Chintan Chandrachud

Proportionality, Judicial Reasoning and the Indian Supreme Court

Through the prism of the Indian Supreme Court's judgment in Koushal v Naz Foundation, this article considers whether it is reasonable to apply the 'reasonableness' standard of review in an age of proportionality review. It makes two broad claims. First, the Indian Supreme Court does not currently apply proportionality review, but only takes proportionality-type considerations into account while applying reasonableness review. Second, unlike reasonableness review, proportionality review mitigates the possibility of errors that represent a failure of the duty to give reasons for judgment.

1. Introduction

On the 11th of December 2013, a bench of two judges of the Indian Supreme Court passed judgment in amongst its most awaited decisions in recent history.[1] Following over a decade of litigation, the Court was called upon to decide the constitutionality of section 377 of the Indian Penal Code (IPC) – a colonial-era law criminalizing 'carnal intercourse against the order of nature'. After the Delhi High Court's decision to read down the law, [2] expectations ran high for the Supreme Court to establish its *Lawrence v Texas*[3] moment. Instead, the Court marked its *Bowers v Hardwick*[4] moment: reversing the Delhi High Court and upholding the constitutionality of section 377 on the basis that it was facially gender-neutral.

The Court's judgment was heavily critiqued based on liberal conceptions of gender, identity and sexuality. Commentators, however, were not just unsettled by the ultimate decision of the Court, but also by the absence of logical reasons in support of the Court's decision. Ironically, the Court relied upon the 'reasonableness test' – well established in Indian constitutional law – in deciding the case. This judgment offers

[1] *Suresh Kumar Koushal v Naz Foundation* (2014) 1 SCC 1.

[2] *Naz Foundation v Govt of NCT of Delhi* (2010) Cri LJ 94 (reading down section 377 to exclude its application to consensual sexual activities between adults in private).

[3] *Lawrence v Texas* 539 US 558 (2003) (striking down a Texas statute forbidding persons of the same sex to engage in intimate sexual conduct).

[4] *Bowers v Hardwick* 478 US 186 (1986) (upholding a Georgia statute criminalizing sodomy between consenting adults).

an opportunity to reflect upon whether it remains reasonable to employ the reasonableness test in an age in which the proportionality test is 'dominating the dockets'[5] of supreme courts around the world.

Many commentators claim that the Indian Supreme Court is already applying the test of proportionality in constitutional adjudication. The first objective of this paper is to debunk these claims. Although proportionality-type considerations are sometimes taken into account in the reasonableness test, there is a difference between adopting the proportionality test comprehensively and relying, *ad hoc*, on one or more of its components. Even in cases in which the Court has explicitly claimed to be applying the proportionality test, it has done so only in name.

From this analytical argument, the paper then moves to a normative argument. Proportionality promotes a culture of justification and reason-giving that is lacking under the reasonableness test. To establish this claim, the paper distinguishes between three categories of errors – and explains that proportionality review mitigates the possibility of errors that represent a failure of the duty to give reasons for judgment. The Indian Supreme Court's (anti-) LGBT rights judgment provides a paradigm case of how reasonableness, in contrast with the proportionality test, can obscure reason-giving in a most remarkable way.

2. *Koushal v Naz Foundation* and reasonableness review

Let us begin by briefly considering the circumstances that led to the Supreme Court's judgment in *Suresh Kumar Koushal v Naz Foundation*.[6] Section 377 formed part of the IPC, which was enacted in the year 1860 by an all-British Legislative Council[7] during colonial rule. It reads as follows:

> Unnatural offences: Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Section 377 represented the erstwhile law proscribing 'buggery' in the UK,[8] and was increasingly relied upon by public authorities, especially the police, to persecute

[5] A. Stone Sweet and J. Mathews 'Proportionality Balancing and Global Constitutionalism' (2008) 47 Colum. J. Trans'l L. 72, 74.

[6] (2014) 1 SCC 1.

[7] R. Wintemute 'Same-Sex Love and Indian Penal Code § 377: An Important Human Rights Issue for India' (2011) 4 NUJS L. Rev. 31, 43.

[8] For details on the development of the law on buggery in the UK, see N. Lacey, C. Wells, O. Quick, *Reconstructing Criminal Law* (3rd ed, Cambridge University Press 2003) 519–31.

members of the LGBT community. In 2001, the Naz Foundation – an NGO dedicated to offering care and support to HIV/AIDS patients in India – filed a writ petition in the Delhi High Court challenging the constitutionality of section 377, to the extent that it criminalized activities between consenting adults. The High Court initially refused to hear the case on the basis that no cause of action had accrued and that the challenge was purely hypothetical. However, in an appeal, the Supreme Court remitted the writ petition to the High Court requiring it to examine the case on its merits.

Following a consideration on the merits, the Delhi High Court held that section 377 violated articles 14,[9] 15[10] and 21[11] of the Constitution. The Court held that the statutory provision discriminated on the ground of sexual orientation, targeted homosexuals as a class, and was contrary to constitutional morality. Section 377 was therefore read down to exclude consensual sexual activities between adults in private. It was this judgment that was appealed to the Supreme Court – and presented the Court with an opportunity to sound the death knell for a relic of the British Raj that Britain itself had repealed many decades previously.[12]

It was an opportunity that the Supreme Court did not take. The Court reversed the judgment of the Delhi High Court, holding that section 377 did not criminalize a particular identity or orientation, but uniformly regulated sexual conduct. In what will go down as one of the most regrettable sentences in its history, it observed that LGBT people constituted only a ‚miniscule fraction of the country's population'.[13] The implications of the Court's judgment were clear – the LGBT community was too insignificant a minority to deserve the Court's time and protection.

The judgment prompted a wave of critical commentary in journals,[14] newspaper op-eds[15] and blogs,[16] highlighting the Court's failure to protect the rights of sexual

[9] The right to equality before the law and equal protection of the laws.

[10] Prohibition of discrimination on the basis of religion, race, caste, sex or place of birth.

[11] The right to life and personal liberty.

[12] Legislation criminalizing private consensual sodomy was deleted from the statute books of England and Wales by the Sexual Offences Act 1967; see M. Duggan, *Queering Conflict: Examining Lesbian and Gay Experiences of Homophobia in Northern Ireland* (Ashgate Publishing 2012) 49.

[13] *Suresh Kumar Koushal v Naz Foundation* (2014) 1 SCC 1 [43].

[14] See, for eg, S. Narrain, 'Lost in Appeal: The Downward Spiral from Naz to Koushal' (2013) 6 NUJS L. Rev. 575; D. Sheikh, 'The Quality of Mercy, Strained: Compassion, Empathy and other Irrelevant Considerations in Koushal v Naz' (2013) 6 NUJS L. Rev. 585; V. Venkatesan, T.K. Rajalakshmi, S. Dutta, 'Rights and Wrongs' *Frontline* (New Delhi, 10 January 2014).

[15] See, for eg, P. Bhanu Mehta, 'Justice Denied' *The Indian Express* (New Delhi, 12 December 2013); G. Harris, 'India's Supreme Court Restores an 1861 Law Banning Gay Sex', NY Times (New York, 12 December 2013).

[16] See, for eg, A. Chandra, 'Recriminalizing Homsexuality: The Many Sins of Koushal' (*Law and Other Things*, 12 December 2013) <http://lawandotherthings.blogspot.com/2013/12/re-criminalizing-homosexuality-many.html>; P. Baxi, 'Suresh Koushal v Naz Foundation' (*Kafila*, 16 December 2013) http://kafila.org/2013/12/16/suresh-koushal-v-naz-foundation-pratiksha-baxi/.

minorities that have remained at the margins of political discourse for decades. Somewhat more unexpectedly, however, the Court was also criticised for its failure to give reasons for its decision. As Tarunabh Khaitan observed:

The Supreme Court in *Koushal* fails to respect this fundamental judicial duty [to give reasons] at so many levels that it is difficult to escape the conclusion that the Court seems to be voting, not adjudicating.[17][18]

Other scholars noted that the decision was 'startling for eschewing all attempts at reasoning'[19] and was based on 'wholly insufficient and unreasoned justification'.[20]

It is worth briefly pausing here to consider whether there is any meaningful difference between a judgment whose outcome we disagree with but which is based on plausible reasoning, and a judgment whose outcome we disagree with but which is based on insufficient or implausible reasoning (or indeed, no reasoning at all). Consider this simple equation. In a sufficiently reasoned judgment, R1+R2=D (where R1 and R2 are the reasons offered by the court, and D is the court's decision). Imagine the ways in which we may disagree with the decision as three categories of errors. First, we could accept that R1+R2=D, but that the court was wrong to consider R1 or R2, or that it should also have taken other reasons into account (R3, R4, R5, etc). I will refer to these as 'Category 1' errors. It would be somewhat awkward to describe this situation as an abdication of the duty to give reasons, since the court has merely failed to provide some or all of the *right* reasons. Second, we could contend that R1+R2 is not equal to D. This involves the claim that the reasons provided by the court, even if accepted as legitimate, are not sufficient to compel conclusion D ('Category 2' errors). Third, we could argue that, in a form of judicial fiat, no reasons at all were offered for a decision – which would look something like (D=D) or (?=D). These are 'Category 3' errors.

The *Koushal* judgment suffers not from Category 1 errors, but from Category 2 and Category 3 errors. Let us begin by considering the Category 2 errors – where the reasons offered by the Court do not impel its decision. This was evident in the Court's treatment of the challenge to section 377 under article 14, the general equality clause. Under established doctrine, a law that classifies amongst groups will only be upheld if it is based on 'intelligible differentia', and if there is a rational or reasonable nexus between the differentia and the objective of the law.[21] The Court articulated neither intelligible differentia, nor a rational nexus between the differentia

[17] T. Khaitan, '*Koushal v Naz*: Judges Vote to Recriminalise Homosexuality' (2015) 78(4) MLR 672, 677.
[18] M. Khosla, 'The Courtly Way' *The Telegraph* (Calcutta, 17 December 2013).
[19] A. Sengupta, 'The Wrongness of Deference' *The Hindu* (Chennai, 16 December 2013).
[20] *State of West Bengal v Anwar Ali Sarkar* AIR 1952 SC 75; *R K Dalmia v Justice Tendolkar* AIR 1958 SC 538; *In re Special Courts Bill* (1979) 1 SCC 380.
[21] *Suresh Kumar Koushal v Naz Foundation* (2014) 1 SCC 1 [42].

and the objective of the law. Instead, the Court made the casual observation that '[t]hose who indulge in carnal intercourse in the ordinary course' and 'those who indulge in carnal intercourse against the order of nature' constitute different classes, and therefore section 377 is not based on irrational classification.[22] On its own, this statement does little to establish that the classification under section 377 is valid.

Other aspects of the judgment suffer from the same deficiency in reasoning. The Supreme Court, for instance, noted that section 377 is facially neutral and regulates sexual conduct regardless of gender identity, and is therefore valid. Again, the reasoning (that the law is facially neutral) does not compel the conclusion (that the law is valid), since the Supreme Court's precedent includes cases in which the Court has struck down facially neutral legislation whose rights-implications have changed over time.[23] Another reason that the Court provides in defense of the statutory provision is that only a ‚miniscule fraction' of the country's population consists of LGBT people. This is a tenuous factual claim.[24] But even if it were to be accepted, it hardly justifies the conclusion that the law is valid. Imposing a *de minimus* threshold for access to fundamental rights would jeopardize the Court's role as a countermajoritarian institution that especially protects minorities lacking representation in the political process.

Let us consider the Court's Category 3 errors (where it offered no reasons at all for its decision). Section 377 was challenged on the basis that it violated articles 14, 15, 19 and 21 of the Constitution. The Delhi High Court left the article 19 question open, but held that section 377 violated the other three fundamental rights. In appeal, the Supreme Court upheld section 377 under article 15 without providing any reason at all, and upheld the provision under article 21 after reproducing extracts from case law, without explaining the relationship between the extracts and the case at hand.[25]

In *Koushal*, the Supreme Court applied its longstanding test of 'reasonableness review' to determine the constitutionality of section 377. It bears mentioning that the fundamental rights chapter of the Indian Constitution contains no general limitations clause. Instead, limitations are specifically set out in separate fundamental rights guarantees. Reasonableness review derives from the text of the limitation or the interpretation of the fundamental right.

---

[22] *John Vallamatom v Union of India* AIR 2003 SC 2902 [33–36].

[23] Reports suggest that the Central Government informed the Supreme Court in 2012 that there were 2.5 million gay people in India: see 'India Has 2.5m Gays, Government Tells Supreme Court', BBC News (London, 14 March 2012) <www.bbc.com/news/world-asia-india-17363200>. This figure is almost certainly a gross underestimate, given the fears of coming out as openly gay in India: see Nish Gera, 'Where Are the Gay Indians? Being Gay in the World's Largest Democracy', (*Huffington Post*, 30 January 2013) <www.huffingtonpost.com/nish-gera/where-are-the-gay-indians_b_2578486.html>.

[24] T. Khaitan (n 17) 677–78.

[25] *Minerva Mills v Union of India* AIR 1980 SC 1789 [79].

Three constitutional provisions (articles 14, 19, 21), described by the Supreme Court as the 'golden triangle' of fundamental rights,[26] sufficiently demonstrate this. Article 19 guarantees six freedoms, each of which are subject to 'reasonable restrictions' made by law for specified purposes. A violation of article 14 – the general equality provision – can be established in two ways. The first is through the classification test, set out above, whose second ingredient requires the state to establish a rational or reasonable nexus between the 'intelligible differentia' (on which the classification is based) and the objective that the law seeks to achieve. The second is by establishing that the law is unreasonable or arbitrary in its own terms.[27] Article 21, the right to life and personal liberty, can be limited only under procedure established by law that is fair, just and reasonable. Indian courts have held that wide discretion exists in determining whether a limitation on rights is reasonable, and that the direct and inevitable effect of the law restricting fundamental rights must be considered in determining if it is valid.[28][29]

3. Proportionality and its (mis)use in India

As the Indian Supreme Court has continued to apply reasonableness review, a different test for judging limitations on constitutional rights – proportionality – has grown in influence across the world. The genesis of proportionality in contemporary constitutionalism is usually traced to German public law, after which it swiftly migrated to other parts of the European continent, Canada, Ireland, the UK, New Zealand, Australia, and South Africa.[30][31] It has also been endorsed by Justice Stephen Breyer of the US Supreme Court, in the face of strong opposition from some of his colleagues.[32]

To say that there is a universal test for proportionality review obscures subtle (and sometimes, significant) differences in the way in which it is applied in different jurisdictions. Nevertheless, the most commonly applied version of the proportionality test has a four-part structure. It requires courts to ask the following questions when determining whether a law comprises a valid restriction on the enjoyment of fundamental rights. First, does the law seek to achieve a proper purpose? This step recognizes that there are some purposes that are, in themselves, illegitimate.

[26] *E P Royappa v State of Tamil Nadu* AIR 1974 SC 555.
[27] M.P. Jain, *Indian Constitutional Law* (5th ed, Wadhwa and Company 2008) 982–83.
[28] For details, see A. Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press 2012) 175–210.
[29] See *District of Columbia v Heller*, 554 US 570 (2008) (Breyer J dissent); Stephen Breyer, *The Court and the World: American Law and the New Global Realities* (Knopf 2015) 254.
[30] See HCJ 4769/95 *Menahem v Minister of Transport* [2003] IsrSC 58(3) 503 [11]; HCJ 7052/03 *Adalah v Minister of Interior* [60].
[31] A. Barak (n 28) 350.
[32] V. Jackson, 'Constitutional Law in an Age of Proportionality' (2015) 124 Harvard Law Review 3094, 3118.

Legislatures may enact laws for more than one purpose, and where this is the case, courts tend to focus on the 'dominant' purpose of the legislation.[33] Second, is there a rational connection between the purpose of the law and the means used to achieve that purpose? This is followed by the 'necessity' step – are there any less restrictive, but equally effective, means available to achieve the purpose of the law? The final step in proportionality review is proportionality *stricto sensu* or balancing – where the court considers whether the law adequately balances the social benefits and harms caused by the law. At first glance, the balancing test looks remarkably deferential. It is easy, for instance, to imagine cases in which a court holds that the national security interests of the community justify imposing draconian restrictions on the fundamental rights of a few. However, properly applied, the test requires balancing the *marginal* social benefit against the *marginal* social harms caused by the change in status quo that the law brings about.[34]

Amongst the most significant aspects of the proportionality test is the fact that each step of the test constitutes a separate veto point for the law. The mere fact that the law satisfies the third or fourth steps of the proportionality analysis is insufficient, if it pursues a purpose that the court considers inappropriate – for example, the regulation of private morals. Some courts combine the third and fourth steps of the proportionality analysis by applying the necessity step, but not restricting it to whether the alternatives available are equally effective.[3536] The critical point for the purposes of this paper is that proportionality review consists of the four steps collectively, rather than any of them individually.

Some aspects of what has been argued thus far may come across as surprising. After all, the taxonomy of proportionality review is familiar to the Indian Supreme Court,[37] and many scholars argue that proportionality is already being applied in India. M P Jain suggests that in deciding constitutional challenges to legislation, Indian courts are essentially applying the proportionality test by considering whether alternatives that restrict rights to a lesser extent are available.[38] David Beatty argues that the reasonableness test

[33] A search on the legal search engine Manupatra reflected that the Supreme Court has used the term 'proportionality' in 49 constitutional law cases.

[34] M.P. Jain (n 27) 983.

[35] D. Beatty, *The Ultimate Rule of Law* (Oxford University Press, 2004) 163.

[36] A. Barak (n 28) 375.

[37] Logically, the intelligible differentia component of the classification test under article 14 seems plausible only if that differentia is based on the purpose that the law seeks to achieve. The intelligibility of the differentia, in other words, is judged with reference to the purpose of the law rather than in the abstract.

[38] The rights: (i) to freedom of speech and expression (ii) to assemble peaceably and without arms (iii) to form associations or unions (iv) to move freely throughout the territory of India (v) to reside and settle in any part of the territory of India (vi) to practise any profession, or to carry on any occupation, trade or business.

in India is proportionality by a different name.[39][40] The relationship between the reasonableness test and the proportionality test really depends on how both of these terms are defined.[41] However, if proportionality is defined as a collective label for the four steps just described, the Indian Supreme Court is not applying proportionality review.

Several points are now worth making. To start with, there are many proportionality-type considerations that are taken into account in reasonableness review. This is clear from a bare reading of the text of the constitution together with established doctrine. The classification test under article 14 includes components of proportionality review. By asking whether the classification is based on intelligible differentia and whether there is a rational nexus between the differentia and the objective of the law, the court runs the means-ends analysis under the second component of the proportionality test. Depending on how the intelligible differentia for the classification is defined, the classification test may also include the first component of the proportionality test.[42]

The text of the six freedoms set out in article 19[43] specifies the purposes based on which the freedoms can be restricted, and thus includes the first step of proportionality review. For example, the freedom of speech can be restricted by law in the interests of 'sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence'.[44] A reviewing court, in other words, is required to determine whether the law restricting freedom of speech was enacted for one of the 'proper' purposes set out in the constitutional provision. The Supreme Court has also effectively incorporated the second step of the proportionality test into article 19 analysis by requiring that the connection between the law and the purpose be 'proximate', rather than remote or 'unreal'.[45]

The Supreme Court also applies the third and fourth steps of proportionality review from time to time. In *State of Madras v V G Row*,[46] the Court was deciding the constitutionality of a law that empowered the state government to notify as unlawful, associations that: constituted a danger to public peace, interfered with the maintenance of public order, or interfered with the administration of law.[47]

[39] India Constitution, art 19(2).
[40] *Ghosh v Joseph* AIR 1963 SC 812 [9].
[41] AIR 1952 SC 196.
[42] Indian Criminal Law Amendment (Madras) Act 1950.
[43] *State of Madras v V G Row* AIR 1952 SC 196 [17].
[44] *State of Madras v V G Row* AIR 1952 SC 196 [18].
[45] *State of Maharashtra v Indian Hotel and Restaurants Association* AIR 2013 SC 2582.
[46] Bombay Police Act 1951, ss 33A, 33B.
[47] *State of Maharashtra v Indian Hotel and Restaurants Association* AIR 2013 SC 2582 [124] ('In our opinion, in the present case, the restrictions in the nature of prohibition cannot be said to be reasonable, inasmuch as there could be several lesser alternatives available which would have been adequate to ensure safety of women than to completely prohibit dance.').

The law permitted associations to make representations to the government, which would be reviewed by an advisory board. The board would review the representation, and if it found that there was no sufficient reason for declaring the association unlawful, could require the state government to cancel its notification.

The state government passed an order declaring the People's Education Society unlawful under this law, on the basis that it was aiding communist propaganda. The Society claimed that the law violated the fundamental right to form associations or unions under article 19(1)(c) of the Constitution. The Supreme Court struck down the law on the basis that it imposed unreasonable restrictions on the exercise of the right to form associations. The Court adopted a necessity test, arguing that a less restrictive means of curtailing rights – setting up a judicial inquiry instead of an advisory board – was available to the state:

The right to form association or unions has such wide and varied scope for its exercise, and its curtailment is fraught with such potential reactions in the religious, political and economic fields, that the vesting of authority in the executive government to impose restriction on such right without allowing the grounds of such imposition both in their factual and legal aspect to be duly tested in a judicial inquiry, is strong element which, in our opinion, must be taken into account in judging the reasonableness of the restriction (...) what is bound to be a largely one-sided review by an Advisory Board, even where its verdict is binding on the executive government (...) [cannot] be a substitute for a judicial enquiry.[48]

The Court also adopted the balancing component of proportionality review, taking the following factors into account in its decision: (a) the only form of conveying the notification to the society was through publication in the Official Gazette, which would probably be overlooked by its members and result in forfeiture of the right to make representations, (b) the consequences of the notification would be serious for the members of the society who, by their very membership, would be committing offences under the law.[49]

The *Maharashtra* dance bars case[50] offers another example of the adoption of necessity and balancing within reasonableness review. In 2005, the legislature of the state of Maharashtra enacted a law imposing a ban on dance performances in bars, except in certain establishments such as hotels rated 'three stars' and above.[51] The state's rationale for the ban was that many such dance performances were obscene, promoted prostitution and the exploitation of women, undermined the dignity of the dancers, and corrupted public morals. The ban resulted in the closing down of

[48] *State of Maharashtra v Indian Hotel and Restaurants Association*, AIR 2013 SC 2582 [120].
[49] *State of Maharashtra v Indian Hotel and Restaurants Association*, AIR 2013 SC 2582 [120].
[50] *Anuj Garg v Hotel Association of India* AIR 2008 SC 663.
[51] Punjab Excise Act 1930, s 30.

dozens of bars across the state and widespread unemployment. It was challenged on the basis that it violated the right to equality and the freedom of trade.

The Supreme Court struck down the law and ordered that the dance bars be allowed to reopen. Two aspects of the Court's judgment are of particular interest. First, the court reasoned that if the primary purpose of the law was to ensure the safety and security of women, many less restrictive options were available to achieve the same objective.[52] A committee appointed by the state government had suggested some alternatives, such as mandatory railings and minimum distances between the stage and the seats, which the government refused to adopt. Second, the Court explicitly balanced the social benefits of the law against its social costs. It held that the social costs of the law were alarming – it prompted the closing down of dance bars and unemployment of over 75,000 women.[53] The law proved counterproductive, as many of the women who were employed in dance bars were forced into prostitution out of necessity.[54]

Another well known discrimination law case from the Indian Supreme Court demonstrates the court's reliance on the necessity and balancing components of the proportionality test. In *Anuj Garg*,[55] the Court dealt with a challenge to the constitutional validity of a Punjab statute prohibiting women, as well as men under the age of twenty-five, from working in premises where liquor or intoxicating drugs were served.[56] By asking whether there was a ‚relationship of proportionality between the means used and the aim pursued',[57] the Court applied the necessity test. It held that the objective of the law – protecting the safety and security of specific social groups – could have been achieved through less onerous measures. Instead of enforcing an 'oppressive' law,[58] the state should have focused on establishing conditions that would inspire confidence amongst women to pursue occupations of their choice.

The danger of overlooking the balancing component of the proportionality test is that it risks legitimating arguments that all alternative measures are not as effective in achieving the objective as the measure chosen by the state. In the context of women's safety, this could legitimate paternalistic arguments about how the most effective way of protecting women is by keeping them within the confines of the home. The Court

[52] *Anuj Garg v Hotel Association of India* AIR 2008 SC 663 [49].
[53] *Anuj Garg v Hotel Association of India* AIR 2008 SC 663 [41].
[54] *State of Madras v V G Row* AIR 1952 SC 196 [16]. This passage has been frequently cited. See, for eg, *State of West Bengal v Subodh Gopal Bose* AIR 1954 SC 92; *Kochuni v State of Madras* AIR 1960 SC 1080; *Municipal Corporation of Ahmedabad v Usmanbhai* AIR 1986 SC 1205; *Ramlila Maidan v Home Secretary, Union of India* (2012) 5 SCC 1.
[55] AIR 1999 SC 1149.
[56] Hindu Minority and Guardianship Act 1956, s 6(a).
[57] T. Khaitan, 'Beyond Reasonableness: A Rigorous Standard of Review for Article 15 Infringement' (2008) 50 J. Indian L. Institute 177, 193–94.
[58] *Hariharan v Reserve Bank of India* AIR 1999 SC 1149 [40] (Banerjee J).

thus applied the balancing test, stating that the law – which was remarkably broad in scope – prevented large numbers of graduates from hotel management schools from securing employment and deprived women of the autonomy to choose their profession. The law was therefore struck down.

Reasonableness review in the Indian Supreme Court thus clearly accommodates proportionality-type considerations. Of course, the question that then arises is as follows. If proportionality review consists of all four components (proper purpose, rational connection, necessity, and balancing) of the test, the reasonableness test (as applied in India) can only be described as an instance of proportionality review if it not only *accommodates* but also *requires* the application of all of those components. In other words: in order for legislation to survive the proportionality test, it always needs to satisfy the requirements of all four components. Does reasonableness review require the application of all four components of proportionality review in all cases?

One of the most authoritative opinions on reasonableness review comes from the *V G Row* case, cited earlier. In that case, the Supreme Court referred to several factors to be taken into account by courts applying reasonableness review, many of which correspond with components of proportionality review. It held:

It is important in this context to bear in mind that the test of reasonableness, where ever prescribed, should be applied to each, individual statute impugned and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restriction 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.[59]

At first glance, the last part of the extract – 'should all enter into the judicial verdict' – suggests that these are mandatory relevant considerations that must be considered by courts applying reasonableness review in all cases. However, read in context, a better interpretation is that the court laid down a number of factors that *may* be considered in determining whether or not a law is reasonable.

The Court's precedent suggests that it often omits one or more components of proportionality review in reasonableness analysis. In *Hariharan v Reserve Bank of India*,[60] the petitioners challenged the validity of legislation that placed them in an inferior position to their husbands with regard to guardianship of their children. Ordinarily interpreted, the law – which laid down that a minor's natural guardian is 'the father, and after him, the mother'[61] – suggested that the mother could

[59] AIR 1981 SC 1829.
[60] *Air India v Nargesh Mirza* AIR 1981 SC 1829 [84].
[61] *Air India v Nargesh Mirza* AIR 1981 SC 1829 [84].

become the natural guardian of the child only after the father's death. The Supreme Court favoured an interpretive solution, reading the word 'after' as 'in the absence of'. This reading allowed the mother to be the natural legal guardian only when the father was not in 'actual charge' of the affairs of a minor, due to indifference, mental incapacity, etc. The Court made no serious attempt to identify whether the law was based on a proper purpose.[62] The concurring opinion did, however, allude that the law was intended to protect the welfare of the children.[63] Even if this were taken to be true, the Court did not make any attempt to establish a rational connection between the gender-based distinction and the achievement of the purpose.

Similarly, the Supreme Court's decision in *Air India v Nargesh Mirza*[64] applied the rational connection and necessity tests, but failed to apply the proper purpose test. The case involved a constitutional challenge to the service regulations for air hostesses, which provided for the termination of services upon attaining 35 years of age, or on marriage (if it took place within 4 years of service), or on first pregnancy, whichever occurred earlier. The airline defended the pregnancy limb of the regulations based on the fact that pregnancies would give rise to medical complications and obstruct the performance of air hostess' in-flight duties before and after conception. Applying the rational connection test, the Court held that there was no medical authority for the proposition that women became weak and would not be able to perform air hostess' duties after conception.[65] The Court also applied the necessity test, highlighting less restrictive alternatives that were available to the airline – for instance, employing additional air hostesses on a temporary basis to cover for those on maternity leave.[66]

It is worth briefly noting here that the rational connection, necessity and balancing components require the identification of a purpose – the purpose provides the factual yardstick against which the other components are tested. However, in *Air India*, the Supreme Court failed to conduct the preliminary segment of the proportionality test – which requires the court to articulate precisely what the purpose of the law is, and whether that purpose is considered proper. The failure to identify a proper purpose becomes discernible from the Court's discussion on remedies. Remarkably,

[62] *Air India v Nargesh Mirza* AIR 1981 SC 1829 [104].
[63] *Om Kumar v Union of India* AIR 2000 SC 3689 [27–72].
[64] *Om Kumar v Union of India* AIR 2000 SC 3689 [28].
[65] See M. Khosla, 'Proportionality: An Assault on Human Rights?: A Reply' (2010) 8 Int. J. Con L. 298, 305 (explaining how some scholars limit proportionality to balancing). See also V. Jackson (n 32) 3157 ('„proportionality as such" is the last in a sequence of inquiries and therefore is part of a more structured decisional process than „all things considered" balancing').
[66] Although this paper focuses on proportionality in constitutional law, it is also worth noting that in several administrative law cases, the Court has applied 'Wednesbury unreasonableness' review under the guise of proportionality review: see A. Chandrachud, 'Wednesbury Reformulated: Proportionality and the Supreme Court of India' (2013) 13 Oxford Uni. Commonwealth L. J. 191.

the Court observed that the regulations could be amended to provide for the termination of service on a third pregnancy, provided that the other two children were alive. In the Court's opinion, an amended regulation to this effect would satisfy the requirements of reasonableness, because it would be in the 'larger interest' of the air hostess and would also aid the family planning program.[67] Of course, had the Court specifically articulated the purpose of the regulations – which seemed to rest on the efficiency of the airline – it would have been more likely to recognize that its proposed solution would not withstand constitutional scrutiny. From this perspective, expressly articulating a purpose makes it more difficult for the Court to 'shift' purposes as its analysis proceeds.

In all of the cases discussed thus far, the Indian Supreme Court applied – and claimed to be applying – reasonableness review. There are also cases in which the Indian Supreme Court has self-consciously claimed to be applying proportionality, but in fact has relied on only one or more of its components – usually necessity or balancing. In *Om Kumar v Union of India*, the Court engaged in a lengthy discussion on proportionality review, concluding that it is applied to legislation as well administrative action.[68] However, it is interesting to note the Court's restrictive understanding of proportionality:

By 'proportionality', we mean the question whether, while regulating exercise of fundamental rights, the appropriate or least restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the Court will see that the legislature and the administrative authority 'maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve'.[69]

This passage expounds upon the Court's restrictive understanding of proportionality review – which in this case, has been delimited to necessity and balancing. If we were to accept this restrictive definition of proportionality, the cases discussed earlier demonstrate that the Court in *Om Kumar* was not entirely incorrect in saying that proportionality review had been applied in the past. In fact, the conflation of proportionality review with one of its components is not a mistake that is unique to the Indian Supreme Court.[70] The confusion, to some extent, stems from the fact that the fourth component of proportionality review is also referred to as proportionality,

[67] J.L. Mashaw, 'Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State' (2001) 70 Fordham L. Rev. 17, 18.

[68] J. Rawls, *Political Liberalism* (2nd edn, Cambridge University Press 2005) 235.

[69] J. Rawls, *Political Liberalism* (n 68) 233.

[70] M. Cohen-Eliya and I. Porat, 'Proportionality and the Culture of Justification' (2011) 59 Am. J. Comp. L. 463.

although it is distinguished from the former by being described as proportionality *stricto sensu* or 'in the narrow sense'.[71]

Before advancing to the next section, it is worth recollecting the argument made thus far. To be sure, the paper has not advanced the claim that the Indian Supreme Court *never* applies all of the components of proportionality review in a single case. Instead, it makes the more limited claim that the doctrine of reasonableness review *is not understood to require* the Court to apply all of proportionality's components in every case. Therefore, if proportionality is defined in terms of proper purpose, rational connection, necessity, and balancing, the Indian Supreme Court does not consistently apply proportionality review in constitutional adjudication. The arguments in the next section will demonstrate that even if reasonableness review were understood to require applying all of proportionality's components, it is the sequential structure of the proportionality test, in contrast to reasonableness review, that promotes reason-giving in adjudication.

4. Proportionality and reason-giving

Reason is the 'modern language of law in a liberal state',[72] and judges are duty-bound to give reasons for their decisions. As Rawls argues, the judiciary is the only branch of government that, on its face, is a ‚creature' of public reason and 'that reason alone'.[73] In fact, judgments such as *Koushal* that defer to the legislative branch without providing public reasons, paradoxically threaten the court's democratic credibility.[74] The structure of proportionality review promotes a ‚culture of justification'[75] and reason-giving. By deconstructing the steps that need to be undertaken in order to determine whether a rights violation has taken place, it requires the judge to work through each step of the test with an account of reasons for which that step is satisfied. The structure of test thus mitigates the possibility of Category 2 and Category 3 errors.

Let us examine this claim with reference to the *Koushal* decision. The Category 2 errors committed by the Court could well have been avoided by imposing the four-part proportionality test. The Court would have found it more challenging to escape consideration of the most difficult aspects of the case, including whether section 377 was based on a proper purpose, and even if so, whether less restrictive alternatives

[71] P. Daly, *A Theory of Deference in Administrative Law: Basis, Application and Scope* (Cambridge University Press 2012) 141.
[72] A. Barak (n 28) 461.
[73] W. Sadurski, 'Reasonableness and Value Pluralism in Law and Politics' in G. Bongiovanni, G. Sartor, C. Valentini (eds), *Reasonableness and Law* (Springer 2009) 139.
[74] W. Sadurski (n 73).
[75] W. Sadurski (n 73) 139.

were available to achieve that purpose. Applying proportionality, if the Court were to find that the law was enacted for the regulation of private morals, it would need to justify why this was a legitimate basis for limiting fundamental rights. On the other hand, if the Court chose to adopt the petitioners' argument that section 377 had the public health rationale of preventing HIV/AIDS, it would also need to establish why less restrictive measures (such as educational initiatives) could not be deployed to achieve the same objective.

The Supreme Court in *Koushal* also committed Category 3 errors, by failing to provide any reasons for upholding the law under articles 15 and 21 of the Constitution. Theses errors were facilitated by the 'black box' reasonableness test, which lacks explicit check posts to guide the Court's analysis. As one scholar notes, '[t]o describe a decision as unreasonable tells us nothing of *why* the decision is unreasonable'.[76] Category 3 errors are much harder to envisage in circumstances in which proportionality review is applied, without exception, to all claims of rights violations. As Barak argues, it enables the judge 'not to skip over things which should be considered'.[77] Theoretically, Category 3 errors would still have been possible by applying the four components of the proportionality test tautologically – for example, that section 377 was enacted for a proper purpose *since its purpose was proper* (without anything further), or that section 377 employed the least restrictive means of limiting the right *since it was the least restrictive alternative*. However, as these statements suggest, it is much harder to commit Category 3 errors – or, if you will, escape genuine reasoning through Category 3 errors – within the structure of proportionality review.

To be sure, proportionality does not protect against Category 1 errors. A Category 1 error in the course of the proportionality test would not involve a claim that the test itself has been methodologically misapplied. Instead, it would involve the separate argument that the court has misconstrued the evidence, or not come out the right way on one of the steps of proportionality review. A good example of a Category 1 error would be where the court misapprehends the purpose for which a law has been enacted. So, for instance, if it decides that the purpose of a law is to protect the safety of women, whereas the real purpose of the law is to preserve gendered stereotypes, the court would have committed a Category 1 error. In this scenario, if we were to presume that the Court was correct about the purpose and if the other steps of the proportionality test were satisfied, the reasons given by the court would justify its conclusion (in other words R1+R2=D). Therefore, as I argued earlier, it would be somewhat odd to characterize this as a failure to give reasons, in contrast with Category 2 and Category 3 errors.

[76] P. Craig, 'Proportionality, Rationality and Review' [2010] NZ L. Rev. 265, 272.
[77] V.C. Jackson, 'Being Proportional About Proportionality' (2004) 21 Const. Comment. 803.

Wojciech Sadurski provides an interesting, although 'admittedly imperfect',[78][79] analogy explaining proportionality's ability to explicate judicial reasoning:

It is (...) as if a cook in an elegant restaurant first revealed to the customers all the ingredients, and then showed the guests, step by step all the stages of the preparation of the dish before it lands on their tables. By showing all the 'ingredients' of his/her reasoning, a judge conducting the proportionality analysis indicates that the final conclusion is not a result of a mechanical calculus (...).[80]

Of course, this analogy holds true only if we were to accept that the legitimacy of a restaurant stems not just from the flavour of the dishes it serves (the judgment), but also from the quality and freshness of the ingredients used to prepare those dishes (the reasoning). A better analogy might involve the purchase of a diamond. The diamond's legitimacy unmistakably stems not only from how it looks, but also from the certificate accompanying it that sets out the attributes which make it valuable (colour, cut, clarity, carat). This analogy also better captures the fact that proportionality does not demand the presence of a live audience watching the analysis unfold step-by-step. Instead, proportionality demands full disclosure – in the form of a certificate, or the court's judgment.

The benefit of proportionality is sometimes conceived of as enabling judicial decisions to become more intelligible not just to lawyers, but also to the general public.[81] This claim is hard to justify – it is easy, for instance, to imagine a reasonableness case written in an uncomplicated style being simpler to understand for the non-lawyer than a proportionality case that relies on complex legal jargon. The argument can perhaps be made in a more limited form – that the structure of proportionality review makes it easier for the non-lawyer to cull out the court's reasoning. Even in these situations, one would expect a lawyer trained to a certain standard to be able to cull out the court's reasoning when it applies the reasonableness test. This paper makes a more limited claim. The real danger with Category 2 and Category 3 errors that appear in reasonableness review is that no one, not even a lawyer, knows the full set of reasons behind the decision. The Court's reasoning when it commits these errors is not just unintelligible or difficult to find, but is genuinely 'unknowable' from the judgment itself. In other words, in circumstances in which the judge is inclined to arrive at the 'incorrect' outcome under proportionality review, proportionality decreases the likelihood of Category 2 and Category 3 errors, and correspondingly increases the likelihood of Category 1 errors.

[78] *Suresh Kumar Koushal v Naz Foundation* (2014) 1 SCC 1 [43].
[79] *Suresh Kumar Koushal v Naz Foundation* (2014) 1 SCC 1 [52].
[80] For a discussion, see C. Chandrachud, 'Rights-Based Constitutional Review in India and the United Kingdom' (PhD Thesis submitted to the Faculty of Law, University of Cambridge 10 August 2015).
[81] D. Beatty (n 35) 166.

The analysis undertaken thus far suggests that it is not only the reliance on proportionality review, but also the structure and application of proportionality that counts. When proportionality is applied as a monolithic,[82] one-step test like reasonableness, many of the dangers of Category 2 and Category 3 errors re-enter the analysis. In fact, this seems to resemble the state of the Indian law, in which judges apply proportionality-type considerations in an *ad hoc*, unstructured way. It is the four-part structure of the proportionality test that ensures that steps cannot be skipped (accidentally or otherwise) and that the duty to give reasons at every stage cannot be easily evaded.

It is now worth addressing another possible line of objection. Is it unfair to judge the reasonableness test based on a bad application of the test in *Koushal*? It might well be argued that proportionality and reasonableness should be tested by comparing cases involving their best, rather than their worst, applications. In order to rebut this argument, we need to distinguish between two kinds of 'bad application' of reasonableness/proportionality review. The first occurs when the court fails to apply the formal methodological steps that the test for review requires. This is not the argument that is made against *Koushal*, simply because reasonableness does not prescribe any formal methodology, except for asking whether the law restricting fundamental rights is reasonable. The second – which is the claim made against *Koushal* – occurs when the court fails to apply the test rigorously enough or in the right way. From this perspective, *Koushal* is not an outlier case, but a paradigm case, for reasonableness review. The difference between proportionality and reasonableness is that merely complying with the first type of application infuses a culture of reason-giving into the decision-making process that is absent under the reasonableness test. A court that complies with the formal methodology, regardless of how rigorously it is applied, is less likely to commit Category 2 and Category 3 errors in proportionality review than under reasonableness review.

Finally, we arrive at the million-dollar question – would applying the proportionality test have affected the outcome of the *Koushal* case? As Vicki Jackson warns, we need to be 'proportional about proportionality'[83] and should be skeptical about claims that it would affect outcomes. A careful reading of the judgment indicates that ideological considerations may have been at play. For instance, the Court refused to accept that there was any factual basis to the claim that LGBT people were discriminated against. Its unsympathetic attitude towards the LGBT community – describing it

[82] *Surendra Singh v State of Uttar Pradesh* (1954) 24 AWR 360 ('Now up to the moment the judgment is delivered Judges have the right to change their mind. There is a sort of locus penitentix, and indeed last minute alterations often do occur.')

[83] See E. Aronson, *The Social Animal* (7th edn, WH Freeman 1995) 178.

as a ‚miniscule' minority[84] with 'so-called rights'[85] also provides strong evidence of this. The Court also (mistakenly) believed that section 377 was being relied upon to prosecute sexual assault of children as well as sexual assault of women falling short of 'rape'.[86] To expect 'personal sympathies of the judges' to 'never come into play' merely because of changes in doctrine is fairly ambitious. From this perspective, proportionality may have eliminated the Court's Category 2 and Category 3 errors, in favour of Category 1 errors.

Nevertheless, there is another perspective from which proportionality may have influenced the outcome in the case. If we were to accept that proportionality involves the articulation of matters that often remain unstated under reasonableness review, the process of articulation may itself prompt a change of mind. This can take two forms. First, there may be a genuine change of mind brought about by the process of articulating the unstated issues – where the judge sees the difficulties with the line of argumentation that he/she initially favoured. Judges have a right to, and sometimes do, change their mind in the course of drafting or finalizing a judgment. Second, there may be a less-than-genuine change of mind, because articulation of the unstated matters may expose hypocrisy that the judge finds it cognitively difficult to sustain. In other words, even though the judge wanted to reach a specific outcome in a particular case, applying the proportionality test would expose cognitive dissonance which the judge is unwilling to assume.

In *Koushal*, applying the proportionality test to uphold section 377 would require an analysis resembling the following: (i) the purpose of the law was to protect public health or prevent HIV/AIDS, (ii) there was a rational connection between section 377 and preventing HIV/AIDS, because criminalizing consensual sodomy would be a deterrent against it, (iii) all available less restrictive alternatives (educational initiatives, etc) were not equally effective at achieving the purpose of the law, (iv) the law adequately balanced social benefits and social harms. A comparable analysis may have been undertaken if the Court conceived of the purpose of the law as protecting private morals. Would articulating these factors prompt a genuine (or non-genuine) change of outcome in the manner that I just described, even in the face of ideological and

[84] Of course, proportionality is not the only method of promoting reason-giving in adjudication. As I explain elsewhere, another method of doing so is by increasing panel sizes: see C. Chandrachud, 'Interpretation' in Sujit Choudhry, Madhav Khosla, Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (Oxford University Press 2016, forthcoming).

[85] See M. Tushnet, *Making Easy Cases Harder* (draft on file with author); J. King, 'Proportionality: A Halfway House' [2010] NZ L. Rev. 327; G. Huscroft, 'Proportionality and Pretense' (2014) 29 Const. Comment. 229.

[86] See G.C.N. Webber, *The Negotiable Constitution: On the Limitation of Rights* (ch 3, Cambridge University Press 2009); S. Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7 Int. J. Const. L. 468.

remedial considerations? It is difficult to speculate any further, let alone be certain about what the Court may have done in the circumstances.

5. Conclusion

This article has set up two broad claims in the backdrop of the Indian Supreme Court's judgment upholding colonial sodomy legislation in *Koushal*. Although some scholars (and on occasion, even the Supreme Court) have argued that the Court applies proportionality review in constitutional adjudication, it actually only takes some proportionality-type considerations into account in its process of reasonableness review. There is a difference between applying each of the four components of the proportionality test in all cases, and applying some components of the test in some cases. Further, proportionality review is not a solution to all of the Indian Supreme Court's adjudicative problems. Instead, the structure of proportionality review promotes reason-giving in the adjudicative process by mitigating the possibility of Category 2 and Category 3 errors. It thus provides an important method of avoiding unreasoned decisions like *Koushal* – which I explained was a paradigm, rather than an outlier, exposition of reasonableness review.

While proportionality review has many supporters, it has also been widely criticized. Although this article has not engaged with proportionality's critics, their arguments relate predominantly to its antidemocratic character and the inability or incompetence of judges in applying it. The normative weight of these critiques is significantly diminished when considered in the context of the fact that the Court frequently relies upon components of proportionality review in reasonableness review. To have any traction in India, these critiques would have to challenge the status quo of proportionality-type considerations being applied in reasonableness review in the first place, or explain why their criticism applies to adopting the four-part proportionality test in all rights cases, but not to applying one or more components of the proportionality test in some rights cases.

Proportionality review may or may not have changed the outcome of *Koushal*. But it would have lessened the likelihood of Category 2 and Category 3 errors – a valuable achievement in and of itself.

Chintan Chandrachud
BLS LLB (Mumbai) BCL MPhil (Oxford) LLM (Yale) PhD (Cambridge). I am grateful to Aharon Barak and Mark Tushnet for discussions. An anonymous reviewer offered useful suggestions. All errors are mine.