

## DOCTRINE OF PROPORTIONALITY AS A STANDARD OF REVIEW UNDER ARTICLE 14

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### ***Abstract***

*Proportionality as a judicial standard has always been read into various provisions of the Constitution of India and other legislations as well regardless of a textual backing of the standard in the Indian Constitution. It has been regarded as an equitable principle for a just construction of many provisions of laws. However, its extension into Article 14 has not only been invalid and illegitimate in the beginning but has also been devastating in terms of its consequences and understanding. Perhaps a better reading of proportionality into Article 19 of the Constitution or Article 19 read with Article 21, would be reasonable. Reading proportionality as a standard under Article 14, as Prof. Tarunabh Khaitan suggests invites a lot of confusions and problems along with it. This is owing to the reason that the equality code of the Indian Constitution was not drafted in the way it was drafted in the Constitutions of other jurisdictions. In this regard, it is important to go back in time and trace the historical jurisprudence that has led to its current understanding and check whether there was a proper incorporation of the standard into Article 14 of the Constitution. That will clarify its context and help understanding its current application.*

**Keywords-** Article 14, proportionality, reasonableness, service law matters, Supreme Court of India.

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## Introduction

One of the foremost functions of the Constitutions is not only to state who is to govern and how but also to limit the powers of the sovereign.<sup>1</sup> The limitations imposed on the government is where the right of its subjects flows from. Similarly, every right comes with its own limitations notwithstanding the absolute rights that some of the (rare) modern constitutional law accounts for.<sup>2</sup> Proportionality, as a principle, emerged at the backdrop of this limitations in the field of law. One of the oldest documents incorporating this standard could be the Magna Carta. Magna Carta has a written principle of proportionality, which calls for proportional imposition of fine on offenders.<sup>3</sup>

This paper enquires into the aspect of proportionality in the context of judicial review of service law matters, where the Courts asks the question of whether the regulating exercise of fundamental rights done by the government is the least restrictive choice of measures that the legislator could do.<sup>4</sup> This test has now been used in Indian jurisprudence for both legislative action and administrative action, even though there is still a substantial amount of scholarly debate,<sup>5</sup> at the International level with regards to its applicability to administrative actions. This paper exclusively deals with the critical analysis of incorporation of Doctrine of proportionality in the context of Article 14 of the Constitution of India. For this purpose, a set of seven cases have been selected from the Supreme Court of India, that uses proportionality doctrine to adjudicate upon disputes around Article 14. Article 14 of the Constitution of India, often called the right to equality guarantees '*equality before law and equal protection of law*'.<sup>6</sup> The paper also makes passing references on comparative jurisprudence attached to the principle of proportionality for better insights into its application and to better appreciate the author's argument of judiciary's flawed incorporation of proportionality in the context of Article 14.

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<sup>1</sup> Rajeev Bhargava, "Why we need a Constitution?", Article on The Hindu dated July 08, 2018. Available on : <https://www.thehindu.com/opinion/columns/why-we-need-a-constitution/article24361253.ece>.

<sup>2</sup> A. Kavanagh, Constitutional Review under the UK Human Rights Act (Cambridge University Press, 2009), 257. He groups rights into qualified and unqualified rights. Qualified are relative rights that have a limited scope whereas unqualified rights cannot be limited.

<sup>3</sup> G. R. C. Davis, Magna Carta (London: Trustees of the British Museum, 1963), 19.

<sup>4</sup> Teri Oats Estates v U.T., Chandigarh, (2004) 2 SCC 130 paras 43 to 46. See also Sudhakar v Post Master General, Hyderabad. 2006 (3) SCALE 524. See also: Tarunabh Khaitan, 'Beyond Reasonableness'- A Rigorous Standard of Review for Article 15 Infringement, 50(2) *Journal of Indian Law Institute* 177-208 (2008) at 180.

<sup>5</sup> *Id.*

<sup>6</sup> For further discussion on Article 14 and Test of Proportionality read: Tarunabh Khaitan (*Supra* Note 4).

### Tracing the Roots of the Doctrine

The doctrine initially was used in the German jurisprudence in the context of disproportionate and illegal police actions. For instance, order for closure of a liquor shop for minor license violations.<sup>7</sup> Post second world war, the principle, for the first time in World history was introduced into Constitutional law by German Courts which was used when legislature imposed restrictions on pharmaceutical sale and the court invalidated it<sup>8</sup> and then in the context of freedom to association<sup>9</sup> and free use of property.<sup>10</sup> From the German Jurisprudence, the principle moved into the European law domain where it was incorporated into the Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>11</sup> It was used in the first of its kind decision in the *Handyside*<sup>12</sup> case in 1976 that included the curbing of the freedom of expression, where the court held that every “condition”, “restrictions” imposed in this sphere must be proportionate to legitimate aim pursued.<sup>13</sup> In this case, the European Court of Human Rights held that the act of confiscation of a book that is deemed by the government as obscene did not violate the right to freedom of expression of its citizens.

From German Jurisprudence, the doctrine was reportedly applied in a Canadian Court. Justice Hogg in the *Sunday Times* case of 1979<sup>14</sup> observed that the word “reasonable limits” in their general limitation clause<sup>15</sup> meant the proportionality doctrine. In the Australian Courts, the proportionality doctrine was adopted in a case regarding the political freedom of expression. In doing so the court referred to the Canadian case of *Oakes*.<sup>16</sup> However, scholars like Barak

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<sup>7</sup> 13 PrOVGE 424, 425, as cited by G. Frumkin, “A Survey of the Sources of the Principle of Proportionality in German Law” (unpublished thesis), University of Chicago, 1991.

<sup>8</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 11, 1958, 7 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 377.

<sup>9</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 14, 1985, 69 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 315.

<sup>10</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 2, 1999, 100 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 226. See also: Bernard Schlink, Proportionality In Constitutional Law: Why Everywhere But Here? 22 Duke Journal of Comparative & International Law 291-302 (2012). Available at: <https://scholarship.law.duke.edu/djcil/vol22/iss2/5>.

<sup>11</sup> The European Convention for the Protection of Human Rights and Fundamental Freedoms (1950).

<sup>12</sup> *Handyside v. United Kingdom*, App. No. 5493/72, 1 EHRR 737 (1979).

<sup>13</sup> *Id.*, para. 47. Please note that the legitimate aim is the restriction on the basis of which the measures are taken to infringe into our rights.

<sup>14</sup> *Sunday Times v United Kingdom*, App. No. 6538/74, 2 EHRR 245 (1980). Upheld in *R v. Oakes* [1986] 1 SCR 103.

<sup>15</sup> Article 1, Canadian Charter of Rights and Freedoms.

<sup>16</sup> See *Nationwide News Pty Ltd. v. Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd. v. Commonwealth* (1992) 177 CLR 106.

argues that the position regarding application of the doctrine is still not settled in Australia.<sup>17</sup> Similar to the position in Canada, the term ‘reasonable limits’ in their general limitation clause was accepted as a doorway for the test of proportionality in New Zealand.<sup>18</sup> The doctrine then spread across many European countries like Spain,<sup>19</sup> Portugal,<sup>20</sup> France<sup>21</sup> etc. When the question came for its incorporation into English law, while Lord Diplock left the question unanswered,<sup>22</sup> Lord Millet considered the test as a dangerous option<sup>23</sup> and there are also instances of cases where the court expressly refused to adopt.<sup>24</sup> It was only after the adoption of Human Rights Act in the United Kingdom, did the Courts start accepting proportionality as a standard of judicial review. It is notable that even in American Jurisprudence, the doctrine of proportionality was brought in as a doctrine to check the power of governmental agency.<sup>25</sup>

### The Indian Scenario

In India, proportionality has been accepted as a standard of review under Article 14 of the Constitution of India.<sup>26</sup> Other than this, the Supreme Court has recognised the traditional doctrine of Rational Basis and the (relatively) recent doctrine of Arbitrariness as the two grounds of judicial review to test a claim under Article 14.<sup>27</sup> Under the rational basis doctrine, Prof. Tarunabh Khaitan argues that there are three different standards of judicial review under Article 14 in the Indian context: (a) Rational Basis (intelligible differentia); (b) Doctrine of

<sup>17</sup> Barak A, *Proportionality: Constitutional Rights and their Limitations*, Cambridge University Press (2012), pp 197.

<sup>18</sup> *Ministry of Transport v. Noort* [1992] 3 NZLR 260; *Moonen v. Film and Literature Board of Review* [2000] 2 NZLR 9.

<sup>19</sup> *Recurso de Amparo (Habeas Corpus) 66/1995* decided by the Constitutional Court of Spain on May 8, 1995; J. Barnes, “El Principio de Proporcionalidad: Estudio Preliminar,” 5 CDP 15 (1998).

<sup>20</sup> 1976 Constitution S18 (2) 7th revision (2005); V. Canas, “Proporcionalidade,” in *Dicionário Jurídico da Administração Pública*, vol. VI (1994).

<sup>21</sup> See X. Philippe, *Le Contrôle de Proportionnalité dans les Jurisprudences Constitutionnelle et Administrative Françaises* (Aix-en-Provence: Presses Universitaires d’Aix-Marseille, 1990); V. Goesel-Le Bihan, “Le Contrôle de Proportionnalité Exercé par le Conseil Constitutionnel,” 22 *Les Cahiers du Conseil Constitutionnel* 208 (2007).

<sup>22</sup> *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374.

<sup>23</sup> Judge Millet’s opinion in *Allied Dunbar (Frank Weisinger) Ltd. v. Frank Weisinger* [1988] 17 IRLR 60, 65.

<sup>24</sup> *R v. Secretary of State for the Home Department, ex p. Brind* [1991] 1 AC 696.

<sup>25</sup> Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution*, pp 49 (2006).

<sup>26</sup> Tarunabh Khaitan, ‘Beyond Reasonableness’- A Rigorous Standard of Review for Article 15 Infringement, 50(2) *Journal of Indian Law Institute* 177-208 (2008) at 180.

<sup>27</sup> *E.P. Royappa v State of Tamil Nadu*, 1974 SCR (2) 348; *Air India v Nergesh Meerza*, AIR 1981 SC 1829. For detailed analysis, See: V.K. Sircar, *The Old and New Doctrines of Equality: A Critical Study of Nexus Tests and Doctrine of Non-Arbitrariness*, (1991) 3 SCC (Journal) 1. Available at: <https://www.ebc-india.com/lawyer/articles/91v3a1.htm>.

Proportionality; (c) Doctrine of Strict Scrutiny. This section would deal with the analysis of the second standard of review, i.e., Proportionality w.r.t Article 14 of the Constitution of India.

### 1. Bhagat Ram v State of Himachal Pradesh<sup>28</sup>

One of the first cases is *Bhagat Ram v State of Himachal Pradesh*.<sup>29</sup> Bhagat Ram was a forest guard who was accused of allowing Kali Das to cut down trees (in a bona fide faith that he is cutting the trees from the adjoining land that belonged to Kali Das) and charged with causing loss to government, negligence and dishonesty. He was thereby terminated of his services. When this was challenged in the Court, it was held that *the penalty imposed must be commensurate with the gravity of the misconduct, and that any penalty disproportionate to the gravity of the misconduct would be violative of Article 14 of the Constitution*.<sup>30</sup>

From a plain reading of the judgment, it becomes evident that the Court has just used the term “disproportionate” in its usual term, without referring to any test/doctrine/ standard of judicial review as such. It is merely a generic statement as to the action being “disproportionate” without actually citing any authority or reasons as to how disproportionate administrative action is read into Article 14 of the Constitution of India. This paves the way for further ambiguities and confusions in the future, which will be discussed in the cases mentioned below.

### 2. Ranjit Thakur v Union of India<sup>31</sup>

The previous judgment was further upheld by Justice M.N. Venkatachaliah in *Ranjit Thakur v Union of India*<sup>32</sup> while dealing with a similar service matter. An army soldier who was already serving a 28-day punishment refused to eat food after receiving direct orders from the senior officials. He was summarily court martialled for insubordination and removed from the service subsequently. The Court referred to the UK case of *Council of Civil Service Unions v. Minister for the Civil Services*<sup>33</sup> that dealt with judicial review of administrative action and

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<sup>28</sup> (1983) 2 SCC 442.

<sup>29</sup> *Id.* at 447 (hereinafter referred to as “Bhagat Ram”).

<sup>30</sup> *Id.*

<sup>31</sup> (1987) 4 SCC 611.

<sup>32</sup> *Id.* at 620.

<sup>33</sup> (1984) 3 WLR 1174 (hereinafter referred to as “CCSU case”).

which had invoked the principle of proportionality as was understood in the sense of European Courts at that point of time.<sup>34</sup> The learned judge then relied on the rationale of *Bhagat Ram* case that which merely referred to the term “disproportionate” mentioned in it, and arrived at a conclusion that Indian Courts also follow proportionality as followed around in Europe.

The findings are not correct at least for two reasons. First, the mere mention of the term ‘disproportionate’ in *Bhagat Ram* was not in the context of the doctrine of proportionality that was invoked in the UK’s *CCSU case*. Second, even in UK’s *CCSU case*, Lord Diplock only discussed the possibility of such a test along with similar tests been applied in the future and refused to apply the same in the instant case. This position was also clarified by Justice Jagannadha Rao in the subsequent case of *Union of India v Ganayutham*.<sup>35</sup>

The case was disposed on the touchstone of the test of ‘*Wednesbury Reasonableness*’ and on the basis of the other three grounds of judicial review i.e., illegality, irrationality and procedural impropriety. Therefore, it appears that the Court erred in invoking a case for proportionality, when it did not even apply the same.

### 3. **State of Andhra Pradesh v McDowell and Co. and Ors.**<sup>36</sup>

This landmark is case well known for the rejection of the test of arbitrariness for legislative actions and the doctrine of proportionality was also rejected as a standard to scrutinize a legislation. The validity of Andhra Pradesh Prohibition Act, 1995 was challenged in this case, where Justice B.P. Jeevan Reddy was reviewing the said legislation. He observed that since the application of the doctrine of proportionality is not well settled in administrative law itself,<sup>37</sup> it would be odd to apply the same to strike down any enactment applying that principle.<sup>38</sup> However, provided that the position regarding the application of the said doctrine to strike down a legislation is still debateable,<sup>39</sup> thus, should not be applied as a sole ground to

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<sup>34</sup> *Id.* Per Lord Diplock.

<sup>35</sup> (1997) 7 SCC 463, at 471.

<sup>36</sup> (1996) 3 SCC 709 (hereinafter referred to as “*McDowell’s case*”).

<sup>37</sup> After referring to Lord Ackner’s observations in *R v. Secretary of State for Home Department Ex-parte Brind and Ors.* (1991) A.C. 696.

<sup>38</sup> *Supra* Note 31 at 754.

<sup>39</sup> Boyron, S. (1992). Proportionality in English Administrative Law: A Faulty Translation? *Oxford Journal of Legal Studies*, 12(2), 237-264. Retrieved from <http://www.jstor.org/stable/764704>.

strike down any legislation. The debate is primarily around whether proportionality as a standard of review must only apply to administrative actions of the executive branch or even extend to legislations that enjoys the presumption of constitutionality.

#### 4. **Union of India v. Ganayutham**<sup>40</sup>

This is one of the initial cases that debated upon the applicability of the doctrine of proportionality in administrative action and legislative review. In the said case, a Central Excise Officer was charged of misconduct resulting in a substantial loss to the government of India, which withheld half of his payments in pensions and gratuity. The court, however, held that the punishment was excessive and over-ruled it.

First, the Court also held that the doctrine of proportionality could be applied to administrative action in India after referring to *Ranjit Thakur*. However, it does not appear that Ranjit Thakur itself had properly incorporated the doctrine of proportionality into Indian Jurisprudence.

Second, after referring to McDowell's case, the Court also held that the doctrine also applies for legislative review.<sup>41</sup> However, it must be noted that the Court had only taken a portion of the judgment, and therefore misrepresented the holding in the case. Whereas, the court in *McDowell* expressed strong doubts and concerns regarding the possibility of applying the doctrine of proportionality in legislative review, the court in this case failed to appreciate the doubts of the court in McDowell and relied on the holding to extend the application of the doctrine of proportionality to legislative review.

Third, the court cites cases that have mentioned the word "proportionality" (or disproportionate") in its literal sense (not as a doctrine has been applied) in the context of Article 19 and 21 and not Article 14.<sup>42</sup> Fourth, the court also states that the doctrine applies for

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<sup>40</sup> (1997) 7 SCC 463 (hereinafter referred to as Ganayutham Case)

<sup>41</sup> *Id* at 482.

<sup>42</sup> *Id*. The Court refers to cases like *State of Madras v V.G. Row* 1952 Cri LJ 966 and *Indian Express Newspapers v. Union of India*.

legislative review in Australia and Canada.<sup>43</sup> However, as stated previously, both the countries have a general limitation clause that reads that “reasonable limits” can be imposed on fundamental rights and freedoms. In our country we only have such a terminology applicable to Article 19 in the form of restrictions mentioned in Article 19(2), but a similar provision does not exist for Article 14. Therefore, it is contended that these countries cannot be cited as authorities to argue that proportionality should be a ground for legislative review.

However, I would like to draw attention to the concluding remarks of Justice Jagannadha Rao in the same case. After much analysis, he arrives at a conclusion that the doctrine of proportionality must not be applied in the context of Article 14. It must be applied only when the Courts will have to decide upon issues relating to Article 19 or 21 violations.<sup>44</sup> Notwithstanding the analysis that the court had extensively done in the case, the concluding observations made by the Court is the correct and more sensible position of law since it is also congruent with the textual understanding of the Constitution of India.

## 5. **Om kumar & Ors. v. Union of India**<sup>45</sup>

Om kumar was one of the Officers in Delhi Development Authority against whom Departmental inquiries were conducted regarding land allotment scam with Skipper Construction. The ultimate penalty that was imposed on them was challenged for disproportionate quantum of punishment. The Court had applied the doctrine of proportionality and also held that the same is applicable under Article 14 too.

However, there is one strange aspect of the judgment that requires immediate attention. Justice Jagannadha Rao who in *Ganayutham* held that the doctrine of proportionality should not be applied in the context of Article 14 for primary review but only in the context of Article 19 and 21, but his stance seemed to have changed in *Omkumar* case as he held that the doctrine of proportionality is also applicable to Article 14<sup>46</sup> with no authority or precedents to support his

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<sup>43</sup> *Id.* The Court also cites cases like *Cunliffe v. Commonwealth* (1994) 68 Aust LJ 791; *Australian Capital Tel. Co. v. Commonwealth* 1992 CL 106; *Queen v. Oake* (1987) Law Reports of Commonwealth 477 (at 500) (Can); *R. v. Big M. Drug Mart Ltd.* 1985 (1) SCR 295.

<sup>44</sup> *Supra* Note 31, at 491 (4(b)).

<sup>45</sup> (2001) 2 SCC 386 (hereinafter referred to as “*Omkumar*”).

<sup>46</sup> *Id.*, at 418.

conclusion. One of his arguments to include it was that when Article 14 is broad enough to include reasonable classification and arbitrariness as two distinct tests, there is nothing wrong in also including the doctrine of proportionality into it. He relied upon the Canadian and the Australian position to incorporate the same into Indian position,<sup>47</sup> which, as previously argued lacks context.

It is important to note that the court also discussed in brief, and acknowledged the fact that the doctrine was first incorporated into Indian jurisprudence in the context of Article 19<sup>48</sup> through the case of *State of Madras v V S Row*.<sup>49</sup> Similarly, scholar Barak also argues that the doctrine of proportionality was introduced in India in the context of the “reasonable restrictions” in Article 19(2) of the Constitution of India.<sup>50</sup> In his paper, Barak also goes on to say that Ganayutham and Omkumar marked a significant change in the Indian history of proportionality since they have provided a new way of looking and applying the tests itself.

Omkumar’s case also moves forward to hold that both the test of proportionality and strict scrutiny as a ground of judicial review are one and the same and could be read together. It is submitted that the test of strict scrutiny was initially proposed in the case of *R v. Ministry of Defense*<sup>51</sup> as a higher order/standard of scrutiny of a legislation that even falls above the test of proportionality. In that case, this conflation cannot be the right way of looking into the two tests. Even writers like Prof. Tarunabh Khaitan and Ashish Chugh<sup>52</sup> disagree with this conflation, who have also criticised it arguing that strict scrutiny is in fact a higher threshold to scrutinize a law since laws under this standard do not enjoy a presumption of constitutionality.<sup>53</sup> This case has also served as the pavement of roadway of conflation of the principle of proportionality and Wednesbury unreasonableness and the aftermath of this judicial

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<sup>47</sup> *Id.*, at 419.

<sup>48</sup> *Id.*, at 416.

<sup>49</sup> 1952 Cri LJ 966. Justice Patanjali held that The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict, with reference to imposition of restrictions on fundamental right to freedom.

<sup>50</sup> *Supra* Note 14, at pp 220-21.

<sup>51</sup> (1996) 2 WLR 305.

<sup>52</sup> Tarunabh Khaitan, ‘Beyond Reasonableness’- A Rigorous Standard of Review for Article 15 Infringement, 50(2) Journal of Indian Law Institute 177-208 (2008) at 180.

<sup>53</sup> A. Chugh, “Is the Supreme Court Disproportionately Applying the Proportionality Principle?” 8 SCC (J) 33 (2004 ), available at [www.ebcindia.com/lawyer/articles/2004\\_8\\_33.htm](http://www.ebcindia.com/lawyer/articles/2004_8_33.htm).

pronouncement can be understood through the subsequent cases that have used these two tests inter-changeably; thereby conflating the two tests.<sup>54</sup>

## 6. K T Plantation (P) Ltd v State of Karnataka<sup>55</sup>

The Karnataka State Government in exercise of its powers under Section 110 of the Karnataka Land Reforms Act of 1961, issued a notification to withdraw the exemption granted by the Legislature in regard to agricultural land under Section 107(1)(vi) of the Act. Both the notification and the power conferred by Section 110 of the Act were challenged on the ground of excessive delegation.

While upholding the validity of the notification and the Act, the Court made several observations as to the grounds that could be adopted in order to invalidate a legislation. When senior counsel T. R. Andhyarjina, argued that Article 14 is invoked when the legislation is disproportionate,<sup>56</sup> the court rejected the argument of doctrine of proportionality under Article 14 as a standard of legislative review, and observed that the doctrine of proportionality raises an element of subjectivity on which a court cannot strike down a statute or a statutory provision.<sup>57</sup> The Constitutional bench unanimously observed that if such standards are allowed, then in effect *the Court will be substituting its wisdom to that of legislature, which is impermissible in our Constitutional Democracy*.<sup>58</sup>

The Court stressed on the aspect of doctrine of separation of powers that forms the core of the basic structure of the Constitution, which cannot be over looked to permit liberal interpretation of Article 14.<sup>59</sup> The same should only be understood in the context of Article 14 and not in the context of Article 19 or 21. This is indeed the correct position of law and high probability of subjectivity is one of the standard criticism that even prominent scholars like Bernhard Schlink

<sup>54</sup> For example, See: Maharashtra Law Development Corporation v. State of Maharashtra 2011 15 SCC 616;

<sup>55</sup> (2011) 9 SCC 1.

<sup>56</sup> *Id.* at 74.

<sup>57</sup> *Supra* Note 53, at 130.

<sup>58</sup> *Id.*

<sup>59</sup> Indira Nehru Gandhi v. Raj Narain and Ors. 1975 (Supp) SCC 1, at para 136.

put forth against the doctrine of proportionality.<sup>60</sup> One of the limb of doctrine of proportionality is the value judgment in terms of what could be a least restrictive measure to achieve the same objective,<sup>61</sup> which is not the nature of enquiry under either of the standards of rational review or arbitrariness.

## 7. *Shayara Bano and Ors v Union of India*<sup>62</sup>

*Shayara Bano* is one of the landmark judgments with respect to the jurisprudence of grounds of legislative review under Article 14 of the Constitution of India. A Muslim wife had challenged the act of triple talaq pronounced by her husband (which in effect meant that the husband has divorced the wife) and in essence also the validity of section 2 of the Muslim Personal Law Application (Shari'at) Act, 1937. The court while striking down the law made numerous observations in which Justice Nariman's observations are crucial and relevant to the discussion in the paper.

Justice Nariman referred to *Om Kumar case* observed that the test of proportionality had been validly incorporated in Article 14.<sup>63</sup> Since, I have previously argued against it, the same will not be covered here again to avoid repetitions. Second, he has conflated the doctrine of proportionality into the doctrine of non-arbitrariness.<sup>64</sup> The conflation of the doctrine of proportionality and non-arbitrariness is problematic. Justice Nariman held that a law could be challenged if it is manifestly arbitrary (a threshold of arbitrariness) on the basis of it being excessive, disproportionate and without adequate determining principle(irrational).<sup>65</sup> One of the possible consequences of this conflation is both the doctrines being used interchangeably and Proportionality (and arbitrariness) being both a ground and a standard of review as proposed by Prof. Tarunabh Khaitan.

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<sup>60</sup> Bernard Schlink, Proportionality In Constitutional Law: Why Everywhere But Here? 22 Duke Journal of Comparative & International Law 291-302 (2012), at 300. Available at: <https://scholarship.law.duke.edu/djcil/vol22/iss2/5>.

<sup>61</sup> K S Puttaswamy (Retd.) & Anr. v. Union of India & Ors., 2017 (10) SCC 1.

<sup>62</sup> (2017) 9 SCC 1 (hereinafter referred to as "*Shayara Bano*").

<sup>63</sup> *Id.*, at para 271.

<sup>64</sup> *Supra* Note 59, at para 272.

<sup>65</sup> *Supra* Note 59, at para 289.

## 8. Pravin Kumar v Union of India & Ors.<sup>66</sup>

This is a service law matter decided in 2020 by a three-judge bench led by Justice N V Ramana. In this case Pravin Kumar was a sub-inspector with the Central Industrial Security Force (CISF) was charged for corruption because he was found with large denomination of monies. While reporting the same to Anti-Corruption Branch of the CBI, a simultaneous enquiry was also held in the department within the ambit of departmental rules and Pravin was dismissed from his services. While this matter reached the Supreme Court of India, it invoked Article 14 and the test of proportionality in terms of decisions of disciplinary boards. It held that principles of “*Proportionality and fair play*” flows from Article 14 mandating the equal treatment of everyone in the state.<sup>67</sup> It further held that the courts could “only” interfere on the ground of proportionality when the punishment is inordinate to a high degree enough to shake the conscience of the court itself.

The administrative test of proportionality has been read into Article with very less valid jurisprudence to offer. The court held that it was “well settled” that proportionality flows from Article 14 of the Constitution of India but this reference only adds up to the confusion even further. The same conclusion would be possible if the means was just an administrative test and not necessarily referring to Article 14 which only adds up to the confused jurisprudence. It disturbs the thin line of distinction that is present between administrative law and constitutional law as they exist in jurisprudence and in practise notwithstanding the reality that most of the administrative law jurisprudence refers to Article 14 itself.

## Conclusion

In this paper, I have discussed the history and the origins of the doctrine of proportionality. It is clear that the inception of proportionality into Constitutional law was in the context of limitation clauses. As German Basic Law has a general limitation clause, proportionality was more or less applicable to all the laws/articles enshrined in German Basic Law. The same cannot be applied to India as we have restrictions specific to Articles (viz.

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<sup>66</sup> (2020) 9 SCC 471.

<sup>67</sup> *Supra*, at page 20, para 36.

Article 19(2)). As argued above, the context in which Australian or Canadian Courts adopted the principle was also different from how the Indian Court has understood it to be. Thus, there is a primary problem of adoption of the doctrine with a flawed translation into Indian Jurisprudence by Indian Courts. If we were to accept what Barak argues and what *Omkumar* observes that it was initially only brought into Indian jurisprudence in the context of “reasonableness” in the Article 19(2), its extension to Article 14, even in intertextual reading of Article 19 and 14 is absurd. There is no need for inter-textual reading of the Constitution when it is absolutely not necessary or absurd.<sup>68</sup>

Secondly, even India adopted the doctrine and applied it initially in the context of Article 19 and 21. Its extension to Article 14 is unprecedented. It is submitted that *Omkumar*’s observations that Article 14 including proportionality as a standard, which was not backed by any textual basis or precedents for the same. The correct position of law was laid down by the case of *K T Plantation and Ganayutham* to the extent that proportionality as a doctrine and standard of review is not applicable to Article 14 and is only limited to Articles 19 and 21.

Thirdly, one of limbs of the doctrine of proportionality asks the question of whether the said act was the least restrictive means available to achieve certain goals. While there can be an agreement that Article 19 rights could be restricted by Article 19(2), the question of restricting Article 14 still remains answered. Introducing the test of least restrictive measure into article 14, which was originally drafted as a provision without any “reasonable restrictions” goes against the intention of the drafters and its original understanding.

Fourthly, another way of asking the same question of proportionality would be whether the means adopted is proportionate to the intended ends/objective. Justice Jagannatha Rao observed in *Omkumar* that this test is nothing but another way of putting the test of reasonable classification. In such a situation where it is just the difference in the terminology used, where is the need to introduce this entire new doctrine for that purpose? In addition to this, India also has the non-arbitrariness doctrine as another ground of review provided by the Supreme Court of India. In wake of non-arbitrariness doctrine, the doctrine of proportionality is not necessary as such. Having both the doctrines and conflating them like how Justice Nariman conflated in

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<sup>68</sup> *A K Gopalan v State of Madras*, 1950 SCR 88.

the recent case of Shayara Bano only adds up to its further vagueness and ambiguity.<sup>69</sup> In effect, it makes the test proportionality as both a ground and a standard of review as defined by Prof. Tarunabh Khaitan.

Therefore, it is concluded that the position of doctrine of proportionality in the context of Article 14 is something that needs to be clarified removing all the doubts and undoing all the errors committed by the Courts in the journey of its attempt to incorporate the doctrine into Article 14. The Supreme Court must constitute a seven-judge bench to finally decide on the issues discussed above as most of the benches that had made observations on this matter are either a two-judge bench or a Constitutional Bench. The seven judge bench must clarify the position of the three standards of tests as proposed by Prof Tarunabh Khaitan and theorise its application in the future cases to avoid any further confusions and misapplications.

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<sup>69</sup> Bernard Schlink, Proportionality In Constitutional Law: Why Everywhere But Here? 22 Duke Journal of Comparative & International Law 291-302 (2012), at 297 argues that one of the classic criticism to the doctrine of proportionality is its vagueness and ambiguity.