

The Proportionality Test Models of Competing Rights Cases in the Civil and Common Law Systems: Lesson to Learn for Indonesia

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Abstract: This research focuses on the Proportionality test model of Competing Rights in practice in civil law countries (Germany and South Korea) and the Common Law System (United States and Canada). The research method used is a normative legal research method with statutory, comparative, and case approaches. The results show that the proportionality test is the "ultimate rule of law," a fundamental benchmark in judicial review, and has become a global constitutionalism recognised and applied internationally. Its application is structured and systematic with four test stages, such as German, Canadian, and South Korean models. Meanwhile, it is unstructured in the United States, and there is only one analytical tool (balancing test). In the case of decision, the four stages are only sometimes applied, but according to the needs of the analysis. If, at the third stage (necessity/minimal impairment), it is found that the object being tested is contrary to the Constitution, then the argumentation focuses on that analysis of it. The fourth stage is used if the case is more complicated and requires analysing the balance of norms and legal values. Meanwhile, in the Indonesian Constitutional Court practice, there is a proportional analysis, but it is partial, unstructured, and unsystematic. Therefore, in the future, it is essential to develop an Indonesian model of the principle of proportionality under the values of Pancasila and the 1945 Constitution.

Keywords: Competing Rights; Civil Law; Common Law; Judicial Review; Proportionality Test

1. Introduction

The proportionality test, also known as the proportionality principle or proportionality analysis, is the foundational principle in the field of global constitutionalism¹ and the ultimate rule of law.² It is a constitutional doctrine for reviewing constitutional rights disputes, the tool of human rights protection, rationally and systematically.³ Specifically as a standard for assessing the legitimacy of government actions or conflict between

¹ Alec Stone Sweet and Jud Mathews, "Proportionality and Rights Protection In Asia: Hong Kong, Malaysia, South Korea, Taiwan - Whither Singapore?" (2017) *Singapore Academy of Law Journal* 29, p.775. See also Vicki C. Jackson, "Constitutional Law in an Age of Proportionality", *The Yale Law Journal* 124 (2015), 3096-3196, <https://openyls.law.yale.edu/handle/20.500.13051/10213?show=full>

² Moshe Cohen-Eliya and Iddo Porat, "American Balancing and German proportionality: The Historical Origins", *International Journal of Constitutional Law* Vol. 8 No. 2 (2010): 263-286, <https://doi.org/10.1093/icon/moq004>

³ Guy Lurie, "Proportionality and the Right to Equality", *German Law Journal* (2020), 21, pp. 174-196, <https://doi.org/10.1017/glj.2020.8>

some other values⁴ (individual, group/ mass organisations, and state interests). Nussberger opinion is that it is to balance triangular or multipolar conflict rights.⁵ From a comparative law perspective, it is characterised by the Continental European System based on practised in the legal system and culture of courts and Justices, especially the German Federal Constitutional Court (GFCC) and the European Court of Human Rights (ECtHR).⁶ Another model of competing rights analysis is called the "balancing test" applied by the United States Supreme Court (USSC).⁷

The proportionality test models examine balance analysis in the rule of law and democratic countries between the protection of individual rights⁸ and legal restrictions conflict with government interest and constitutional rights.⁹ It is one of the most common legal concepts used by constitutional courts to rationalise judicial decision-making, particularly to oversee political authority¹⁰ or conduct analysis and evaluation of government policies. It is receiving more and more attention in international legal scholarship worldwide. From the court decision perspective, it will be a more democratic human rights protection.¹¹ Hailbronner and Martini¹² believe it is a model for many constitutional courts worldwide and an international constitutional principle. It is a constitutional reasoning standard for deciding competing rights and conflicts of human rights in judicial review cases.

The GFCC was the first Constitutional Court in the world to apply the proportionality test as a legal reasoning instrument of the judicial review system (1950) known as "*Verhältnismäßigkeitsprüfung*." This model has four constitutional analyses. The first step is to identify the objectives pursued by the government. Second, suitability: actions taken

⁴ Gehan Gunatilleke, "Justifying Limitations on the Freedom of Expression", *Human Rights Review* (2021) 22, 91–108, <https://doi.org/10.1007/s12142-020-00608-8>

⁵ Angelika Nußberger, "Subsidiarity in the Control of Decisions Based on Proportionality: An Analysis of the Basis of the Implementation of ECtHR Judgments into German Law," Anja Seibert-Fohr and Mark E. Villiger (ed), *Judgments of the European Court of Human Rights – Effects and Implementation* (Germany, Nomos Verlagsgesellschaft: 2014), 167

⁶ Fan, Jizeng. "Rethinking the Method and Function of Proportionality Test in the European Court of Human Rights." *Journal of Human Rights*, Vol. 15, 2016, 47-86. <https://doi.org/10.16696/j.cnki.11-4778/d.2016.01.006>

⁷ Charles Fried, "Two Concepts of Interests: Some Reflections on the Supreme Courts Balancing Test," *Harvard Law Review*, Vol. 76, 1962, 755-778. <https://doi.org/10.2307/1338701>

⁸ Benedikt Pirker, "Proportionality Analysis and Models of Judicial Review", (Europa Law Publishing, Amsterdam, 2013), p.120. See also Pascal Berger, "Proportionality, Evidence and the COVID-19-Jurisprudence in Germany", *European Journal for Security Research* <https://doi.org/10.1007/s41125-022-00087-7>

⁹ Niels Petersen, *Proportionality and Judicial Activism Fundamental Rights Adjudication in Canada, Germany, and South Africa* (Cambridge University Press, 2017). See also Bertus de Villiers, "Freedom of Expression and Hate Speech: When Values Collide in Divided Societies", *Constitutional Review*, Volume 8, Number 2, December 2022, 184-214. <https://doi.org/10.31078/consrev821>

¹⁰ Martin Höpner, "Proportionality in the PSPP Saga: Why Constitutional Pluralism Is Here to Stay and Why the Federal Constitutional Court Did not Violate the Rules of Loyal Conduct" (2021) 6 *European Papers- A Journal on Law and Integration* 1527. See also Mordechai Kremnitzer and Raanan Sulitzeanu-Kenan, "Protecting Rights in the Policy Process: Integrating Legal Proportionality and Policy Analysis", *International Review of Public Policy [Online]*, 3:1 (2021). <https://doi.org/10.4000/irpp.1974>.

¹¹ Geoffrey Thomas Sigalet, *American Rights Jurisprudence Through Canadian Eyes*, *Journal of Constitutional Law* Vol. 23:1, (2021), 125-192. <https://scholarship.law.upenn.edu/jcl/vol23/iss1/3>

¹² Michaela Hailbronner and Stefan Martini, "The German Federal Constitutional Court", in András Jakab, Arthur Dyevre, and Giulio Itzcovich (ed), *Comparative Constitutional Reasoning*, (United Kingdom, Cambridge University Press: 2017), 367

by the government must be suitable for achieving its objectives. Third, necessity, the justices review whether the action is necessary to achieve a legitimate aim because no equally suitable but 'less restrictive' means are available.

At this final stage, called proportionality in the strict sense, appropriateness or reasonableness, the Court broadens the scope of the analysis by balancing the benefits derived from the action at issue and the costs arising from violating fundamental rights.¹³ The GFCC models have spread to other European countries. It has been adopted by the European Court of Human Rights (ECtHR), is an internationally recognized model, and has spread to constitutional courts outside Europe,¹⁴ including in the Common Law System (for example, the Supreme Court of Canada).

Canada applies the same four-step proportionality test as Germany. The Supreme Court of Canada is one of the courts influenced by the ECtHR jurisprudence, and this model was designed in the David Oakes case. It became known as the "Oakes test," one of the central models for fundamental rights protection in the world.¹⁵ Similarly to Canada, the proportionality test in South Korea is a product imported from Germany since the Korean Constitutional Court (KCC) was established and is specifically regulated in the Korean Constitution. Meanwhile, the United States has a different model, which is internationally called the "balancing test."

The proportionality test not only includes standardized stages of analysis, but each stage contains clear and measurable legal arguments/ reasoning of Justices. It is applied in most judicial processes, even in Germany, without oral meetings in constitutional complaints cases. In addition, it is also used to resolve competing rights between German and European interests, as well as conflicts between the 1949 Basic Law and the European Legal System. This system can realize legal certainty and legal fairness in the community, reflecting the intellectual credibility of constitutional Justices' opinions, transparency, and accountability in deciding the competing rights cases and building public trust in competing rights disputes.

Best practices in the application of the proportionality test in civil law countries (Germany and South Korea) and common law countries (the United States and Canada) can be used as a reference in developing it in the Indonesian Constitutional Court or Mahkamah Konstitusi Republik Indonesia (hereinafter the MKRI). It must still formulate proportionality as a structured and comprehensive approach. There needs to be a transparent model in applying it as an analytical tool in examining laws, either by adopting the German system or other countries or the original model developed by MKRI.

¹³ Andrej Lang, 'Proportionality Analysis by the German Federal Constitutional Court', In M. Kremnitzer, T. Steiner, & A. Lang (Eds.), *Proportionality in Action: Comparative and Empirical Perspectives on the Judicial Practice* (Cambridge: Cambridge University Press, 2020), pp. 22-133

¹⁴ Dieter Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) *University of Toronto Law Journal* 57. <https://doi.org/10.1353/tlj.2007.0014>

¹⁵ Rafael Tedrus Bento, "Oakes Test and Proportionality Test: Balance between the Practical Costs of Limiting Rights and the Benefits Arising from the Law," *World Academy of Science, Engineering and Technology International Journal of Law and Political Sciences* Vol. 15, No.5, (2021)

In addition, the insight and international network of constitutional Justices regarding the proportionality test still needs to be improved. Stefanus Hendrianto is the only expert who has researched the problematic proportionality test in the MKRI. He argues that the practice has recognised the proportionality test since 2010 but has yet to progress until now. Furthermore, due to the weak intellectual leadership of the court, and the justices do not comprehensively understand the notion of proportionality. There is a lack of intellectual depth among Indonesian constitutional stakeholders, including Indonesian constitutional law experts, who cannot generate a robust discussion on the principle of proportionality.¹⁶ For this reason, the research focused on comparative study in civil and common law countries. The final result provides the construction of an analysis model as a benchmark in reviewing competing rights under the Indonesian legal system based on Pancasila and the 1945 Constitution.

2. Method

This legal science research focused on comparative law in the practice of the civil law system (Germany, South Korea), the common law system (Canada and the United States), and Indonesia. Hence, a proportional analysis design is necessary to resolve competing rights cases in Indonesia. This normative research used the statutory, comparative, and case approaches as analytical guides.

3. Proportionality Test Models in Civil and Common Law Systems

The proportionality test was born from the legal culture of the judiciary and justices in resolving concrete cases with a dimension of conflict between the interests of individuals, groups/mass organisations, and the State. It assesses the aspect of a law that is made with a legitimate purpose and has a friendly rationality towards the constitutional rights of citizens. It is a truly international tool of constitutional law—a uniform process for assessing the legitimacy of rights restrictions around the world¹⁷ and great moral questions.¹⁸ In addition, it will examine the impact of losses and benefits caused by the enactment of such laws on the guarantee and fulfilment of human rights. The most famous practice of using the proportionality test in constitutional and administrative courts in Germany¹⁹ and Canada was the Oakes test (1986). South Korea's model is known as *gwaing-geumjiwonchig* or prohibition of excessive restriction (1988), while a different model is applied by the United States (1950), which is commonly referred to as the

¹⁶ Stefanus Hendrianto. Against the Currents: The Indonesian Constitutional Court in an Age of Proportionality, in Po Jen Yap (ed). *Proportionality in Asia*. (United Kingdom. Cambridge University Press, 2020), p.170

¹⁷ David Kenny, «Proportionality and the Inevitability of the Local: A Comparative Localist Analysis of Canada and Ireland», *The American Journal of Comparative Law*, Volume 66, Issue 3, (2018): 537–578, <https://doi.org/10.1093/ajcl/avy034>

¹⁸ Grant Huscroft, Bradley W. Miller, Grégoire Webber, *Proportionality and The Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014).

¹⁹ Gertrude Lübbe-Wolff, 'The Principle of Proportionality in the Case-Law of the German Federal Constitutional Court' (2014) 34 *Human Rights Law Journal*, 174–196. <https://doi.org/10.1017/glj.2020.8>

"balancing doctrine." The following explains the historical development of it in some of these countries:

In Germany, this analysis is evolved and older than the 1949 German Basic Law, first as an 18th-century legal philosophy and then as an unwritten principle of public law and first developed by the High State Administrative Courts (Prussian Supreme Administrative Court)²⁰ in Kreuzberg judgments of 1880 and 1882.²¹ After the German Basic Law was applied, this analysis model was transferred into GFCC and used as legal reasoning in reviewing competing rights cases. It offers courts a doctrinal structure that allows them to resolve conflicts between competing values without establishing abstract value hierarchies. From the 1950s until now, the GFCC has issued more than two thousand decisions that explicitly refer to the proportionality principle.²²

Rupprecht Krauss' dissertation (1953) is widely regarded as having significantly impacted an application of the proportionality test in case settlement at the GFCC. Krauss introduces the approach of "proportionality in a narrow sense." It will make the State pay more attention to the rights of its citizens. It is irreconcilable with the 1949 Constitution that the executive can be allowed to intrude into the private sphere of individuals beyond the limits of what is necessary to achieve the authorised objective." A strict sense could be added to the final stage of analysis.

Apothekenurteil (1958) is the first leading case, and it applied a strict sense for the first time as a separate element. In its considerations, the GFCC focuses on the tug-of-war between the rights of citizens and the public interest, stating, "The purpose of constitutional rights is to protect individual freedom and liberty. When attempting to maximise both demands most effectively, the solution can only be found in carefully balancing [*Abwägung*] of the two opposing and possibly conflicting interests (individual and group rights and the government interest). This conflict is ultimately resolved at the balancing stage.

The President of GFCC 2010-2020, Andreas Voßkuhle stated that it decides cases based on developing an excellent legal concept system called *Verfassungsrechtsdogmatik*. It is a coherent legal system based on the legal texts and decisions made and discussed by the courts, professors of law from law schools, and government agencies. It is most successful in the proportionality test.²³ It is an analytical model often used in deciding the issue of competing rights in exercising the judicial review authority (abstract, concrete, and constitutional complaint).²⁴ It examines whether challenged measure serves a legitimate

²⁰ Niels Petersen and Konstantin Chatziathanasiou, 'Balancing Competences? Proportionality as an Instrument to Regulate the Exercise of Competences after the PSPP Judgment of the Bundesverfassungsgericht,' (2021) 17 European Constitutional Law Review 2, 314 – 334. <https://doi.org/10.1017/S1574019621000201>

²¹ Anne Peters, "A plea for proportionality: A reply to Yun-chien Chang and Xin Dai", International Journal of Constitutional Law, (2021), Vol. 19 No. 3, 1135-1145. <https://doi.org/10.1093/icon/moab071>

²² Andrej Lang, "Proportionality Analysis by the German Federal Constitutional Court," in Mordechai Kremnitzer, Talya Steiner, Andrej Lang (ed), Proportionality in Action Comparative and Empirical Perspectives on the Judicial Practice, (United Kingdom, Cambridge University Press: 2020), 22

²³ Andreas Voßkuhle, "Preface to the German Law Journal's Constitutional Reasoning: Special Edition," German Law Journal, Vol.14 No.8 (2013), 979 – 981. <https://doi.org/10.1017/S2071832200002121>

²⁴ Tanto Lailam & M. Lutfi Chakim, "A proposal to adopt concrete judicial review in Indonesian Constitutional court: a study on the German Federal Constitutional Court experiences." *Padjadjaran Jurnal Ilmu Hukum* 10 (2023): 148-71. <https://doi.org/10.22304/pjih.v10n2.a1>. See also Tanto Lailam & Nita Andrianti, 'Legal Policy of

aim and is suitable, necessary, and appropriate for achieving it. The last element (appropriateness) entails balancing the different interests affected by the measures.

In GFCC practices, the proportionality was in four stages: (1) Legitimate aims. An assessment of whether the government policy of limiting constitutional rights is under legitimate aims. (2) Suitability. The assessment focuses is on whether the policy of limiting constitutional rights follows the objectives for forming the law.. (3) Necessity (*Erforderlichkeitsprinzip*). It focuses on whether the protection of constitutional rights is more detrimental than the policy of limiting such rights. The restriction of rights is intended to minimise the legal impact of the law. (4) Balancing. It focuses on analysing the balance of values norms, including costs and benefits resulting from the law.

Applying the proportionality test model in the GFCC has inspired international and constitutional courts in various countries, but it is open to criticism, especially in the third stage of balancing. It is an instrument of political power arrogance, a legal instrument of judicial self-empowerment,²⁵ and an instrument of irrational reason, putting incomparable values on the same scale.²⁶ The balancing stage is seen as an arbitrary measure that lacks rational standards and is thus suspected of being a cover for political considerations in legal decision-making.

This German model has influenced the design of the proportionality test applied by the KCC. It was imported since the KCC inauguration in 1998 by the Korean constitutional scholars and lawyers at the time who studied for doctoral degrees in Germany.²⁷ It regulated the freedoms and rights of Korean citizens restricted by law only when necessary for national security, the maintenance of law and order or for the general welfare" based on Article 37 (2) of the South Korean Constitution. Article 37 (2) of the Constitution outlines crucial principles that must be followed when limiting civil liberties, including the principle of statutory reservation, the principle against excessive restriction and the rule against violation of essential aspects. The Constitution provides legislators with the authority to curtail civil liberties. Simultaneously, it expressly obliges them to justify such actions.

The proportionality principle's historical development was in the constitutionality of the National Land Planning and Management Law (88Hun-Ka13, December 22 1989). The Court argued that "Article 37(2) of the Constitution is a clause that not only delegates but also restricts the legislature's right to impose limitation on fundamental rights." The implementation of the proportionality principle became explicit in the case of policy legislation (89Hun-Ka95, September 3, 1990); the Court stated, "*Even if the legislature*

Constitutional Complaints in Judicial Review: A Comparison of Germany, Austria, Hungary, and Indonesia', (2023) 11 *Bestuur* 1, 76-66. <https://doi.org/10.20961/bestuur.v11i1.70052>

²⁵ Niels Petersen, "Balancing and judicial self-empowerment: A case study on the rise of balancing in the jurisprudence of the German Federal Constitutional Court," *Global Constitutionalism* Volume 4 Issue 01, 2015, 49-80. <https://doi.org/10.1017/S2045381714000173>

²⁶ Niels Petersen, "How to Compare the Length of Lines to the Weight of Stones: Balancing and the Resolution of Value Conflicts in Constitutional Law," *German Law Journal* Vol.14 No.8 (2013), 1387-1408. <https://doi.org/10.1017/S2071832200002315>

²⁷ Yoon Jin Shin, "Cosmopolitanising Rights Practice: The Case of South Korea" in Takao Suami, Anne Peters, Dimitri Vanoverbeke and Mattias Kumm (eds), *Global Constitutionalism from European and East Asian Perspectives* (Cambridge University Press 2018), 256

finds a corrective measure that restricts fundamental rights fulfils legislative purpose, the measure needs to be revised upon the necessity to guarantee the minimum level of restriction on basic rights” to describe minimum restriction, and “the legitimate public interest protected by the legislation should outweigh the infringed private interest” to describe balance of interest. The KCC also determined that the principle of proportionality testing fundamentally derives from the rule of law principle and is grounded in Article 37(2) of the Constitution.²⁸

Based on these decisions, the KCC applies a four-step proportionality test in reviewing laws that limit constitutional rights: (1) the legitimacy of a purpose, which focuses on assessing whether the policy has legitimate objectives. The KCC assesses whether the statute or provision has properly obtained its legislative end as prescribed in Article 37(2) of the Constitution. (2) the appropriateness; review focuses on legitimate objectives under the Constitution. This stage is to assess whether the legislature objectives can cause its intended effect and thus achieve the legislative goal is closer to a matter of an empirical judgment based upon the prediction of a future event rather than a normative value judgment. (3) the “least restrictiveness”; the focus of the assessment on the limitation of rights is to minimise constitutional problems. In other words, if it is possible to arrange the available means according to the order of “limitation of fundamental rights”, legislators should choose the means that least interfere with fundamental rights. (4) the balance of interests; restrictions can be made if the public interest outweighs the individual interest. The balancing test is indeed the essence of the principle of proportionality because this stage considers legislative objectives and balances the weight of these objectives with limited basic rights. The KCC reviews the extent of the weight or significance of legislative objectives.

Hence, the GFCC and ECtHR models are also applied to countries with a common law system, such as Canada. The “Oakes’s test” model is based on the Supreme Court of Canada case No. (1986) 1 S.C.R.103 on February 28, 1986. It is a stringent standard of justification.²⁹ It is formulated from section 1 of the Canadian Charter of Rights and Freedoms on freedoms based on the law. The Oakes test is an analysis of the limitation clause above, which is essential that the government can restrict rights and freedoms to the extent that, regulated by laws, the legal aims are justifiable in a free and democratic society in Canada; the legal restriction must be reasonable and proportionate.³⁰

This model of proportionality test was the first judicial jurisprudence constructed in a constitutional question case. In this case, David Edwin Oakes was charged with an offence under the Narcotic Control Act (NCA) of unlawfully possessing narcotics for trafficking.³¹

²⁸ Constitutional Court of Korea, Constitutional Review at AACC Members, (Seoul: Constitutional Court of Korea, 2019), 127.

²⁹ Bredt, Christopher D. and Pessione, Heather K. "The Death of Oakes: Time for a Rights-Specific Approach?" *The Supreme Court Law Review: Osgoode’s Annual Constitutional Cases Conference* 63. (2013). <http://digitalcommons.osgoode.yorku.ca/sclr/vol63/iss1/20>

³⁰ Miriam Cohen and Sarah-Michèle Vincent-Wright, “Conflict Resolution in Human Rights Cases: The Role of the Supreme Court of Canada”, *Constitutional Review*, Volume 8, Number 2 (2022), 308, <https://doi.org/10.31078/consrev824>

³¹ Brian Slattery, “The Pluralism of the Charter: Revisiting the Oakes Test” in Luc B. Tremblay and Grégoire C.N. Webber (eds), “The Limitation of Charter Rights: Critical Essays on R. v. Oakes (Montreal: Éditions Themis (2009), 13-35, Available at SSRN: <https://ssrn.com/abstract=3345978>

At trial, however, he chose not to testify and rejected the reverse liability provision in Section 8 of the NCA. Finally, Davis Oakes brought the Article that had harmed his constitutional rights to the SCC. It decided that Article 8, which provides for reverse proof, was contrary to Section 1 of the Canadian Charter of Rights and Freedoms. It is guaranteed "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." In addition, contrary to Article 11(d), which provides for a guaranteed presumption of innocence, everyone charged with an offence has the right to be presumed innocent until proven guilty according to the law in a fair and public trial by an independent and impartial tribunal.

The Oakes test has four stages: *first*, sufficient importance or Pressing and Substantial Objective. It is the reason for the restriction sufficiently important or substantial. In other words, is the intent or purpose of the restriction significant in achieving the collective goal of a free and democratic society in accordance with the Canadian Chapter of Human Rights? *Second*, the rational connection between the aim of government policy to legal limitation and constitutional rights is carefully designed to minimize constitutional rights problems.³² In other words, it can be proven that there is a rational relationship between the objective and the measure/means chosen. *Third*, minimal impairment, i.e., the measure/means adopted to implement the objective, must minimally affect or impair a person's rights.³³ *Fourth*, detriments vs. benefits (proportionality of effects) focuses on measures to restrict rights with goals/objectives based on proportionate analysis of costs and benefits.

On the other hand, the balancing test is a doctrine that developed in the US Supreme Court. The balancing test is a model of analysis used to assess and decide competing rights cases. It began with the idea of balance entering American legal thought through the Article published by Oliver Wendell Holmes. He is an American jurist and legal scholar who has progressive legal thinking. His thought did much to criticise formalism and Langdellianism theory (Christopher Columbus Langdell). Balancing test as anti-Langdellianism and antiformalist movement. In the Minnesota Mortgage Moratorium Act in Home Building & Loan Association v. Blaisdell case (1934), US Supreme Court Chief Justice Charles Evans Hughes used a balancing test in this legal argument. Also, in the free speech case "Schneider v. State", Justice John Roberts wrote a legal argument for the first explicit balancing test. The Court's ruling by Justice Hugo Black decided that government policy discriminates by public necessity analysis.

In judicial practice, the balancing test is a constitutional interpretation method used to identify, evaluate, and compare competing interests.³⁴ It is not prioritised in resolving competing rights cases. It uses necessary analysis and is less structured than the proportionality model in Germany and Europe. The model that developed in common law countries is the balancing doctrine model. It defines a subjective test that courts use to weigh competing interests.

³² Panaccio, CM In Defense of Two-Step Balancing and Proportionality in Rights Adjudication. In: The Canadian Journal of Law & Jurisprudence. Volume XXIV, No.1 (2011). <https://doi.org/10.1017/S0841820900005087>

³³ Camden Hutchison, "Freedom of Expression: Values and Harms", Alberta Law Review 60:3 (2023):688

³⁴ T. Alexander Aleinikoff, "Constitutional Law in the Age of Balancing", The Yale Law Journal Volume 96, Number 5, April 1987, 943-1005. <https://doi.org/10.2307/796529>

For example, the Court will weigh the interests between the prisoner's liberty interest and the government's interest in public safety to decide which interest prevails. The balancing test is different from the "bright-line rule concept." It is a clear and objective rule that can be applied in all cases of competing rights, for example, the restriction that all persons under 18 years old are not allowed to vote in general elections. This rule is clear and objective and can be applied without subjective evaluation. Meanwhile, the balancing test approaches particular competing rights cases.

The proportionality test model in Germany, Canada, and the United States was born from judicial practice in resolving competing rights cases. It differs from South Korea, which has regulated the provision in its Constitution and was born since the establishment of the KCC, even though the decision experienced the development of analysis criteria. The German legal system strongly influences the practice of proportionality tests in Canada and South Korea. Therefore, in the four stages of analysis, there are many similarities with the legal practice in the GFCC. Meanwhile, the US balancing doctrine rejects German and European legal ideas of the proportionality analysis.

Applying the proportionality test in the GFCC, SCC, and KCC Court is structured, systematic, and comprehensive through four stages. On the other hand, in practice, the US Supreme Court only uses one balancing test tool, as follows:

Stage	Germany	Canada	South Korean	United States
1	Legitimate aims	limitation pressing or substantial	The legitimacy of a purpose	Balancing test
2	Suitability	Rational Connection	The appropriateness of the means	
3	Necessity	minimal impairment	The least restrictive	
4	Balancing analysis	Detriments vs. Benefits (proportionality of effects)	The balance of interests	

The German, Canadian, and South Korean proportionality test models differ slightly in terminology but have the same substance of model analysis. It differs in the applied analysis of it. It is influenced by judicial practice, legal culture, and legal reasoning used by Justices. For example, the most significant difference between Germany, South Korea, and Canada is that most of the settlements of competing rights cases prioritise at least impairment, while in Germany and South Korea, the priority step is at the balancing analysis (fourth stage). However, many decisions only reach the necessity stage. Examining these differences can shed light on the strengths and weaknesses of both approaches.

4. Proportionality Test in the Competing Rights Decisions

This subchapter analyses several landmark decisions that use the proportionality test as a benchmark to assess competing rights in the GFCC, SCC, and KCC—moreover, the application of the balancing doctrine in the USSC.

GFCC decisions are the Climate Change case (2021) and the Bavarian Constitution Protection Act case (2022). Climate change cases have issued a landmark court decision³⁵ because they either mark an unexpected turning point in environmental jurisprudence or introduce a new conceptual analysis of the law vis-a-vis the global challenge of climate change.³⁶ It is a highly complex problem. Many factors and changes in the Earth's climate system due to human activities contribute to global warming.³⁷

In this Climate change case, competing rights occur between individual freedom, future generations, and the State's interests. Applying the principle of proportionality prioritizes the necessity analysis. It is the third stage after analysing legitimate aims and suitability, and it is precautionary measures that respect fundamental rights. It discusses several primary competing rights in the case of climate change, namely: (i) obligation to contain risk to freedom. It focuses on the judge's assessment of the government's policy in regulating the risk to people's freedom in the use of CO₂ before 2030; (2) the necessity of a development-friendly planning horizon; in this context, the Justices assess whether the climate change regulation is under legal politics that are friendly to future development; (3) requirements for the structuring of the reduction pathway. It focuses on whether the legal policy is under the need to reduce gas emissions. Based on the necessity analysis that the provision is contrary to the 1949 Basic Law, it is dedicated to several paragraphs describing how and why politics fails to address the climate crisis in any way that could be considered adequate.³⁸

In this decision, the GFCC ruled parts of the Federal Climate Change Act unconstitutional, arguing that disproportional management of emissions for today and future generations³⁹. The Court decided that a constitutionally relevant temperature threshold of below 2°C and preferably 1.5°C can, in principle, be converted into a remaining global CO₂ budget⁴⁰. It has already defined climate policy and law-making in Germany and revolutionised the traditional concept of 'interference' with fundamental rights under the German Basic Law.

Bavarian Constitution Protection Act case (2022) is a constitutional complaint against several articles of the Bavarian Protection of the Constitution Act of July 12, 2016 (*Bayerisches Verfassungsschutzgesetz*), last amended by § 3 of the Act Amending the Bavarian Police Act and Other Statutory Provisions of July 23, 2021. It is the Bavarian domestic intelligence service. It has powers that allow it to carry out covert surveillance

³⁵ Rike Krämer-Hoppe, The Climate Protection Order of the Federal Constitutional Court of Germany and the North-South Divide, *German Law Journal* (2021), 22, 1393-1408. <https://doi.org/10.1017/glj.2021.84>

³⁶ Petra Minnerop, The 'Advance Interference-Like Effect' of Climate Targets: Fundamental Rights, Intergenerational Equity and the German Federal Constitutional Court, *Journal of Environmental Law*, Volume 34, Issue 1, March 2022, 135-162. <https://doi.org/10.1093/jel/eqab041>

³⁷ Philipp Semmelmayr, Climate Change and the German Law of Torts, *German Law Journal* (2021), 22, 1569-1582. <https://doi.org/10.1017/glj.2021.76>

³⁸ Christina Eckes, Tackling the Climate Crisis with Counter-majoritarian Instruments: Judges between Political Paralysis, Science, and International Law, *European Papers* Vol. 6, 2021, No 3, 1307-1324. <https://doi.org/10.15166/2499-8249/525>

³⁹ Christian Flachsland & Sebastian Levi, Germany's Federal Climate Change Act, *Environmental Politics* 2021, Vol. 30, 118-140. <https://doi.org/10.1080/09644016.2021.1980288>

⁴⁰ Karen Pittel, The Intertemporal Distribution of Climate Policy Burdens, and the Decision of the German Constitutional Court, *CESifo Forum* 5 / 2021 September Volume 22, 17.

measures. Some provisions of the Act are incompatible with the 1949 Basic Law and violate the general right to personality (self-determination of information). Article 15(3) of the Law on disclosure of traffic data originating from data retention is declared unconstitutional and void. It is incompatible with the principle of legal clarity and violates Article 10(1) of the 1949 Basic Law regarding guaranteeing personal data protection. Meanwhile, several articles were declared contrary to the German Basic Law but remain in force temporarily until at least July 31, 2023, such as Article 9(1) first sentence, which regulates surveillance of private homes, Article 10(1) which regulates provisions regarding remote searches of information technology systems, Article 12(1) regarding the tracking of mobile devices, Article 18(1) which regulates explicitly undercover officers, and several other articles.

The decision uses the principle of proportionality as the primary standard of review, analysing four test stages: legitimate purpose, suitability and necessity, and proportionality in the strict sense (balancing). The three questions at these three stages are normative that the protection of constitutional rights in this field is fulfilled. Thus, the Court conducted a balancing analysis, the last to apply the proportionality test.

The fourth stage of the test, balancing in the strict sense, was a comprehensive analysis of the data collection, which assessed the frequent cases affecting personal constitutional rights, the need for harm caused by the application of this Law, the threshold for interference by the Bavarian domestic intelligence service through the exercise of remote search powers, surveillance of private homes, subsidiarity, and other specific cases. It is also proportionate to analyse the need for surveillance related explicitly to the protection of the constitutional order of the Bavarian State. Hence, it is further use and sharing of data: further use within the scope of the original purpose and changed purpose (data sharing). It is an analysis of the criterion of a hypothetical recollection of the data and differentiation according to recipients of the data. It is data sharing with public security authorities, prosecution authorities, any other bodies, foreign bodies, and own further use for changed purposes.

In South Korea, the KCC has decided landmark cases on freedom of speech and assembly. They have taken active steps to provide the most expansive space for the public to criticise the government, placing the KCC as an essential judicial institution to prevent democratic backsliding. Some cases used proportional analysis, namely the Criminal Act penalising all abortions (April 2019). Its decision was a historical judgement on women's right to self-determination, and it is unconstitutional.

In this decision, most justices applied four stages of the proportionality test. The first and second stages focus on the discussed legitimacy purpose and the appropriateness of a woman's criminal penalty for abortion. The following two steps of the proportionality test focussed on health and life factors, psychology, economic issues of raising a child alone, and other issues when the woman did not have an abortion. Based on this analysis, the Court considered the government's role disproportionate. The government focuses on imposing criminal sanctions on women without implementing policies that effectively protect the woman and child's life, such as improving social, economic, and legal conditions to reduce unwanted pregnancies and obstacles in raising children. With these

arguments, the Court declared that the law did not fulfil the least restrictive requirements and the balance of interests.

In Canada, the Supreme Court's decision in the *R. v. K.R.J.* case reflects a significant change in how the proportionality test is conducted in reviewing restrictions on constitutional rights under the *Oakes* test. The *K.R.J.* cases used the "Minimal Impairment" stage of *Oakes*. The customary role of Minimal Impairment as the core of the analysis was challenged in *Alberta v. Hutterian Brethren*, where the majority and lead dissent gave new weight to the proportionality of the effects stage.⁴¹

Another case that uses the minimal impairment analysis and proportionality of effects of the *Oakes* test is speech crime. In the minimal impairment assessment, speech crime is under the purpose of the restrictions set out in the law. However, based on the analysis in the fourth stage, namely proportionality of effects, it is found that speech crime violates freedom of speech. It has an impact that regulating speech crime has a more significant loss than freedom of expression. The effects on freedom of expression are enormous, and speech crime has a chilling effect. In addition, the policy is disproportionate to the constitutional rights of minority groups (Arab and Muslim communities).⁴²

Furthermore, an example of the United States balancing test is the test used by the Supreme Court in *Wilkinson v. Austin* (2005). In this case, the Court had to balance the liberty interests of prisoners against the government's interest in maintaining public safety. The Court ultimately ruled that the government's interest in public safety outweighed the prisoner's liberty interest. Another example of the balancing test is the test used by courts to determine whether one person's right to freedom of speech outweighs another person's right to privacy. In this case, the Court would weigh the interests of the person speaking against the interests of the person whose privacy is being violated.

5. A Proposal of the Proportionality Test Model for the MKRI

Proportionality norms in the 1945 Constitution of Indonesia are regulated in Article 28J (1), which provides a balance of human rights and obligations. Article 28J (2), the limitation of rights by law must be proportionate (protection and limitation)⁴³ and fair based on moral and religious values, security, and public interest in a democratic society. This article explicitly stipulates that such law only imposes the limitation to "guarantee the recognition and respect of the rights and freedoms of others and of satisfying just demands based upon considerations of morality, religious values, security and public order in a democratic society".

⁴¹ Marcus Moore, "R. v. K.R.J.: Shifting the Balance of the *Oakes* Test from Minimal Impairment to Proportionality of Effects" (2018) 82 *Sup. Ct. L. Rev.* (2d), 143.

⁴² A. Percy Sherwood, "Terrorism and Its Legal Aftermath: The Limits on Freedom of Expression in Canada's Anti-Terrorism Act & National Security Act, *UVU Journal of National Security* 3, No. 2 (2019), 26

⁴³ Giri Ahmad Taufik, 'Proportionality Test in the 1945 Constitution: Limiting Hizbut Tahrir Freedom of Assembly' (2018) 4 *Constitutional Review* 1, 45-76. <https://doi.org/10.31078/consrev413>

This provision has given legitimacy to the state through lawmakers to place limitations on exercising everyone's rights and freedoms. These limitations are intended solely to guarantee and respect the rights and freedoms of others and for the sake of fair demands based on moral considerations, religious values, security, and public order in a democratic society. The limitations on these rights apply not only in emergencies but also in normal circumstances, such as maintaining public order, protecting the interests of the state and/or government, preventing the decline in community or public morals, and preventing the urge to commit crimes or violate the law.

The MKRI has discussed Article 28J Paragraph (2) of the 1945 Constitution in decision number 065/PUU-II/2004 on judicial review of the Human Rights Court Act No. 26/2000. In this case, the Court argued: "Although the Court is the opinion that the overriding of the principle of non-retroactivity is justiciable, it is not the intent of the Court to state that such overriding can be undertaken at any time without any limitations. The 1945 Constitution itself, Article 28J Paragraph (2), has affirmed the limitation, namely that the principle of non-retroactivity can be overridden only to guarantee the recognition and respect of the rights and freedoms of others and to fulfil fair demand by considerations of morality, religious values, security and public order in a democratic society."

This provision is the same as in South Korea, but the implementation model must still be structured and systematic. Proportionality, in general, human rights are regulated; both articles balance constitutional rights and obligations. It implies that the government is the primary power, and the people are the supporting power that creates social, harmonious, and prosperous conditions.

Legally normative, the Indonesian legal system also has the proportionality test, either using the terms "*serasi* (harmonious), *selaras* (aligned), and *seimbang* (balanced)" or the term proportionality, which grows and lives in the social system of Indonesian society. However, this principle is only a substantive touchstone and is theoretically different from the internationally recognised proportionality test. It internationally has standard stages of analysis, each of which has criteria and benchmarks for how a law or court decision is tested through the judicial review mechanism. In Indonesia's case, many decisions analyse the balance of values, even though Indonesia does not practise a structured and comprehensive proportionality.

The application of the proportionality test in MKRI practices has a diverse spectrum. It is influenced by the provisions in the Constitution and conventions, which require several restrictions to be met so that freedom of association can be reduced to guaranteed protection. It has never fully embraced its substance in the judicial review system. Because the Justices lack a thorough understanding of the proportionality test, it can be proven in the various decisions that use partial proportional analysis. Additionally, the 1945 Constitution states that the principle of public interest takes precedence over individual human rights interests.

On the other hand, Indonesian legal scholars have also failed to produce a robust discussion on proportionality; there is no such discussion in jurisprudence, and justices usually use a balancing analysis. This constitutional interpretation is used to review competing rights issues and is a one-stage analysis. It means that Justices do not analyse

legitimate aims, suitability, and necessity, and the final stage is proportionality on competing rights issues in Indonesia.⁴⁴

In the MKRI decision on the Election Act No. 10/2008 case, the courts state, the proportionality is the constitutional principle and morality. It could be a standard analysis to justify the conflict between human rights and the government's obligation to protect, promote, enforce, and fulfilment under the 1945 Constitution. However, there is no longer a systematic and structured design after this decision.

Several decisions of the MKRI in the field of socio-economic rights use the balancing analysis, namely: Judicial review on the State Budget for Fiscal Year 2005, Supreme Court Law No.3/2009, the Electricity Law No.20/2002; the Forest Law No.41/ 1999; the Oil and Gas Law No.22/2001; the Water Resources Law No.7/2004; and the Job Creation Law No.11/2020. It was seen that the textual application of the proportionality test is rarely mentioned in the consideration of the decision, but its implications are clear. What is different is that in some decisions, the Court also explicitly uses the term "balance analysis" in assessing norm conflicts. It applies not only to norm conflicts between individual and group interests but also to the aim of government policy. However, several decisions also use the proportionality test to measure the value of legal certainty, justice, and legal benefits in an integrated manner.⁴⁵

The proportionality test is also used in assessing conflicts between norms. For example, in the Article in Law No. 30/2002 on the Corruption Eradication Commission, the conflict occurs between the interpretation of Article 22, which regulates the provision "the replacement commissioner only continues the remaining term of office of the replaced" and Article 34 "commissioners have a term of office of 4 years." Decision No. 5/PUU-IX/2011 states that Article 34 must be interpreted that the term of office of the replacement commissioner is four years. In Decision No. 5/PUU-IX/2011, the Court stated that Article 34 must be interpreted to mean that the term of the replacement commissioner is four years. In its reasoning, the MKRI stated that it is proportional and guarantees fair legal certainty and equal treatment before the law if there is an interim replacement among Corruption Eradication Commission leaders appointed for four years [vide Article 28D paragraph (1) of the 1945 Constitution]; the interpretation of Article 34 of the Law a quo must be placed with a proportional approach by using universally recognised legal interpretations, namely historical, systematic, and teleological (holistically).

Moreover, The MKRI uses the term "balancing" rather than "proportionality" in assessing the limitation of citizens' rights as contained in decision No. 67/PUU-XIX/2021, MKRI also considered the constitutionality of limitations on the fulfillment of citizens' constitutional rights based on Article 28J paragraph (2) of the 1945 Constitution, and the measure always used by the Court in assessing the constitutionality of restrictions on citizens' rights is the balance between limitations on the individual rights of citizens and goals that

⁴⁴ Stefanus Hendrianto. *Against the Currents: The Indonesian Constitutional Court in an Age of Proportionality*, in Po Jen Yap (ed). *Proportionality in Asia*. (United Kingdom. Cambridge University Press, 2020)

⁴⁵ Tanto Lailam & Putri Anggia, "The Indonesian Constitutional Court Approaches the Proportionality Principle to the Cases Involving Competing Rights", (2023) 19 *Law Reform* 1, 110-127. <https://doi.org/10.14710/lr.v19i1.54087>

the government wants to achieve. In this context, MKRI argued that the postponement of the fulfillment of citizens' right to vote and the right to be a candidate in some local elections in the context of implementing simultaneous national and regional elections in 2024 is still within the framework of limiting constitutional rights as specified in Article 28J paragraph (2) of the 1945 Constitution. Moreover, every citizen who has fulfilled the requirements to take part in local elections, whether as a voter or as a candidate for regional head or deputy regional head, will still have their constitutional rights accommodated in the simultaneous regional elections in 2024.

Based on the analysis of several decisions, there is a common thread regarding the international understanding of the proportionality test. MKRI does not apply the four stages of analysis. The analysis is closer to the US Supreme Court model, which characterises the focus on balancing analysis of legal norms, unstructured, unsystematic, and uncomprehensive stages. MKRI uses a balancing analysis of conflicting constitutional norms and values by combining constitutional interpretation approaches. In the future, MKRI certainly needs a more credible and responsible competing rights analysis order that all components of the nation can recognise. The GFCC proportionality analysis model is the best option to be developed in the Indonesian legal system. However, it must be based on the values of Pancasila and Indonesian Constitutionalism. For example, freedom of speech and expression is not an absolute right and can be restricted; such restrictions must be done with strict consideration and in a proportionate manner by considering the proportionality test against the State's arguments.⁴⁶

Proportionality analysis is very important to be used as standard constitutional justice reasoning to analyse competing rights cases. It is to conduct a balanced analysis of the rights and obligations of individuals, groups, religious and national organisations, customary law society, and the State. The proportionality analysis model at MKRI in examining competing rights cases must refer to the values of Pancasila and Indonesian Constitutionalism, namely: Belief in One God and religious pluralism, Humanity with dignity, unity of society that prioritises the interests of the State but does not neglect the interests of individuals, deliberation to reach consensus, and social justice for all Indonesian people. Furthermore, *Bhineka Tunggal Ika* (unity in diversity), the spirit of *Gotong Royong* (mutual aid), *Kekeluargaan* (kinship principle), and moral-ethical principles that live amid society are also the basis for the application of proportionality analysis. The assessment of competing rights must be based on these values. In the context of decisions, there should be no decisions that prioritise aspects of individual rights that contradict the existence of religion as the foundation of society, causing disharmony in the nation and injustice.

In the judicial review practices, the Justices must comprehensively interpret the constitutional issues in competing rights and the use of proportionality analysis, namely:

- a. Justices must interpret clearly and in detail what is meant by 'the meaning of the interests of the nation and state above personal and group interests'. This aspect must be considered proportionally, and this leading to individual interests that align with

⁴⁶ M Lutfi Chakim, "Freedom of Speech and the Role of Constitutional Courts: The Cases of Indonesia and South Korea," *Indonesia Law Review*, Vol. 10 No. 2 (2020): 191-205. <https://doi.org/10.15742/ilrev.v10n2.605>

the state's interests. It is not permissible to prioritise individual interests over the interests of the nation and state.

- b. Justices must examine the proportionality of citizens' and government's rights and obligations. This must be done, and the rights and obligations of individuals are equal. Justices must not prioritise individual constitutional rights without considering individual obligations. Individual constitutional obligations are not to violate the constitutional rights of other citizens and the obligation to maintain social harmony in society, nation and state.
- c. Justices in assessing competing rights cases must explain the meaning of "*serasi* (harmonious), *selaras* (aligned), and *seimbang* (balanced)" as a standard that lives in the community (the living law). These principles must be concretely in every competing rights case and maintain legal and religious pluralism to create national unity (unity in diversity).

Proportionality analysis in Indonesia requires a more standardised, clear, and measurable assessment, selectivity, and the precautionary principle. It contains several elements that must be fulfilled, including (1) Legitimate aims: laws made must refer to and must not conflict with the values of Pancasila and the 1945 Constitution; (2) Suitability / Rational Connection of moral and religious reason, security, and public interest; (3) necessity / minimal Impairment, the impact caused by the formation of this law; (4) The Balancing Analysis. In the balancing analysis, ideally, Indonesia as a Pancasila legal state in this stage not only conducts a balance test of legal norms but also a balance test of legal values that have been applied so far, namely the value of legal certainty, the value of justice, and the value of legal benefits is often carried out. Hence, in the Indonesian constitutional system, proportionality is based on Article 24 (1), Article 28D (1) (legal certainty and fairness values), and Article 28H (2) on legal expediency value. The MKRI decision must create integrated values for both, but the decision must produce a quality of social harmony.

6. Conclusion

The proportionality test is the foundational principle in global constitutionalism, the ultimate rule of law, and a fundamental judicial review benchmark. Its application is structured and systematic with four stages of the test. In Germany, this includes the legitimate aim, suitability, and necessity balancing analysis. The Canadian model is limitation pressing or substantial, rational connection, minimal impairment, detriments v. benefits (the proportionality of effects). Also, in South Korea, a purpose is legitimate, the appropriateness of the means, the least restrictive, and the balance of interests. In case resolution, the four stages are only sometimes applied, but according to the needs of the analysis. If, at the third stage (necessity/minimal impairment), it is found that the object being tested is unconstitutional, then the argumentation focuses on it. This provision applies to the balancing analysis or proportionality of effects stage. What is different in practice at the US Supreme Court is that the analytical tool is called the balancing test, which focuses on assessing the balance between one norm and another, including clashes of values and interests.

Meanwhile, in MKRI practice, there is a proportional analysis, but it is partial, unstructured, and unsystematic. Therefore, in the future, if MKRI decides on a judicial review case that requires it to assess limitations on the constitutional rights of citizens, MKRI can take best practices from the Constitutional Court in other countries, including Germany and South Korea, where both countries use the proportionality test method by applying four steps in assessing restrictions on citizens' rights. It is necessary to develop a four-stage analysis model based on the Pancasila and the 1945 Constitution, which can be used as a standard in assessing limitations on citizens' rights in subsequent cases

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Conflict of Interest Statement: The author(s) declares that the research was conducted in the absence of any commercial or financial relationship that could be construed as a potential conflict of interest.

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