

REMAINING ALL EARS: ENDING AUSTRALIA'S STRUCTURED PROPORTIONALITY EXCEPTIONALISM

SCOTT CURRIE*

This essay received second place in the Sir Anthony Mason Constitutional Law Essay Prize competition in 2021 and Sir Anthony Mason's personal commendation. It is included here as a non-peer reviewed essay. The essay argues for the next step in using structured proportionality analysis. It suggests that the Australian jurisdiction should look to how other jurisdictions are applying this analysis to better understand it and avoid repeating mistakes.

KIEFEL CJ: I think it is right to say that in *McCloy* it was said that the three-stepped approach - it was not suggested that that was the only criterion. Although the Court has been waiting to hear what other criterion there might be, no one has usefully put anything forward yet.

MS WALKER: I will take that as a challenge.

KIEFEL CJ: But we remain all ears ...¹

I INTRODUCTION

Though the High Court has thrown down the gauntlet, structured proportionality has yet to be displaced. Structured proportionality is an approach to reasoning that clearly outlines what must be considered by the court in adjudicating rights-based issues. In *Palmer v The State of Western Australia*, Gageler J noted the global march of the structured proportionality test, mirroring the snowballing force it has had in the High

* LLB (Hons I), School of Law, University of Tasmania and Editor of the University of Tasmania Law Review for 2022.

¹ *Clubb v Edwards; Preston v Avery* [2018] HCATrans 208 (10 October 2018).

Court.² Most of the High Court now accepts structured proportionality.³ Yet, judicial (and broader) reservations persist.

A powerful concern is that structured proportionality is a doctrine, not a mere tool, thereby importing considerations and rigidity inappropriate for the Australian constitutional landscape. This concern is recently and ably addressed elsewhere.⁴ However, the idea that Australia is uniquely concerned with structured proportionality's nuances remains. This essay uses foreign courts' decisions to address domestically articulated concerns about structured proportionality's use in constitutional analysis. Tapping into this wide pool of judicial experience accords with the best traditions of the common law. The judgments of international apex courts contain a wealth of relevant reasoning, though alloyed with local considerations. Australian courts should be cautious, but 'remain all ears' to these riches.

Briefly, the standard structured proportionality model is comprised of four distinct stages: legitimacy, suitability, necessity, and balancing.⁵ However, different apex courts have 'bent' structured proportionality to their specific circumstances rather than 'uncritical[ly]' adopting it.⁶ A recent adoption and adaptation of structured proportionality occurred in Singapore.

² (2021) 95 ALJR 229, [141] ('Palmer'). For gaining acceptance, compare *Rowe v Electoral Commissioner* (2010) 243 CLR 1, particularly the dissent of Kiefel J (as Her Honour then was), with *Palmer v The State of Western Australia* (2021) 95 ALJR 229 (where Gordon J and Gageler J remained the only holdouts).

³ For Gleeson and Steward JJ's views, see *LibertyWorks Inc v Commonwealth of Australia* [2021] HCA 18, [76]-[85], [247].

⁴ Adrienne Stone, 'Proportionality and its Alternatives' (2020) 48(1) *Federal Law Review* 123; Rosalind Dixon, 'Calibrated Proportionality' (2020) 48(1) *Federal Law Review* 92.

⁵ Juergen Schwartz, *European Administrative Law* (Sweet & Maxwell, rev ed, 2006) [687]; Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 43 *Columbia Journal of Transnational Law* 68. Cf Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press, rev ed, 2010).

⁶ *Roach v Electoral Commissioner* (2007) 233 CLR 162, [17] ('Roach'). For differences see Alec Stone Sweet and Jud Mathews, *Proportionality Balancing and Constitutional Governance: A Comparative and Global Approach* (Oxford University Press, 2019), chs 2 and 3. Also for the impact of localising structured proportionality, consider David Kenny, 'Proportionality Analysis and the Inevitability of the Local: A Comparative Localist Analysis of Canada and Ireland' (2018) 66(3) *The American Journal of Comparative Law* 537.

A *Proportionality: Wither Reasonableness*

In Singapore, ‘the notion of proportionality has never been part of the common law in relation to the judicial review of legislative ... power’.⁷ Singaporean courts assiduously applied a presumption of legislative constitutionality, resulting in no statutory provision ever being invalidated for constitutional right violation.⁸ Significantly, this approach was shed in a recent landmark case in favour of a three-step framework.⁹ In explaining the adoption of the framework, the court stressed that such review was a product of the Westminster separation of powers and it was incumbent upon the ‘judiciary to determine whether [any constitutional right infringement] falls within the relevant purpose’.¹⁰

The Singaporean framework’s first two steps are equivalent to the ‘legitimacy’ stage of structured proportionality.¹¹ The third step asks the court to ensure the right’s impairment ‘falls within [a] relevant and permitted purpose ... established by showing a nexus between the purpose of the legislation [and a] permitted purpose [under the Constitution] ... it is imperative to appreciate that a balance must be found between the competing interests at stake’.¹² This is a composite of the last three stages of structured proportionality, and operates as a ‘reasonableness’ test.

However, the court’s finding under the framework’s last step failed to substantially engage with any ‘balancing’ of competing interests. Rather, it simply stated that the relevant legislation ‘achieves a careful balance’.¹³ The court buttressed this conclusion with ‘necessity’ considerations.¹⁴ That is, there were not equally effective, less intrusive measures the government could have adopted. No attention was given to whether the statute impaired the relevant right more than is permissible given countervailing considerations (including constitutional guarantees). The court’s conclusion obscures two chains of reasoning and their concomitant value

⁷ *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582 (HC), [87] (‘*Chee*’).

⁸ See, eg, *Chee* (n 7) [49]; *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 (CA).

⁹ *Wham Kwok Han Jolovan v Public Prosecutor* [2020] SGCA 111 (‘*Jolovan*’).

¹⁰ *Ibid* [28].

¹¹ *Ibid* [30]-[31].

¹² *Ibid* [32]-[33].

¹³ *Ibid* [48].

¹⁴ *Ibid* [49]-[53].

judgements: why the means employed were not excessive and what benefits were considered sufficient to uphold the statute's validity.

The Singaporean court placed a reasonableness test as the framework's final stage. In trying to analyse the three stages of suitability, necessity, and balancing, the Singaporean approach fails to achieve the benefits of clarity and transparency which structured proportionality offers.¹⁵ Moreover, it lacks clearly defined considerations, permitting a restriction which is not minimally intrusive (and is potentially unbalanced) because the means are well-adapted and rationally connected to its legitimate purpose. The Singaporean decision shows the difficulties in adding too much flexibility by removing structured proportionality's discrete steps.

B Judge as Lawmaker: Deference

The Singaporean approach also highlights the concern that using structured proportionality pushes judges too far into the realm of legislators.¹⁶ Judges in multiple apex courts hesitate to disallow legislation under the 'balancing' stage of structured proportionality.¹⁷ To offset this, courts would misapply structured proportionality, disallowing legislation under the 'necessity' limb but employing 'balancing' techniques.¹⁸ Thus, courts would consider an alternative measure which was less restrictive, but also less effective. This is not permissible under structured proportionality and, by failing to distinctly weigh the limitation against the justification, obscured reasoning. Indeed, the Canadian Supreme Court corrected this misapplication in 2009, after using structured proportionality for 23 years.¹⁹ Reflecting on the adjustment, McLachlin CJ stressed the importance of correctly applying the model to avoid unnecessarily involving the judiciary in legislative decisions.²⁰ Her Honour noted that deference to Parliament was a valid inclusion in the balancing stage but

¹⁵ Aharon Barak, 'Proportionality' in Michel Rosenfeld and András Sajó (eds), *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 738.

¹⁶ See, eg, *Roach* (n 6) [17]; *McCloy v New South Wales* (2015) 257 CLR 178, [339].

¹⁷ This further illustrates that concerns are frequently shared between jurisdictions: Niels Petersen, *Proportionality and Judicial Activism: Fundamental Rights Adjudication in Canada* (Cambridge University Press, 2017), 83–95.

¹⁸ *Ibid* 93.

¹⁹ *Alberta v Hutterian Brethren of Wilson Colony* [2009] 2 SCR 567.

²⁰ Beverly McLachlin, 'Proportionality, Justification, Evidence and Deference: Perspective from Canada' (Speech, Hong Kong Judicial Colloquium, 24 September 2015).

was often overlooked when the initial model was utilised.²¹ This reflects the implementation of judicial restraint within ‘balancing’.²² In delineating where and to what extent deference is granted, structured proportionality clarifies the legislature’s ‘expertise’.²³

The Canadian jurisdiction’s experiences are apposite. For instance, the Australian High Court applies three stages of structured proportionality, eschewing ‘legitimacy’.²⁴ Instead, a similar process, ‘compatibility testing’ is undertaken antecedent to structured proportionality.²⁵ However, this approach negatively impacts judicial clarity and transparency. Currently, there are too many considerations which occur before Australia’s three-stage structured proportionality framework, but which colour all subsequent reasoning. This includes the circumstances that trigger structured proportionality analysis, statutory construction, characterisation of the head of power, and even determination of whether the law’s purpose is ‘compatible with the maintenance of the constitutionally prescribed system’.²⁶ Canadian jurisprudence shows that completing the adoption of the entire structured proportionality framework does not necessarily change the outcome of the analysis. However, it enhances transparency and better separates out distinct considerations.²⁷ Bringing the question of the legitimacy of a measure within the proportionality framework would distinctly identify when structured proportionality applies, characterisation of the question, and compatibility of the measure with the right. This would explicate, for instance, what constitutional questions are resolved through structured proportionality. It

²¹ McLachlin (n 20). See generally Lorian Hardcastle, ‘Proportionality Analysis by the Canadian Supreme Court’ in Mordechai Kremnitzer, Talya Steiner and Andrej Lang (eds), *Proportionality in Action: Comparative and Empirical Perspectives on the Judicial Practice* (Cambridge University Press, 2020) 134; note *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2015] AC 945, [22]–[26].

²² Shipra Chordia, *Proportionality in Australian Constitutional Law* (Federation Press, 2020) 171, ch 3.III.

²³ *Beit Sourik Village Council v Government of Israel* [2004] HJC 2056/04, [48].

²⁴ Shipra Chordia, *Proportionality in Australian Constitutional Law* (Federation Press, 2020) ch IV.

²⁵ See, eg, *McCloy* (n 16) [2].

²⁶ *Brown v Tasmania* (2017) 261 CLR 328, [104] (‘Brown’).

²⁷ Alec Stone Sweet and Jud Matthews, *Proportionality Balancing and Constitutional Governance: A Comparative and Global Approach* (Oxford University Press, 2019) ch 2.

would also infuse subsequent reasoning within the framework with a strong sense of the ‘right’ in issue, enhancing the test’s sensitivity.

Furthermore, the Canadian Supreme Court’s candour on deference promotes transparency as well as demonstrating the ‘strength’ of a right. The latter is a key concern in Australia, given the tension between the limitations on an implied freedom and the extent of a constitutionally conferred power. To what extent does balance between these two considerations differ between heads of power and the implied freedom? The Canadian approach requires such differences to be made explicit.

Relatedly, structured proportionality is criticised in Australia on the basis that it increases a court’s willingness to invalidate legislation. Gordon J raised this concern, suggesting structured proportionality shifts weighting in favour of the ‘right’.²⁸ The idea that structuring proportionality inherently narrows judicial reasoning or discretion is not a uniquely Australian concern.²⁹ The response has been to highlight that only at the balancing stage is the nature of the right itself considered, and that a judge can adduce any number of counterbalancing factors.³⁰ Furthermore, the danger of ‘overweighting’ one side is shared with other tests, including ‘reasonableness’.³¹ However, structured proportionality provides a framework which requires judges to transparently explain their reasoning on distinct questions.³² Thus, the Canadian Supreme Court’s approach to structured proportionality demonstrates its importance in ensuring that all factors are clearly enunciated and considered to ensure analytic completeness. If anything, this reduces the risk of the judge operating as a lawmaker.³³

²⁸ *Clubb v Edwards, Preston v Avery* (2019) 267 CLR 171, [392] (‘*Clubb*’).

²⁹ See, eg, *Clubb* (n 28) [395]; Eirik Bjorge, *Domestic Application of the ECHR: Courts as Faithful Trustees* (Oxford University Press, 2015) ch 6.

³⁰ Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press, 2012) ch 14.

³¹ *Clubb* (n 28) [400]–[401].

³² As does rule-based decision making, for brief consideration, see below discussion of *Hysan* (2016) 19 HKCFAR 372.

³³ See, eg, *RJR MacDonald Inc v Canada (Attorney General)* [1995] 3 SCR 199, [128]–[129].

C Structuring Proportionality: Too Prescriptive

Structured proportionality has also been criticised as binding judges to a rigid mechanism.³⁴ Proponents of this argument view structured proportionality as too prescriptive, in specifying an order of considerations, and too open-ended, in failing to specify how competing considerations are to be balanced.³⁵

Starting with prescription, this argument's core problem is that structured proportionality does not dictate the content of each stage. In South Africa, despite having a constitutionally enshrined structured proportionality test, the Constitutional Court views it as a tool to 'arrive at a global judgement on proportionality and not adhere mechanically to a sequential checklist'.³⁶ Thus, structured proportionality ensures that the court judges the measure 'in the concrete legislative and social setting ... paying due regard to the means which are realistically available ... but without losing sight of the ultimate values to be protected'.³⁷ The Canadian Supreme Court similarly stressed the importance of context.³⁸ In this light, structured proportionality ensures only that certain factors are consistently considered and like considerations compared with like. There is no reason Australia cannot use 'a restrained approach to each stage' where appropriate.³⁹ South Africa demonstrates that such an approach is ground in a sensitivity to the context of the right. For example, the Constitutional Court took a wider approach in considering the right to housing compared with the right to access a social assistance scheme.⁴⁰

This context-sensitivity directly addresses the criticism that structured proportionality does not accommodate common law reasoning because it is too restrictive to permit a case's particulars to be addressed.⁴¹ Canadian

³⁴ See, eg, *Palmer* (n 2) [144]–[145].

³⁵ For instance, Gageler J has made both points: *McCloy* (n 16) [142]; *Brown* (n 26) [160].

³⁶ *S v Manamela* 2000 (3) SA 1, [32]; *S v Makwanyane* 1995 (3) SA 391 (CC), [104].

³⁷ *S v Manamela* 2000 (3) SA 1, [32].

³⁸ *Thomson Newspapers Co. v Canada (Attorney General)* [1998] 1 SCR 877, [87].

³⁹ *Clubb* (n 28) [408].

⁴⁰ *Jaftha v Schoeman* 2005 (2) SA 140 (CC), particularly [35]–[49]; *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC).

⁴¹ See, eg, *Brown* (n 26) [475]–[476]; *Murphy v Electoral Commissioner* [2016] HCA 36, [103] ('Murphy').

Supreme Court justices have consistently engaged with this concern, concluding that structured proportionality is a framework which does not regulate content.⁴² Case-specific elements involved in balancing have ranged from the nature of the regulated activity, to the subjective apprehensions of harm by impacted groups, to whether the efficacy of a particular harm or remedy is scientifically measurable.⁴³ In all these cases the inherent nature and undergirding reason for the constitutional right was a key factor in judicial determination. As Australia embraces that ‘there is no fixed approach’ to structured proportionality, the South African and Canadian jurisdictions provide guidance for ensuring the particulars of the right and the case, not the framework, remain central.⁴⁴

D Structuring Proportionality: Too Open-ended

Justices who dissent on structured proportionality prefer either a general ‘reasonableness’ review or a rule-based approach. The former is *prima facie* more open-ended. This open textured approach promotes greater danger of a ‘wilderness of single instances’ and analytic incompleteness.⁴⁵ Alternatively, there are issues with a rule-based approach, such as Gageler J’s calibrated scrutiny.⁴⁶ This is neatly demonstrated in Hong Kong’s *Hysan Development Co Ltd v Town Planning Board* (‘*Hysan*’).⁴⁷

In *Hysan*, the court developed a constrained ‘balancing’ step, forcing a selection between two standards: ‘no more than necessary’ or ‘manifestly without reasonable foundation’.⁴⁸ This requires courts to engage in categorical decision-making. Worse, it does not allow courts to engage in an investigation of the right being protected. This has become clear in subsequent cases, like *Leung Kwok Hung* (‘*Leung*’).⁴⁹ There was no

⁴² See, eg, *Canada (Attorney General) v RJR-Macdonald* [2007] 2 SCR 610.

⁴³ *R v Keegstra* [1990] 3 SCR 697, [857]; *Thomson Newspapers Co v Canada (Attorney General)* [1998] 1 SCR 877, [91]; *R v Butler* [1992] 1 SCR 452, 508; see also *Rocket v Royal College of Dental Surgeons* [1990] 2 SCR 232, 246–7.

⁴⁴ *Clubb* (n 28) [408]. Cf *Palmer* (n 2) [145].

⁴⁵ *Clubb* (n 28) [407].

⁴⁶ Adrienne Stone, ‘Proportionality and its Alternatives’ (2020) 48(1) *Federal Law Review* 123, Part IV(C).

⁴⁷ (2016) 19 HKCFAR 372.

⁴⁸ *Ibid* [81]–[82], [105]–[107].

⁴⁹ *Leung Kwok Hung v Secretary of Justice* [2020] HKCA 192.

consideration of balance between impairment and benefit, rather the only decision was which standard to apply. The decision between standards is reached, ironically, through balancing.⁵⁰ However, compared to its structured proportionality namesake, the reasoning is less candid and engages with significantly fewer factors. The decision-making in selecting a standard substitutes for consideration under that standard.⁵¹

Arguably, the analytical incompleteness of *Hysan* and *Leung* could be salvaged by increasing the number of categories that a court chooses between. But this would continue to obscure reasoning and constrain contextual sensitivity.⁵² Moreover, it would also fail to address the *Hysan* framework's worst consequence. In both cases, judicial reasoning focuses on which standards are applicable rather than why that approach is desirable in the specific circumstances.⁵³ Thus, in sacrificing flexibility for a little more predictability, the framework loses clarity and candour. These issues would also affect Gageler J's calibrated scrutiny, and there is no reason why that test's considerations could not be applied under current structured proportionality.⁵⁴ Rule-based approaches, particularly when spliced into structured proportionality, sacrifice flexibility and contextual sensitivity for predictability. They also suggest judges' decisions are a mechanical selection of certain prescribed categories. This diminishes transparency of judicial reasoning overall and clarity of the decisions themselves.⁵⁵ 'If balancing judgements are not truly rationally justifiable, proportionality cannot deliver what it promises'.⁵⁶

⁵⁰ Ibid [159]–[161].

⁵¹ Note the 'also' at *Leung* (n 49) [240]; Rehan Abeyratne, 'More Structure, More Deference? Proportionality in Hong Kong' in Po Jen Yap (ed.), *Proportionality in Asia* (Cambridge University Press, 2020) 25.

⁵² For instance, where would it be appropriate to consider federal-state balance, a key question in constitutional COVID cases?

⁵³ *Hysan* (n 47) [124]–[130]; *Leung* (n 49) [156]–[164].

⁵⁴ Adrienne Stone, 'Proportionality and its Alternatives' (2020) 48(1) *Federal Law Review* 123, pt IV(C).

⁵⁵ See generally Moshe Cohen-Iliya and Iddo Portat, *Proportionality and Constitutional Culture* (Cambridge University Press, 2013); Charles-Maxime Panaccio, 'In Defence of Two-Step Balancing and Proportionality in Rights Adjudication' (2011) 24 *The Canadian Journal of Law and Jurisprudence* 109.

⁵⁶ Alec Stone Sweet and Jud Matthews, *Proportionality Balancing and Constitutional Governance: A Comparative and Global Approach* (Oxford University Press, 2019) 57.

Fundamentally, the decisions from Hong Kong demonstrate a preference for a legal mechanism that generates predictable outcomes. However, the reasoning that leads to the outcome, selecting between standards, remains uncertain. Conversely, structured proportionality focuses on a framework of mandatory considerations, which delivers outcomes in a more predictable manner.

E Predictability

Predictability, like flexibility, is a desirable quality of legal reasoning. The necessity of predictable legal operation is illustrated in fast evolving situations, such as the COVID pandemic, but is also needed to maintain the separation of powers. The High Court must be clear on how the Constitution will evaluate statutes.⁵⁷ The legislature cannot check with the Court whenever it legislates on matters touching on, for instance, political communication. Where judicial decision-making lacks certainty, the number of constitutional challenges will increase, likely pushing the judiciary into the legislature's realm.

Structured proportionality is particularly beneficial for evidence-based law making. For example, consider the legislative COVID response which was ground on health data. Structured proportionality cleanly organises evidence, emphasising to lawmakers the importance of separating out evidence for the means they pursued as being rationally connected to the end, for the means' necessity (and efficacy), and evidence which illustrates marginal benefits. An epidemiologist will better appreciate such requirements rather than one for 'reasonably appropriate and adapted' measures.⁵⁸ The benefits go both ways. Consider Kiefel CJ's statements: 'we are not epidemiologists' and 'I mean, seriously, what is the Court to do with all of this data?'.⁵⁹ Structured proportionality's transparent structure can organise relevant considerations within clear steps of analysis, assisting both legislators and courts. Transparency, in turn, promotes certainty and the predictable operation of the law.

⁵⁷ For an overview, see Shipra Chordia, *Proportionality in Australian Constitutional Law* (Federation Press, 2020), chs V and IX; see also *Bank Mellat v Her Majesty's Treasury* [No 2] [2014] AC 700, [72]–[74].

⁵⁸ Broadly on this, and many other, points (though focused on discrimination): *Palmer* (n 2) [261]–[274]; also note *Palmer v Western Australia* [2020] HCATrans 087.

⁵⁹ *Palmer v Western Australia* [2020] HCATrans 087.

II CONCLUSION

Structured proportionality strikes a difficult balance between predictability and flexibility. The application of this test in Australia could be usefully informed by the considered work of courts in common law jurisdictions that have a longer tradition of its use. This includes understanding unsuccessful developments that indicate paths that should be left untaken.

The growing Australian recognition of structured proportionality as an analytic tool shows it does not mark the ‘end of law’ in spaces where qualified ‘rights’ (as well as legislative powers and implied freedoms) are adjudicated. Instead, it emphasises that the judge making and elucidating their decision is most important outcome. Structured proportionality is not a panacea. Difficult questions will arise. *Palmer* indicated one such question: how does structured proportionality treat changing circumstances or facts?⁶⁰ This is a thorny problem, but it is not endemic to Australia. The Australian jurisdiction should monitor developments in other countries, particularly other common law jurisdictions to ensure mistakes are not repeated.

There should be greater focus, not on alternatives to structured proportionality, but the alternate ways it has been applied. This is what the Australian jurisdiction needs to listen for.

⁶⁰ Though foreshadowed in *Clubb* (n 28) [470]–[471].

