ and the Madhewoo case in Mauritius.^{4*}

*For a background on these cases, please see <https://digitalid.design/judicial-trends.html>

In all of these cases, the legal question before the court was whether the national biometric digital ID programs were constitutional, despite the privacy (and other) infringements they caused. Since the constitutional framework in the respective countries allowed violations so long as they could be reasonably justified and were proportionate in their infringing impact, the task before the courts was to analyse the aim of the ID program, its manner of implementation, and its potential impact on the rights of people involved.

In Jamaica, the court found that several features of the ID system produced disproportionate risks, and that since the state did not do enough to justify its measure or safeguard its residents, the whole system must be struck down for violating the constitution.⁵ Similarly, in Kenya, although the court found that its residents' rights can be infringed for a digital ID system, it halted the operation of the system until the Kenyan government implemented a sufficiently robust data protection legislation, and framed regulations to safeguard the data collected. They held that in its current form, the ID system was risky and not well protected, and therefore unconstitutional. The Mauritian court found that while the collection of biometric data for the purpose of an ID system was valid, its storage exposed ID holders to risks of unauthorized access especially in a centralised

¹ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, 1 SCC 1 (2019).

² *Nubian Rights Foundation & Ors. v. Attorney General of Kenya & Ors.* [2020] eKLR (Kenya).

³ *Julian J. Robinson v. The Attorney General of Jamaica*, [2019] JMFC Full.

⁴ *Madhewoo M v. The State of Mauritius*, 2015 SCJ.

⁵ *Julian J. Robinson v. The Attorney General of Jamaica*, [2019] JMFC Full 04, ¶¶ 248 to 253.

system, and that this disproportionality warranted a termination of the system.⁶ Only in India did the court allow the Aadhaar ID system to continue despite the risks it introduced, holding that because of the safeguards governing the system and the important aim it sought to achieve, it was proportionate and constitutional.⁷

⁶ *Madhewoo M v. The State of Mauritius*, 2015 SCJ, 33.

⁷ The court did strike down some provisions, but as a whole upheld the Act. These include reducing the period of retention of authentication records, prohibiting the storing of metadata, disallowing the participation of private parties, etc. See *Justice K.S. Puttaswamy (Retd.) v. Union of India*, 1 SCC 1 (2019), ¶¶ 301, 230, 293, 219.

LOCATING THE PRIVACY TESTS

The very first step in this analysis is identifying the legal test that guided the courts in deciding the constitutionality of these ID systems. On finding that the introduction of a digital ID system infringes the fundamental right to privacy, the courts had to assess whether it was a justifiable restriction because of the purpose they serve to users. To do this, they applied the proportionality test, made famous in modern day by the Canadian Supreme Court in *R v. Oakes*. This test, however, has morphed in several ways over the years, resulting in different iterations. The judgments examined here have applied these different iterations, in some cases with modifications of their own.

For the purposes of the four cases, the different versions of the test can be summed up into two schools of thought— the Canadian (Oakes) test and the German test.

Canadian Test

The Court in *R v. Oakes* created a two-step balancing test to determine whether a law which limits a constitutional right is justifiable—

1. The government must first show that the law under review has a goal that is both “pressing and substantial in a free and democratic society.”
2. The court then conducts a proportionality analysis using three sub-tests.
 - 2(a). First, the provision of the law that limits a fundamental right must be rationally connected to the law’s goal. If it is arbitrary or serves no logical purpose, then it will not meet this standard.
 - 2(b). Second, the provision should minimally impair the violated constitutional right. It will be constitutional only if it impairs the right as little as possible or is “within a range of reasonably supportable alternatives.”
 - 2(c). Finally, the court examines the law’s proportionate effects. Even if the above steps are satisfied, the effect of the provision on constitutional rights may be too high a price to pay for the advantage the provision would provide in advancing the law’s purpose. If so, the law is unconstitutional.

German Test

The German test of proportionality has been a part of its administrative jurisprudence since the late 19th century, developed by then Prussian courts.⁸ It was first used to assess whether actions of the police were necessary for achieving a relevant objective.⁹ Since then, its application has grown to areas of public law, including that of constitutional interpretations.¹⁰ Currently, the proportionality test is used (in Germany, and other European countries) to assess the constitutionality of legislative, executive, and judicial actions that infringe citizens' rights.

The German test can be grouped into 3 major elements: suitability, necessity, and proportional result (or proportionality *stricto sensu*). For a statutory measure to pass this test, the government must be able to prove the following steps:

1. Legitimate goal stage: a measure restricting a right must, first, serve a legitimate goal;
2. Suitability or rational connection stage: it must, second, be a suitable means of furthering this goal;
3. Necessity stage: there must not be any less restrictive but equally effective alternative; and
4. Proportionality stage: the measure must not have a disproportionate impact on the right-holder.

While largely similar, there are two main differences between the Canadian and German approaches. First, the Canadian test requires the state aim to be of sufficient importance (“substantial in a democratic society”) as against the German test which only requires a “legitimate goal”.

Second, the German test insists that there must exist no other “less restrictive but equally effective alternative”. In contrast, the Canadian formulation only requires that the state impair the right “as little as possible.”

In Mauritius, the proportionality test inheres in the constitutional right to privacy, through an exception that allows the right to be infringed if it is done “(a) under the authority of any law, and (b) if it is done in the interest of public order or the protection of rights/ freedoms of other persons, and (c) unless

⁸ Kreuzberg decision (14 June 1882), PrOVG 9, ¶ 353.

⁹ Moshe Cohen-Eliya, Iddo Porat, “American balancing and German proportionality: The historical origins pages,” 8 *International Journal of Constitutional Law* (2010), 271-273; Kreuzberg decision (14 June 1882), PrOVG 9, ¶ 353.

¹⁰ Yutaka ARAI-Takahashi, “Proportionality –a German approach,” 19 *Amicus Curiae* (1999).

the thing done can be shown not to be reasonably justifiable in a democratic society.”¹¹ Citing *S and Marper*,¹² the court interpreted “reasonably justifiable in a democratic society” to be “if it answers a ‘pressing social need’ and, in particular, if it is proportionate to the legitimate aim pursued and if the reason adduced by the national authorities to justify it are ‘relevant and sufficient.’” Necessity was further assessed based on whether the reasons for interference were “relevant and sufficient and the measures taken at the national level proportionate to the aims pursued.”¹³ Although not strictly one of the two interpretations of the proportionality test, it bears close resemblance to the Canadian test, as it required the state aim to be answering a “pressing social need.”

Similarly, in Kenya, the proportionality test is imbibed in the constitutional provision prescribing the possible limitations or interferences with all constitutional rights. A right can only be limited by law, and only to the extent that this limitation is reasonable and “justifiable in an open and democratic society” based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right or fundamental freedom;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
- (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

This provision has features of both tests, as it requires the state aim to be assessed for its importance and mandates the state to prove that there were no less restrictive means to achieve the aim.

The Jamaican court applied the Canadian test to determine proportionality. With this test, at every stage the state was required to justify the importance of its measure to warrant the breach of a constitutional right. For instance, the court held that the provision that made the ID scheme applicable only to Jamaican residents was unconstitutional because the state was not able to show how this was a legitimate state aim that passed the first prong of the Canadian test.

¹¹ Section 9(2), Constitution of Mauritius.

¹² *S and Marper v. the United Kingdom* [2008] ECHR 1581 (Applications Nos. 30562/04 and 30566/04 – 4 December 2008), ¶ 101.

¹³ *Sahin v. Turkey* (2005) 41 E.H.R.R.8.

In the Aadhaar case, choosing an appropriate proportionality test took much of the court's attention. The majority bench pointed out the differences in the two tests, and identified what in their opinion was the major distinction between the two. According to them, the Canadian test focuses on resolving cases at the stage of evaluating the "compelling state interest" while the German test does it largely at the balancing stage. They found the German test to be flawed because it ignores the earlier steps and relies largely on the balancing stage of the inquiry, which is done in a "subjective, arbitrary and unpredictable" manner because of the lack of bright-line rules.¹⁴ The issue the majority takes with the Canadian test is that it is too strict; it rejects any legitimate goal and requires instead that it be of sufficient importance, and the minimal impairment test narrows down the range of constitutionally acceptable policies far too much, insisting that only the measure that impairs the right the *least* can pass constitutional scrutiny.¹⁵ This, in their opinion, would filter out all but one policy, essentially encroaching on the law-making role of the government.¹⁶

Instead, the court adopted the interpretation by Professor David Bilchitz,¹⁷ that draws largely from the German test, but with a shift in focus from the balancing test to the necessity test, such that it has "a meaningful but not unduly strict role."¹⁸ According to Prof. Bilchitz, the following form the proportionality leg of the test—

First, a range of possible alternatives to the measure employed by the government must be identified. Second, the effectiveness of these measures must be determined individually. The test here is not whether each respective measure realises the governmental objective to the same extent, but rather whether it realises it in a 'real and substantial manner'. Third, the impact of the respective measures on the right at stake must be determined. Finally, an overall judgment must be made if the findings of the previous steps lead to an alternative which is preferable. This also requires a form of balancing to be carried out at the necessity stage.

¹⁴ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, 1 SCC 1 (2019), ¶ 123.

¹⁵ This differs from the German test also because the latter required that alternative measures be just as effective (but less restrictive) while this test requires that the measures simply achieve the stated goal, without prescribing an effectiveness.

¹⁶ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, 1 SCC 1 (2019), ¶ 123

¹⁷ David Bilchitz, "Necessity and Proportionality: Towards A Balanced Approach?", Hart Publishing, Oxford and Portland, Oregon, (2016).

¹⁸ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, 1 SCC 1 (2019), ¶ 123.

However, neither Prof. Bilchitz nor the majority decision in the Aadhaar case offer further insight into what the end result of this assessment is, or what the “balancing” that is to be carried out at this stage is. As I note later in this essay, this led to a curious interpretation in this step of the court’s inquiry. The court also found that the final proportionality or balancing stage of the German test was arbitrary, and sought to address this by “avoiding ‘ad-hoc balancing’” and “instead proceeding on some ‘bright-line rules.’”¹⁹ However, the court failed to identify what these tests may be, or how they could be created. The end result was that the court adopted a diluted version of the German test, offering no additional insight into objective rules for the subjective balancing process.

¹⁹ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, 1 SCC 1 (2019), ¶ 124.

BURDEN OF PROOF & RULES OF EVIDENCE

Before individual issues of the cases are considered, an important comparative question that we should look at is the burden of proof required by the respective courts for constitutional matters such as this. The burden of proof is important to the success of a case, and determines which party is given the presumption of accuracy and which party is responsible for presenting evidence. Particularly where one of the parties is the state, and has an advantage in having better access to information and evidence about its own technology, this can be looked at as an unfair burden on the petitioners; certainly one that impacted the final outcome.

In the Jamaican case, the Court categorically applied a burden of proof to the case, that of preponderance of probability.²⁰ This, they stated, was more appropriate than the proof beyond reasonable doubt standard, since it was a matter of “reasonableness” and “democratic society”.²¹ In the reasonable doubt standard, the burden of proof is met if there is greater than a 50% chance that, based on all the reasonable evidence shown, the plaintiff’s claims are true and the defendant did in fact do the wrong that caused the damage. The alternative criminal law standard was rejected by the court, as it would be unduly onerous on one of the parties.²² In the context of the ID system (especially one that is yet to be fully implemented), this means that the petitioners need not give definitive evidence of infringement or harm caused by the system to prove a violation of their rights; they only need to show the *likelihood* of it. However, the court also pointed out that even within this civil law standard, the degree of cogency of evidence required depends on the gravity of the matter before the court; for a violator of important fundamental rights to justify their violation, as is the case here, compelling evidence is necessary.²³

In contrast, none of the other courts made mention of the burden of proof necessary for petitioners to prove their case. The Indian Supreme court even went so far as to reject evidence supporting proof of exclusionary harms caused by the Aadhaar mandate, as it was disputed by the respondents, and they had no means

²⁰ *Julian J. Robinson v. The Attorney General of Jamaica*, [2019] JMFC Full 04, ¶ 102

²¹ *R. v. Oakes*, 1 S.C.R. 103 (1986), ¶ 22; *Julian J. Robinson v. The Attorney General of Jamaica*, [2019] JMFC Full 04, ¶ 102.

²² *Julian J. Robinson v. The Attorney General of Jamaica*, [2019] JMFC Full 04, ¶ 102.

²³ *Julian J. Robinson v. The Attorney General of Jamaica*, [2019] JMFC Full 04, ¶ 104.

to definitively determine its accuracy.²⁴ The court claimed it could not invalidate a legislation on the basis of material whose credibility was not tested. Thus, by failing to articulate an evidentiary burden about factual questions, or articulating what would happen in case of factual uncertainty, the court overlooked a crucial aspect of its case— one that eventually (and arbitrarily) favoured the State. Even for the exclusionary impact accepted by the court, they simply reposed faith in the state to remedy the situation, without determining the proportionality of the system on such harm caused. This would patently fail the test identified by the Jamaican court, as it does impose an unusually high burden on the petitioners to prove potential harm caused by the ID system. It also becomes dangerous particularly because of the pervasive nature of national digital ID systems, that may not always cause an immediate impact but whose consequences compound over time. The court was inconsistent even in the standard it imposed on the government; it relied on key evidence presented by the chief administrator of the Aadhaar system that was not even placed on affidavit,²⁵ and therefore would not normally be accepted as evidence.

Another important point of comparison is where the burden was allocated. The Jamaican court was once again categorical in imposing this burden on the state, as they were the party potentially violating the constitutional right. Except for cases where the justification was patent, it would be the state that had to submit evidence to prove that the violation is constitutional. The Mauritius court, on the other hand, imposed this burden on the petitioner to prove that the state measure was *not* reasonably justifiable in a democratic society.²⁶

²⁴ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, 1 SCC 1 (2019), ¶ 317.

²⁵ “The Aadhaar Judgment and the Constitution – I: Doctrinal Inconsistencies and a Constitutionalism of Convenience,” *Indian Constitutional Law and Philosophy* (blog post), last accessed December 18, 2020, <https://indconlawphil.wordpress.com/2018/09/28/the-aadhaar-judgment-and-the-constitution-i-doctrinal-inconsistencies-and-a-constitutionalism-of-convenience/>.

²⁶ *Madhewoo M v. The State of Mauritius*, 2015 SCJ, 27.

STATE INTERESTS, EVIDENCE, AND LEGITIMACY

The very first step in determining the proportionality of a state measure is identifying the state interest or goal, and evaluating its legitimacy. In all of the four cases analysed, the courts applied a variation of the proportionality test that required an analysis of not just whether the goal or state interest was *legitimate* but also if it was of sufficient importance (in a democratic society) to be infringing on constitutional rights.²⁷ For this test to be satisfied, the state has to show that the goal was important for the society it is operating in, and it is aimed at tackling some identified problem. For instance, in *R v. Oakes*, the court stated that the objective must “relate to concerns which are pressing and substantial,” so that concerns that are trivial to a democratic society are not met with rights-infringing measures.²⁸ The court, in this case, was deciding on the constitutionality of a narcotics law aimed at criminalising drug trafficking,²⁹ and concluded a legitimate state aim on the basis of government evidence showing the increase of drug trafficking in the state,³⁰ along with evidence of success in other countries that adopted similar criminalization measures to tackle it.³¹

In the Aadhaar case, the primary aim in establishing Aadhaar, as identified by the court, was to address fraud and leakages in the welfare system, and ensure the state fulfils its duty of delivering welfare to all eligible citizens.³² There was no doubt that such an aim is important and non-trivial by itself, but its legitimacy was disputed because of the overbroad categorisation of this as a problem arising from the lack of “unique identities”. The petitioners claimed that the state was unable to show that the leakages in the welfare system were due to identity fraud, as opposed to eligibility and quantity frauds, which they claimed comprised the

²⁷ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, 1 SCC 1 (2019), ¶ 126.

²⁸ *R. v. Oakes*, 1 S.C.R. 103 (1986), ¶ 69.

²⁹ The respondent was charged with unlawful possession of a narcotic for the purpose of trafficking, contrary to s. 4(2) of the Narcotic Control Act, but was convicted only of unlawful possession. Section 4(2) provides that if the Court finds the accused in possession of a narcotic, the accused is presumed to be in possession for the purpose of trafficking. The respondent challenged this section.

³⁰ *R. v. Oakes*, 1 S.C.R. 103 (1986), ¶ 73.

³¹ *R. v. Oakes*, 1 S.C.R. 103 (1986), ¶¶ 74-75.

³² Statement of Objects and Reasons, Aadhaar Bill (Targeted Delivery of Financial and Other Subsidies, Benefits and Services), 2016; *Justice K.S. Puttaswamy (Retd.) v. Union of India*, 1 SCC 1 (2019), ¶ 330.

majority of such leakages.³³ The court was, however, unmoved by this, and barely engaging in this discourse, held that the state aim of providing “unique” identity via technology to ensure welfare reached eligible beneficiaries was aimed at enhancing citizens’ rights to food and dignity, and was therefore legitimate.

In contrast, the Jamaican court interpreted the test strictly, and struck down every aspect of the ID system that was not well justified by a legitimate state aim. For instance, they held that the aim of providing reliable identification to residents was not sufficiently proven by the white paper describing its need submitted by the Attorney General as evidence, and that in the absence of authentic sources and statistics showing the requirement of the ID system, the state aim would not pass the test.³⁴ They also struck down the provisions that made the system mandatory, allowed third party access, discriminated against residents etc because the state could not tender justifiable aims for introducing them.³⁵ In Mauritius and Kenya, the courts found that the state aims of providing secure identity systems were legitimate. In the Mauritius court, the state was able to show that the specific problem aiming to be addressed was that of *identity* fraud that occurred rampantly in the old system, due to people registering several times for the same ID. They also held that the respondents were able to show why the use of fingerprints were essential, and this evidence was not challenged by the petitioners. Once again, this differs widely from the Aadhaar case, where the respondents did not show why the use of biometrics was indispensable in their state aim, even though it was a key contention of the petitioners.

Closely connected to this step is the rational nexus test, where arguably the Aadhaar bench once again diluted its application. In *R v. Oakes*, the “rational connection” was interpreted to require that the means chosen were “carefully designed” to minimize problems of “over inclusion.”³⁶ The offending law there was Section 8 of the Narcotic Control Act, which put a reverse burden on anybody found with possession of a narcotic, to prove that they did not possess with intention of trafficking. The court determined the unconstitutionality of this provision at this stage,³⁷ and held that Section 8 was clearly over-inclusive as it would include in its scope even people found with possession of small/negligible

³³ The petitioners also submitted to evidence the studies backing these claims.

³⁴ *Julian J. Robinson v. The Attorney General of Jamaica*, [2019] JMFC Full 04, ¶ 247(42)-(44).

³⁵ *Julian J. Robinson v. The Attorney General of Jamaica*, [2019] JMFC Full 04 ¶¶ 248-253.

³⁶ *R. v. Oakes*, 1 S.C.R. 103 (1986), ¶ 78.

³⁷ *R. v. Oakes*, 1 S.C.R. 103 (1986), ¶¶ 78-79.

amounts of narcotics.³⁸ This, in turn, could lead to results in certain cases that are not rational or fair, especially considering the seriousness of the offence in question.³⁹

The Aadhaar case had similar facts, with the petitioners showing evidence to support their claim that the introduction of Aadhaar was not likely to address the state aim (that of reducing fraud in welfare delivery) in any substantial way, and would in fact lead to exclusions and further obstacles in the welfare delivery system. However—and herein lies a key error whose impact we will see throughout the court’s decision—the majority bench noted early on in its proportionality analysis that it would not examine the actual working of the Act, as that bears no relevance to judging the constitutional validity of the scheme.⁴⁰ This means that the court would only test the Act on its face, for inconsistencies within the law itself that might impact fundamental rights, notwithstanding its actual effectiveness or impact. When looked at in the context of the suitability or the rational connection test, this leaves the court unable to examine the extent to which this law is actually able to advance the aim, and therefore whether it is a suitable measure. For example, the State’s evidence showed that there were Aadhaar authentication failure rates of 6% for fingerprint authentication and 8.54% for iris scan-based authentication.⁴¹ The court did not examine whether the presence of such failure rates would render the Aadhaar system unsuitable for its purpose of being a vehicle for targeted welfare delivery.⁴²

The court also failed to look at the over-inclusion potentially present in the Aadhaar measure. Aadhaar imposes the burden of requiring every resident to prove their innocence by sharing their biometrics if they wanted to claim their right to state subsidies and services. There was no consideration given to this aspect, despite it being highlighted by the petitioners, and based on almost a factual acceptance of the need of the Aadhaar unique identity to effectively deliver welfare, accepted the ID system as a suitable measure. This becomes even more unjustifiable when juxtaposed with the fact that the Aadhaar system had already been functional for several years before the court made its decision; all its failings and consequences were already present for the court to analyse, and yet these factors were ignored.

³⁸ *R. v. Oakes*, 1 S.C.R. 103 (1986) ¶ 78; Sujit Choudhry, “So What is the Real Legacy of Oakes?: Two Decades of Proportionality Analysis under the Canadian Charter’s Section,” *The Supreme Court Law Review: Osgoode’s Annual Constitutional Cases Conference* 34 (2006).

³⁹ *R. v. Oakes*, 1 S.C.R. 103 (1986), ¶ 78.

⁴⁰ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, 1 SCC 1 (2019), ¶ 249.

⁴¹ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, 1 SCC 1 (2019), ¶ 53.

⁴² Aparna Chandra, “A Bridge to Nowhere?” 3(2) *University of Oxford Human Rights Hub Journal* (2020) 23.

National Security

Another noteworthy observation is the conflicting views the different courts had on the legitimacy of some state goals, particularly that of “national security.” In the Aadhaar case, the court considered whether the disclosures of identity information permitted by the Aadhaar Act in the interest of “national security” met the proportionality test, as it could not be related to the state aim of ensuring targeted welfare. The court held that since “national security” forms a legitimate interest of the state and satisfies the proportionality test,⁴³ disclosure for national security was entirely appropriate in this case.⁴⁴ This was notwithstanding the fact that “national security” would have to be carved out as an additional state goal unrelated to the one justifying the creation of the ID system in the first place.

In contrast, although national security did arguably form part of the state goal in the other cases as well, (in the form of addressing identity fraud) it was not considered an additional state aim used to justify disclosures and third-party access in the ID system. In fact, in Mauritius, the court was categorical in holding that it was disproportionate to expose the data stored in the ID systems to disclosures and access in the absence of appropriate judicial safeguards (such as court orders). This was even when the state goals in these circumstances were closer to that of national security than the Aadhaar case, since they were not restricted to identity for welfare programs.

Even more relevant here is jurisprudence from the Jamaican case explaining why it disagreed with the Aadhaar court— since in India interests of national security are not a question of law but that of policy,⁴⁵ such a threshold offers no protection at all as it can be easily met.⁴⁶ For that reason, they would not permit it as a legitimate state goal, as it would allow complete discretion on part of the executive, and fail to filter out unreasonable goals.

The Aadhaar court, however, used this reasoning to deny the petitioner’s claims of possible misuse because of the lack of a definition of “national security,” and held that it was a legitimate goal that would be left to the interpretation of the executive.⁴⁷

⁴³ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, 10 SCC 1, (2017).

⁴⁴ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, 1 SCC 1 (2019), ¶ 349.

⁴⁵ *Ex-Armyemen’s Protection Services Private Limited v. Union of India & Ors*, 5 SCC 409 (2014).

⁴⁶ *Julian J. Robinson v. The Attorney General of Jamaica*, [2019] JMFC Full 04, ¶ 247(120-122).

⁴⁷ The court did strike down the provision contained in Section 33(2) of the Act to the extent it gives power to the Joint Secretary as it did not consider this sufficient safeguard, and invited the respondents to add a provision that would suitably protect the interests of the people.

LEAST INTRUSIVE TEST

The third leg of the test, the least intrusive or necessity test, forms an important part of the proportionality analysis as it requires the state to show that the measure adopted was the only one available, and there was no other alternative in the state's arsenal that could have addressed the state aim without infringing fundamental rights to this degree. This would ideally require some sort of testimony from the state as to why no other state action could satisfactorily tackle the identified state aim.

This objective was missed in the Aadhaar case. While applying the proportionality test, the court simply states that there is no alternative measure that can achieve the same purpose, without ever explaining how it came to that conclusion. This follows a pattern seen earlier in the case as well, where it accepted without question that biometric authentication was the only credible way to establish “uniqueness”. The court then took it one step further, by holding that this “uniqueness”— and by extension Aadhaar— was necessary to achieve the state's purpose, which was to tackle fraud in the welfare system. Nowhere was this conclusion explained, thereby entirely defeating the purpose of this test (which was to ensure that the state *considered* other less infringing measures, even while deciding on the contested one). The court even stated this test was fulfilled because the petitioners were unable to suggest any alternative method.⁴⁸ However, it is clear from most interpretations of this test, that such burden does not fall on the petitioners, and it makes no difference to the application of the test whether or not they were able to suggest less intrusive actions. This, coupled with the court's hesitation to apply the original *Oakes*' “minimal impairment” test because it intrudes on the legislature's role, shows a preference to defer to the State's policy choices and limit itself to deciding the constitutionality of the chosen law.

On the other hand, Justice Batts of the Jamaican court categorically disagreed with this, holding that for a rights-infringing legislative measure to be constitutional, it must embody the least harmful way to achieve the objective. If the court *knew* of a less restrictive measure, then it cannot allow the former to stand.⁴⁹ The Chief Justice was also clear in his interpretation of this test— in cases of violation of fundamental rights such as this, the state will need to show to the court the alternate measures that satisfied the objective that were available

⁴⁸ This was contested, as petitioners had argued for other measures such as smart cards to be just as effective, both in their petitions and oral arguments before the court.

⁴⁹ *Julian J. Robinson v. The Attorney General of Jamaica*, [2019] JMFC Full 04, ¶ 142.

to them while making their decision.⁵⁰ On this ground, the court challenged the state's measure of making the ID system mandatory, as the state was unable to show that having it as a voluntary scheme would not sufficiently fulfil the state's objective.

Another crucial aspect of this test is a determination of its intrusiveness based on the *structure* or *design* of the ID system. In the Aadhaar and the Huduma Namba case, the petitioners argued that certain features of the system— such as the use of a centralised database— were disproportionate in their harmful impact, and were also not the least intrusive way to achieve the purpose of the ID system. In the Aadhaar case, only Justice Chandrachud's dissent acknowledged the integration of technological design of the system and its impact on fundamental rights in this case,⁵¹ the majority decision did not engage with it in any manner. The Kenyan court refused to prescribe the choices that can be made in a system's architecture, as that would be outside their jurisdiction.⁵²

It is important to note that the proportionality test requires the state to show that it chose the least intrusive measure (out of, presumably, several available measures) to fulfil a stated aim; this would mean that here, the state has to demonstrate why it was not possible to have a decentralised storage system (which has a lower privacy risk). Thus, while the court need not “prescribe” a design choice for the ID system, especially since that would be outside their jurisdiction, it is very well within their limits to determine the proportionality of the particular design choice that the state has implemented.

⁵⁰ *Julian J. Robinson v. The Attorney General of Jamaica*, [2019] JMFC Full 04, ¶ 106.

⁵¹ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, 1 SCC 1, (2019) ¶ 155 (Chandrachud, J.)

⁵² *Nubian Rights Foundation & Ors. v. Attorney General of Kenya & Ors.* [2020] eKLR (Kenya), ¶¶ 875-876.

PROPORTIONALITY

The very last part of the test, that of the measure's impact, is often considered to be the most significant part of the judicial inquiry. In this analysis, the statutory measure could have a legitimate state interest (first limb), be rationally connected to its objective (second limb), and narrowly tailored (third limb), but could still fail the proportionality component. This was where the issues were ultimately decided in most of these cases.

In Jamaica, the court struck down several parts and features of the ID system—such as mandatory collection of biographic information, third party access to the system, etc— as they produced risks that were disproportionate to the objective.⁵³ Eventually, they held that since these provisions could not be sufficiently severed from the rest of the ID system, the ID enacting Act was struck down as unconstitutional. Similarly, in Kenya, the court halted the system until the Kenyan government implemented a sufficiently robust data protection legislation, as well as framed regulations in order to safeguard the data collected. They held that in its current form, the ID system was risky and not well protected, and therefore unconstitutional. The Mauritian court, persuaded by testimony about the risks of unauthorized access especially in a centralised system, held that the storage and retention of data is disproportionate to the legitimate aim, as it exposed ID holders to too many risks.⁵⁴ On examining the legal framework, the court held that the many exceptions allowed to consent through disclosures, third party access, etc, introduce potential for misuse of the exercise of the powers granted under the law, and is therefore unconstitutional.⁵⁵

In the Aadhaar case, despite the petitioners highlighting similar issues, such as the disclosures and third party access allowed by the Act, the seeding of aadhaar data into other databases, etc, the court did not find any impact that was disproportionate to its welfare goal.⁵⁶ It held that since the fundamental right to

⁵³ *Julian J. Robinson v. The Attorney General of Jamaica*, [2019] JMFC Full 04, ¶¶ 248 to 253.

⁵⁴ *Madhewoo M v. The state of Mauritius*, 2015 SCJ, 33.

⁵⁵ *Madhewoo M v. The state of Mauritius*, 2015 SCJ, 33-34.

⁵⁶ The court did strike down some provisions, but as a whole upheld the Act. These include reducing the period of retention of authentication records, prohibiting the storing of metadata, disallowing the participation of private parties, etc. See *Justice K.S. Puttaswamy (Retd.) v. Union of India*, 1 SCC 1 (2019), ¶ 301, 230, 293, 219.

privacy applied only to some categories of data,⁵⁷ and that the privacy incursion was minimal and balanced with the important benefit offered by the scheme, the ID system was constitutional. Seeing that an important factor to consider would be the actual impact of the law, it is unclear how the court could answer the question of proportionality without considering empirical evidence to that effect. If the law is effective in delivering welfare and stemming leakages, the balance may tip in favour of the measure; if on the other hand it results in excluding people, is ineffective in its purpose, or has repeatedly allowed data breaches, then the balance may have to fall in favour of the right to privacy.⁵⁸ With the Aadhaar system being operational for several years before this judgment, it is difficult to see why the court relied more heavily on the law and the government's intentions than empirical evidence of its functioning.

As the test of proportionality is subjective, it is difficult to conclusively claim that the Aadhaar court erred in its application in the absence of any bright-line rules that govern this step; however, it is clear that the court did not consider the risks posed by the ID system with the same gravity that the other courts did, despite identical facts.

⁵⁷ The use by the Aadhaar court of the “reasonable expectation of privacy” test in this step has been criticised as being an inaccurate application of the proportionality analysis. See “The Aadhaar Judgment and the Constitution – II: On proportionality,” *Indian Constitutional Law and Philosophy* (blog post), last accessed December 18, 2020, <https://indconlawphil.wordpress.com/2018/09/30/the-aadhaar-judgment-and-the-constitution-ii-on-proportionality-guest-post/>

⁵⁸ Aparna Chandra, “A Bridge to Nowhere?” 3(2) *University of Oxford Human Rights Hub Journal* (2020) 23.

ADDITIONAL FACTORS CONSIDERED BY THE COURTS

In addition to these major points of comparison, the courts also had some unique additions to their analyses that were pivotal in how they applied the test.

1. Reasonable expectation of privacy

Only in the Aadhaar case was some information subject to the “reasonable expectation of privacy” test during the assessment of proportionality. At the stage of balancing the impact of Aadhaar with its stated goal, the court looked at what information may be analysed through this lens, and held that since the demographic information required by Aadhaar (such as name, gender etc) is already widely shared in the public opinion, it would fall outside the purview of this test.⁵⁹ Typically, the proportionality test would only apply to cases of privacy infringement, which is an assessment that would take into consideration what aspects the petitioner has a reasonable expectation of privacy over, and thus what would be a valid claim to privacy. Thus, if the petitioner had no reasonable expectation of privacy over certain information, there should be no application of the proportionality test over it in the first place.

More important perhaps, is the impact such a finding had in this case. By applying the reasonable expectation test, the court essentially allowed such information to be collected despite it not necessarily meeting the requirement of state aim— as was argued by the petitioners for certain categories of demographic information. This was a situation unique to the Aadhaar case, and was an anomaly in the interpretation of the proportionality test, as it allowed data to be taken from residents, despite it not serving any state aim. It is not difficult to see the harm in this, especially when considered that such data is added to a system that already has a host of other data about the ID holder, with several parties having access to it.

⁵⁹ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, 1 SCC 1 (2019) ¶ 249.

2. Transparency in functioning of system (technology disclosures)

Since much of the petitioners' case revolved around the danger of using biometric technology on a national scale, a claim that came up in both the Aadhaar as well as the Kenyan courts was transparency and insight into the technology itself. The petitioners in the Kenyan case specifically asked for disclosures about the technology and the relevant source code, as it was crucial to knowing the security of the system and how their data was being processed. Similarly in the Aadhaar case, petitioners argued the Aadhaar system was opaque in its functioning because of the lack of transparency into how the algorithms work.⁶⁰ However, both courts were hesitant to encroach upon what they deemed the domain of the government. The Kenyan court in particular asked the petitioners to approach the government directly with this claim through their Access to Information statute, as it was not something the court would grant.⁶¹

3. Balancing of Fundamental Rights

The three wings of the proportionality test work together to ensure that the state measure, despite its justifiable goal, does not result in an infringement of constitutional rights that is disproportionately grave. A measure fails the test if— at the last stage— it is concluded that the impact is too grave, despite any advantage it could reasonably provide.⁶² In fact in much of the Jamaican, Mauritius, and Kenyan cases, it was this stage at which the courts struck down the ID system as they found that the potential harm caused by the inadequately protected ID system was too risky to allow it to stay, despite all its goals. However, in the Aadhaar case, the bench interpreted this provision curiously, agreeing with the respondents' case on this point.

The respondents in the Aadhaar case argued that the final stage of the test required a balancing of two fundamental rights, namely the right to privacy and the right to food and dignity under Article 21.⁶³ The court, accepting this wholly unusual line of inquiry, applied two tests at this stage—⁶⁴ the first, whether the “legitimate state interest” is also tailored narrowly to require minimal intrusion; here too they applied the reasonable expectation

⁶⁰ Vidyut, “Constitutional Validity of Aadhaar, Day 11: “Man transcends Algorithm,” *Medianama* (February 21, 2018).

⁶¹ *Nubian Rights Foundation & Ors. v. Attorney General of Kenya & Ors.* [2020] eKLR (Kenya), ¶¶ 886-887.

⁶² This is common to the Oakes, German, and Aadhaar test.

⁶³ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, 1 SCC 1 (2019), ¶ 253.

⁶⁴ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, 1 SCC 1 (2019), ¶ 285.

of privacy test to hold that since minimal data was being collected from ID holders, it (the collection) was not unreasonable. This seemed to be a reiteration of the minimally invasive step of the proportionality test that preceded this one, since what was being analysed was the reasonableness of the *measure* itself, even though it was suggested that the assessment would be of the tailoring of the state interest. If the latter, the measure may not have passed this stage, since as discussed earlier, the state aim of “ensuring the fundamental right to food and welfare” was not narrow enough to be substantially connected to the use of Aadhaar.

For the second test, the court engaged in a *balancing* of the fundamental rights that would be infringed and ones that (it deemed) would be realized by this measure.⁶⁵ Even notwithstanding that the court unequivocally took as fact (without accompanying proof) that it was the use of Aadhaar that would guarantee these rights, what was required from the court at this stage was simply to assess whether despite all the legitimate goals of the measure, its impact on the rights of citizens was too grave to allow it. What the court did instead was balance these two facets of dignity (that of privacy and ensuring welfare) and held that Aadhaar strikes a good *balance* between the two, passing the test of proportionality.⁶⁶ By balancing the fundamental right to food against any privacy infraction brought about by Aadhaar, the court bypassed a scrutiny of whether and to what extent the functional Aadhaar system is actually able to realise this fundamental right.

⁶⁵ The court referred to several other cases that also engaged in such balancing, but it is important to note that none of them were applying the proportionality test, and were instead occupied in different analyses. See *Justice K.S. Puttaswamy (Retd.) v. Union of India*, 1 SCC 1 (2019), ¶¶ 310 to 312.

⁶⁶ It is important to mention that the court did at this stage intermittently state that due to the minimal data taken by the state for aadhaar, it was not a disproportionate measure. However the goal of the court’s analysis seemed to remain to balance the two.

CONCLUSION

Justice Chandrachud, in his dissenting judgment in the Aadhaar case, wrote of the increasing use of the proportionality test as a “shift from the culture of authority to a culture of justification.”⁶⁷ According to him, testing the ID scheme against proportionality is not a case of the court second-guessing the wisdom of the legislature, but of subjecting it to judicial scrutiny, and holding the government accountable.⁶⁸ Essential to this is that the court cannot mechanically defer to the State’s assertions, but must instead require the State to discharge its burden of demonstrating that the rights-infringing measures were necessary and proportionate to the goal sought.⁶⁹

This is perhaps the most important feature of the test, and suitably the most appropriate tool of comparison across the cases for its application— the level of deference accorded by the court to the government’s word. Another is the role played by the actual operation or functioning of the ID system, notwithstanding the legal measure bringing it into effect.

The Jamaican court arguably applied the test most strictly, holding the government accountable at every step. It imposed a lower burden of proof on the petitioners, struck down provisions where the government was unable to tender sufficient evidence describing a need for the measure, and imposed a high standard on the government to justify the violation. Where the test required the State to prove its measure was the least intrusive, although other courts chose to be deferential to their governments on its policy choices, the Jamaican court insisted on holding its government accountable to show that it had implemented the least intrusive option available.

It also shared one important feature with the courts in Kenya and Mauritius, though the latter were far less exact in their application of the test: they were wary of the risks involved in the operation of the ID system itself. The Jamaican court struck down the entire system as the threat it posed to privacy and freedom was vastly disproportionate to any benefit it offered. Like the other two courts, that was in an assessment of what the system could be used for or what it might allow in the real world, and not simply what it was intended to be used for. For

⁶⁷ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, 1 SCC 1 (2019) ¶ 814(197) (Chandrachud, J.), quoting Moshe Cohen-Eliya and Iddo Porat, “Proportionality and the Culture of Justification,” 59 *American Journal of Comparative Law* 59 (2011); Etienne Mureinik, “A Bridge to Where? Introducing the Interim Bill of Rights,” 10 *South African Journal on Human Rights*, (1994).

⁶⁸ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, 1 SCC 1 (2019) ¶ 814(198) (Chandrachud, J.).

⁶⁹ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, 1 SCC 1 (2019) ¶ 814(198) (Chandrachud, J.).

instance, the Kenyan court found that the collection and use of data for the ID system was proportional to its purpose, but suspended its operation until the newly introduced data protection law was implemented— complete with the appointment of a data protection authority— because of the risks it invites for data breaches. It also noted that the government was unable to justify why there were such lapses in implementing an appropriate framework to protect the data collected, attributing it to the rushed process of introducing the ID system.⁷⁰ Similarly, the Mauritian court held that although there was sufficient justification for the introduction of the ID system, the potential it allowed for misuse of the powers granted by the law was significantly disproportionate.⁷¹

The Kenyan court can also be appreciated for its engagement with the issue of the necessity of biometrics for the ID system— in its application of the test— which cannot be said about any of the other courts. It heard expert witnesses on the matter and deliberated the application of biometric authentication in an ID system, but eventually refrained from looking into questions of how the ID system was designed as it held that it was out of its ambit.

The Aadhaar case in India arguably shows the least thorough application of the proportionality test, despite perhaps having the most opportunity to.⁷² By explicitly noting that the “working of the Act” was irrelevant to the question of its constitutionality, the court hindered its ability to examine several important questions such as the Aadhaar system’s intrusiveness, efficacy, necessity, etc. The court seemed more remiss of the proven ill-impacts of the Aadhaar system, than the other courts were on the possible impacts of their ID systems. There is a general passivity of the court even in its treatment of the glitches in the functioning of the Aadhaar system: while the Kenyan court observed that the errors in implementing their ID system point to a “haste” on part of the State, that could allow grave effects of breach of data on residents,⁷³ the Aadhaar court held that the exclusionary errors that have occurred thus far should be excused because it is “a work in progress.”⁷⁴ As Justice Chandrachud noted in his dissenting judgment, errors that have such grave impacts have to be anticipated when a project is on the drawing board, and cannot be condoned after they cause such severe deprivations.⁷⁵

⁷⁰ *Nubian Rights Foundation & Ors. v. Attorney General of Kenya & Ors.* [2020] eKLR (Kenya), ¶ 920.

⁷¹ *Madhewoo M v. The State of Mauritius*, 2015 SCJ, 33.

⁷² The Aadhaar system was in operation for the longest time before the court decided the case, allowing the court the most opportunities to witness the consequences of the ID system.

⁷³ *Nubian Rights Foundation & Ors. v. Attorney General of Kenya & Ors.* [2020] eKLR (Kenya), ¶ 922.

⁷⁴ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, 1 SCC 1 (2019), ¶ 316.

⁷⁵ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, 1 SCC 1 (2019), ¶ 264 (Chandrachud, J.).

Looking beyond the court's reluctance to examine evidence of faulty working of the Act, it also failed to look into much more than the legal framework of the Aadhaar eco-system. An example of what the court could have done can be seen in Justice Chandrachud's dissent, where he scrutinized the contracts signed between the UIDAI (the administrator of the Aadhaar system) and foreign entities providing the source code for biometric storage, and found that it allowed too much third party access to the Aadhaar system.⁷⁶ The majority bench, on the other hand, was satisfied with analysing the Act and rules/ regulations for safeguards provided and relying on reassurances offered by the respondents.

The Aadhaar court did not fare any better in its deference to the State's assertions, and the evidential burden it subjected the State to. It did not, at any point, require the respondent-State to justify its decisions re using biometrics, making Aadhaar authentication mandatory, using a centralised database, etc., despite the petitioners bringing such claims. The evidential burden it imposed on parties was unclear and arbitrary; it relied on evidence shown by the government through a powerpoint presentation, but rejected evidence by the petitioners in the form of studies⁷⁷ and newspaper articles⁷⁸, as their credence could not be properly tested. Even where the court was convinced of risks in the Aadhaar system, it did little to address them or hold the government accountable. For instance, after acknowledging that authentication failures in the Aadhaar system were excluding scores of people from accessing important services, it observed that the government was "making sincere efforts to correct it"⁷⁹ and took on record a statement by the Attorney General that they would address it.⁸⁰ Similarly, while the other courts disallowed the ID system from continuing in the absence of a fully operational data protection law, the Aadhaar court simply reposed faith in the government to enact a data protection law, without ensuring any accountability.

Thus, although the proportionality test was meant to apply a high standard of scrutiny to infringements of fundamental rights, its application depended largely on what factors the courts were willing to consider, how much they deferred to the decisions of their government, and what evidentiary standards they applied. Ultimately, nearly identical questions of law and fact lead to very different results.

⁷⁶ "Under the Contract, L-1 Identity Solutions retains the ownership of the biometric software. UIDAI has been given only the license to use the software. It has also been provided that L-1 Identity Solutions can be given access to the database of UIDAI and the personal information of any individual. See *Justice K.S. Puttaswamy (Retd.) v. Union of India*, 1 SCC 1 (2019), ¶ 231 (Chandrachud, J.).

⁷⁷ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, 1 SCC 1 (2019), ¶ 317.

⁷⁸ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, 1 SCC 1 (2019), ¶ 212.

⁷⁹ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, 1 SCC 1 (2019), ¶ 318.

⁸⁰ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, 1 SCC 1 (2019), ¶¶ 447(l)(i)-(ii).