The Doctrine of Proportionality: A Comparative Analysis of the Proportionality Principle Applied to Free Speech Cases in Canada, South Africa and the European Convention on Human Right and Freedoms

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Abstract

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This thesis argues that despite the criticism often levied against proportionality it is a sound and appropriate tool for reaching clear, justified and defensible judgments that also provide an adequately fair degree of predictability and certainty. The thesis argues that the criticisms of incoherent, inconsistent, and unprincipled judgments are not the result of proportionality as an analytical framework but rather by the doctrine's misapplication. The author suggests that the courts are misapplying proportionality review in three primary ways: (1) The test they employ does not contain all four necessary components of proportionality – proper purpose, rational connection, necessity and proportionality *stricto sensu* (balancing); (2) courts are engaging in balancing at inappropriate stages of the analysis; (3) and courts are not being upfront about how they are conducting the final proportionality *strico sensu* stage. This thesis suggests that each component of proportionality requires a particular and specific investigation, which must be followed in order for the analysis to be properly applied. If all four components are not included in the test, then this makes the proper analysis impossible. The author argues that the stages of proportionality analysis should be carried out as a series of distinct steps in sequential order employing balancing techniques only in the final proportionality *stricto sensu* stage of the analysis.

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INTRODUCTION

When a court is called upon to determine when an interest is such that a fundamental right must be limited, or asked to draw a line between two conflicting fundamental rights, it must employ some form of decision-making framework that will guide it to a reasoned and justifiable determination. In most of the modern world, this framework is proportionality analysis. Having originated in German administrative law during the mid twentieth century,[1] proportionality has since spread to "virtually every effective system of constitutional justice in the world, with the partial exception of the United States."[2] The doctrine of proportionality has also been incorporated by treaty based legal systems such as the European Union (EU), the European Convention on Human Rights, and the World Trade Organization.[3]

Proportionality has also been highly criticized by some legal scholars, particularly from within American legal circles. The criticism has largely focused on the final proportionality *stricto sensu* (balancing) stage of the analysis, which they increasingly view as being synonymous with proportionality review. No area of law produces more criticism from these scholarly circles than does constitutional adjudication. Proportionality is seen as too

[1] Although German judges and scholars credited with the modern comprehensive approach to proportionality, proportionality as a legal principle appears in numerous legal systems dating back to antiquity. *See* Eric Engle, *The History of the General Principle of Proportionality*, DARTMOUTH L.J. 2012 (forthcoming); Jonas Christoffersen, FAIR BALANCE: PROPORTIONALITY, SUBSIDIARITY AND PRIMARITY IN THE EUROPEAN CONVENTION OF HUMAN RIGHTS 33-34 2009 (stating that "ideas more or less closely associated with present day proportionality" are found, inter alia, in Greek and Roman law).
[2] Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72, 74 (2008).
[3] *Id*.

unpredictable, to unprincipled and too ad hoc to adjudication disputes involving constitutional rights with the acceptable degree of certainty and predictability that this area of law requires.[4]

This thesis argues that the area of fundamental rights and freedoms and the government's power to limit those rights and freedoms is the one area of law where proportionality is most appropriate. I argue that the proportionality review, as a framework for managed balancing, is a sound and appropriate tool for reaching clear, justified and defensible judgments that also provide an adequately fair degree of predictability and certainty. I argue that the criticisms of incoherent, inconsistent, and unprincipled judgments are not the result of proportionality as an analytical framework but rather by the doctrine's misapplication. There are three primary ways that the courts are misapplying proportionality review. First, the test they employ does not contain all four necessary components of proportionality – proper purpose, rational connection, necessity and proportionality *stricto sensu* (balancing). Second, courts are engaging in balancing at inappropriate stages of the analysis. Third, courts are not being upfront about how they are conducting the final proportionality *stricto sensu* stage.

This thesis suggests that each component of proportionality requires a particular and specific investigation, which must be followed in order for the analysis to be properly applied. If all four components are not included in the test, then this makes the analysis impossible. Secondly I suggest that the stages of proportionality analysis must be carried out as a series of distinct steps in sequential order employing balancing techniques only in the final proportionality

[4] *See e.g*. Stavros Tsakyrakis, *Proportionality: An Assault on Human Rights?,* 7 INT'L J. CONST. L. 468, 470 (2009) ("The view that constitutional rights are nothing but private interests whose protection depends, on each occasion, on being balance with competing public interests, in fact renders the constitution futile."); Vlad Perju, *Proportionality and Freedom – An essay on Method in Constitutional Law*, BOSTON COLLEGE LAW SCHOOL FACULTY PAPERS (2011). (stating that proportionality is a method to limit not protect rights). Available at: http://works.bepress.com/vlad_perju/3; *See* T. Jeremy Gunn, *Deconstructing Proportionality in Limitations Analysis*, 19 EMORY INT'L L. REV. 465, 471 (2005).

stricto sensu stage of the analysis. Finally I suggest that some outer parameters can be established for the proportionality *stricto sensu* stage of the analysis in order to aid potential litigants and other legal actors in predicting how the court will go about their balancing analysis and what types of things will be taken into consideration. I believe this can be done without adversely affecting either the flexibility of the component or judicial discretion.

In order to support the above, this thesis will analyze proportionality review and principle of balancing that is at its core through both and examination of theory and application. Case examination will be restricted to a specific subset of cases that concern the relationship between individual rights and government intrusion. This subset of cases will be where a legislative measure has been enacted that places a restriction on the protection of a constitutionally protected right for the purposes of realizing another constitutionally recognized principle. This thesis has selected freedom of speech and expression as the right that will be limited for the purposes of the case evaluation. I have selected this right because it is universally held as being among the most important rights in a democratic society and I wish to see how it fares on different variations of proportionality review. The thesis is broken into three chapters. Chapter one will examine the principle of balancing and its role both in law generally and in proportionality analysis. Chapter two will examine proportionality review and its various components. Chapter three will examine how three courts of law resort that are either constitutional courts, or constitutional-like in some meaningful sense, have applied proportionality to their cases.

I wish to stress that I am concerned with the application of the proportionality doctrine as a framework to guide adjudication. Therefore, I do not argue that courts should give more or less weight to any particular government interest nor do I suggest that some governmental

interests are never of sufficient importance to override a fundamental right. These are important decisions that will no doubt vary from time to time and place to place depending on the needs of a given society. Additionally, I am concerned with the aspects of this doctrine where the court must determine whether an infringement or limitation is justified. Consequently, I do not address issues related to the steps customarily employed by a court before reaching that stage of the analysis. In other words, I am unconcerned about how the court reached its determination that the right is being or has been infringed or whether the infringement was "prescribed by law." Finally, while I argue for a more structured, coherent, and consistent application of proportionality review by courts, I do not pretend that constitutional and human rights adjudication can be reduced to "some rigid or simple formula" that can be applied at all times and in all contexts.[5] Rights adjudication is always context sensitive. I do however believe that both rights and general public interests are best served by faithful application of a coherent doctrine that consistently produces reasoned and defensible judgments.

[5] Alexandre Charles Kiss, *Permissible Limitations on Rights*, *in* THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 290 (Louis Henkin ed., 1981).

Chapter 1. BALANCING IN CONSTITUTIONAL ADJUDICATION

The term balancing assumes different meanings in different contexts. In can be an interpretive theory or an analytical process for resolving disputes. It can be a highly abstract rule or a specific concrete process. Much of the literature involving the role of balancing in constitutional adjudication does not accurately draw the distinction between these shifting contextual meanings or properly describe how they interact with each other.[6] The result has been an endless stream of literature that presents balancing as a single methodological concept that is either applied in contexts for which the particular mode of balancing described is not suited or applied at varying degrees of abstraction that are seemingly devised to serve the authors purpose of asserting that it does or does not work in a particular legal context.

In light of this unending scholarly dialectic, I wish to devote this chapter to elaborate on how these concepts are understood and used in this thesis. I find this necessary for two reasons. First, I think it is impossible to understand the proper application of proportionality review in a particular context without also understanding the function of the concept that is at its core in that

[6] *See e.g*. T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987); Frank M. Coffin, *Judicial Balancing: The Protean Scales of Justice*, 63 N.Y.U. L. REV. 16 (1988); Robert F. Nagel, *Liberals and Balancing*, 63 U. COLO. L. REV 319 (1992); Robert F. Nagel, *The Formulaic Constitution*, 84 MICH L. REV. 165 (1985); Grégoire C. N. Webber, Proportionality, *Balancing, and the Cult of Constitutional Rights Scholarship*, 23 CAN. J. L. & JURISPRUDENCE 179 (2010); Rev. Thomas A. Russman, *Balancing Rights: The Modern Problem*, 26 CATH. LAW. 296 (1981); Kai Möller, *Balancing and the Structure of Constitutional Rights*, 5 INT'L J. CONST. L 453 (2007); Stephen E. Gottlieb, *The Paradox of Balancing Significant Interest*, 45 HASTINGS L.J. 825 (1994); Kathleen M. Sullivan, *Governmental Interests and Unconstitutional Conditions Law: A Case Study in Categorization and Balancing*, 55 ALB. L. REV. 605 (1992) *[hereinafter* Sullivan*, Categorization and Balancing]*; Kathelen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV 293 (1992) [*hereinafter*, Sullivan, *Post-Liberal Judging*]; Francois Du Bois, *Rights Trumped? Balancing in Constitutional Adjudication*, 2004 ACTA JURIDICA 155 (2004); Basak Cali, *Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions*, 29 HUM. RTS Q. 251 (2007).

same context. Second, of the three assertions that I have offered regarding the court's application of proportionality review in the context of balancing rights protections *vis-à-vis* public interests, two of them pertain directly to how I view the courts' engagement in balancing.

1.1 Balancing Rights and Public Interests in a Constitutional Democracy

The relationship between a democratic society and its individual members is one of extraordinary complexity. The proper protection and realization of individual rights depends upon the on existence of a democracy committed to the rule of law. The existence of a democracy committed to the rule of law is dependent upon the ability of its members to realize their individual rights. Without one, the other cannot exist.[7] Balancing the need for the protection of rights on the one hand and the need for ensuring the proper functioning of the democratic system from which those rights derive their protection on the other is central to this complex relationship. On some occasions, this balance requires that the extent of protection afforded to a right secured by a system's constitutional text be limited by a measure that seeks to promote other constitutionally recognized values. The relationship between a society and its democratic government is based upon this understanding.[8] This understanding is reflected in the constitutional text itself, which provides, for most rights, that the right may be limited under certain specified circumstances. The constitutions of Canada[9] and South Africa,[10] as well as

[7] Aharon Barak, Proportionality: Constitutional Rights and their Limitations 472 (2012) (Democracy, the rule of law and human rights are inseparable. Without democracy and the rule of law there are no human rights, and without human rights there is no democracy and rule of law") [hereinafter Barak, Proportionality I]

[8] *Id.*

[9] "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Canadian Charter of Rights and Freedoms, §1 (1982).

Article 10 of European Convention on Human Rights (ECHR),[11] all of which are relevant to this thesis, codify this relationship.

It would not be consistent however with our notions either rights or democracy if the understanding which defines the relationship ended here. The mere existence of another constitutionally recognized value does not alone "justify the use of any means of having it realized."[12] The relationship between the individual and the state requires the realization of the other constitutional value be of sufficient importance to warrant the limitation on the protection of the specific right in question in a particular context. In order to make such a determination, a method must exist to compare the relative importance of realizing that constitutional value against the importance of not limiting the right.[13] This requires balancing.

1.2 BALANCING

To determine when a particular value can be limited to obtain the realization of another requires a rule. This rule in turn establishes the parameters for how the rule may be applied in specific cases. The two are interconnected. Aharon Barak refers to these as the "basic balancing

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[10] "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation' the relation between the limitation and its purpose; and the less restrictive means to achieve the purpose." CONST. S. AFR. §36.1.

[11] "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary." Council of Europe, CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, Art. 10, Nov 4, 1950, 213 U.N.T.S. 222 [*hereinafter* ECHR}

[12] Barak, PROPORTIONALITY I, *supra* note 7 at 364.

[13] *Id*. at 349.

rule" [14] and "specific balancing rule."[15] Although my use of these terms will not describe concepts quite as thorough as his, I find them apt descriptors for what I wish to convey and will therefore appropriate them for the purposes of this discussion.

1.2.1 *The Basic Rule of Balancing*

The basic rule of balancing operates at a high level of abstraction. It provides for the outer boundaries of how we manage the existence of competing values within a society. We turn to this basic rule whenever we have a public interest for which its realization requires imposing a limitation on a constitutional right. Perhaps the most well known explanation of this basic rule is Robert Alexy's Law of Balancing, which holds that "the greater the detriment to one principle, the greater must be the importance of satisfying the other."[16] This is determined by breaking balancing down into three stages.[17] The first stage involves a determining the "degree of non-satisfaction of or detriment to, a first principle."[18] The second stage assesses the "importance of satisfying the competing principle."[19] Finally, the third stage "establish[es] whether the importance of satisfying the latter principle justifies the detriment to or non-satisfaction of the former."[20] As this thesis examines only the specific situation where a legislative act which seeks to promote a constitutionally recognized value and in so doing places a limitation on the protection of a constitutionally protected right we will analyze this general rule in that context.

[14] *Id*. at 362.
[15] *Id*. at 368.
[16] Robert Alexy, A THEORY OF CONSTITUTIONAL RIGHTS 102 (Julian Rivers trans. 2002) [hereinafter Alexy, TCR].
[17] Robert Alexy, *Balancing, Constitutional Review, and Representation*, 3 INT'L J. CONST. L. 572, 574 (2005) [*hereinafter* Alexy, *Balancing*].
[18] *Id*.
[19] *Id*.
[20] *Id*.

Thus, according to Alexy, for the purposes of this thesis, we must compare the "intensity of the interference"[21] to the right to the "degree of importance"[22] of realizing the other value.

1.2.1.1 The degree of non-satisfaction of or detriment to constitutionally protected right

Determining the intensity of interference to the specific right in question is not as complicated as it may initially sound. We must look at the degree of protection afforded to the right prior to the existence of the legislative measure as compared to the degree of protection afforded to the right after the enactment of the measure. Detriment to the right is thus viewed in terms of harm. How much harm is done to the protection of the right given the level of protection before and after the enactment of the law? Aharon Barak suggests that the importance of the specific right in question will influence the level of harm suffered.[23] This of course presumes that not all constitutionally protected rights are equal, a presumption for which there is no legal consensus, but with which I agree.[24] Therefore a limitation on a right that has an elevated level of importance in a given society due to that society's unique "social and cultural history," such as dignity and equality in German and South African constitutional orders, would result in a greater harm than a lesser-valued right.[25] Similarly, the role of the right in a particular

[21] *Id.* at 574.
[22] *Id.*
[23] Aharon Barak, *Proportionality* in ***THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW*** 738-755, 746 (2012) (comparing his balancing theory to Alexy's which does not account for varying degrees of importance to different rights) [*hereinafter* Barak, PROPORTIONALITY II]; *but see* Jürgen. Schwarze, **EUROPEAN ADMINISTRATIVE LAW** ch. 5 (1992) (describing the continental European conception of proportionally as treating rights as indistinguishable from other interests); Walter van Gerven, *The Effect of Proportionality on the Actions of Member States of the European Community: National Viewpoints from Continental Europe* in THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE 37 (1999) (also describing rights as indistinguishable from other interests).
[24] Barak, PROPORTIONALITY II at 745-746.
[25] *Id.* at 746.

constitutional system can have greater or lesser importance based on its relationship to other rights. "A right that serves as a precondition to the existence and operation of another right" such as the right to life or the right of political expression would presumably suffer greater harm from a limitation than one which does not.[26] These are value judgments that will vary from society to society but which can be made and I think adequately defended.

1.2.1.2 The importance of realizing the constitutionally recognized value

Just as the detriment to the constitutionally protected right should be viewed in terms of harm to give it a normative dimension, the importance of realizing the conflicting constitutionally protected value should be viewed in terms of the benefit that will be gained by society if the value is realized *to the extent* that the measure seeks to promote it.[27] This is an important point that is frequently lost in discussions regarding balancing. We do not seek to compare the relative importance of the conflicting value to the relative importance of the specific right being limited. Nor do we seek to compare the relative importance of fully realizing the conflicting value with the harm suffered by limiting the right unless the legislative measures seeks to fully realize the conflicting value, which will hardly if ever be the case. Thus when determining the degree of importance of the conflicting constitutionally recognized value we determine only the importance of the degree to which the legislative measure seeks to further that value.[28]

Much like the importance of a specific right may vary the resulting determination of harm should a limitation on the protection of that right be imposed, the importance of the conflicting

[26] *Id.*
[27] *See,* Barak, PROPORTIONALITY I, *supra* note 7.
[28] *Id*. at 358 ("[T]he social importance of [the public interest] is determined as per the marginal social importance gained by their fulfillment compared with the previous situation…").

constitutionally recognized value may vary the determination of the benefit obtained as well. Values that share the same normative status in the legal system, here being constitutionally recognized within the limitation clause, do not necessarily share the same degree of importance.[29] Therefore an evaluation must be made regarding its "societal value in the totality of societal values" and "on the national scale of values."[30] Finally, the benefit gained by society may be influenced by both the likelihood that the measure will actually achieve its intended aim and the society's temporal need for that value to be realized. An urgent need for the realization of the constitutionally protected value would thus award a greater benefit to an incremental gain toward that end than perhaps a larger gain to a lesser important value. Likewise a measure that is less likely to achieve its intended aim is similarly less likely to confer a benefit than one which is more likely to achieve its intended aim. These again are value judgments, with the exception of likelihood that could perhaps be supported by empirical data, which will vary from jurisdiction to jurisdiction based on the unique cultural and social history of the society.

1.2.1.3 Whether the importance of realizing the constitutionally protected value justifies the detriment to the constitutionally protected right

The detriment to the specific right can now be compared to the importance of realizing the constitutionally recognized value according by comparing the harm to the right to the benefit gained by the legislative measure. To construct the basic law in a more rule like formulation we can say that:

> The limitation on the protection of a constitutionally protected right is justified to satisfy the realization of a constitutionally recognized value if:

[29] *Id*. at 350.
[30] Bernhard Schlink, *Proportionality* in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 718-737, 724 (2012).

A. The harm caused by the limitation, taking into account
    a. The degree (intensity) of the intrusion and;
    b. The importance of the specific right in question to the particular society and;
    c. The role of the right in relationship to other constitutionally protected right

is less than

B. The benefit to be gained by the legislative measure taking into account:
    a. The importance the particular society attached to the specific constitutional value in question and;
    b. The degree of realization that the legislative measure intends to achieve and;
    c. The likelihood that the measure will attain its intended aim and;
    d. The temporal societal need for the specific constitutionally recognized interest to be to be realized.

1.2.2 *Specific Balancing*

The boundaries established by the basic rule of balancing, as described above, guide the application of balancing in the context of each specific case.[31] Unlike the basic rule of balancing that exists at a high level of abstraction, specific balancing operates at a low level of abstraction by inserting the relevant data particular to the case it into the formula described in the basic rule of balancing above.[32] From specific balancing we derive a determination as to whether, in the particular case being considered, the measure is proportional, that is there exists an adequate congruence between the benefits gain by the legislative measure and the harm caused by the right under a particular set of fact. This is ad hoc balancing and the final stage of proportionality analysis (proportionality *strict sensu*) that will be discussed further in the next chapter. It is important to highlight that contrary to popular belief, ad hoc balancing is not simply an open

[31] Barak, PROPORTIONALITY I, *supra* note 7 at 367.
[32] *Id*. at 368.

ended all things considered test but rather follows a particular general rule. Like the basic rule of balancing, specific balancing is "value laden in nature."[33]

1.2.3 *Structured Balancing*

Some scholars have made proposals designed to provide balancing with a greater degree of structure to guide decision-makers in formulating specific balancing rules.[34] Aharon Barak, for example has proposed an intermediate level of balancing which would operate between the basic abstract rule, but at a high level of generality than specific balancing and. This intermediate level of balancing, according to Barak, "would translate the basic rule of balancing into rules of balancing in principle…"[35] He gives the example of a law limiting freedom of political expression that has as its purpose to protect public order. At the "principle" balancing stage, according to Barak, a principle that such limitations may only be warranted to "avoid widespread, immediate harm to the public order" or example.[36] While admittedly I don't fully understand how this intermediate level of balancing he proposes would work, it would seem to have the effect of establishing some outer parameters or limitation on how specific balancing could be applied. To make the ad hoc balancing stage mildly less ad hoc.

Stefan Scottiaux and Gerhard van der Schyff, have proposed a more structured approach to the various stages of proportionality analysis more generally and as applied by the European Court of Human Rights. While their particular focus seemed to be on the establishing some parameters for the "democratic necessity test" and the "margin of appreciation," they also seem to suggest that the ad hoc balancing be structured in such a way that it provides guidance on

[33] *Id*. at 342
[34] *See* Barak, PROPORTIONALITY II at 747; Scottiaux & Van der Schyff, supra note 37 at 130.
[35] Barak, PROPORTIONALITY II at 747
[36] *Id*.

"what will be taken into account," and "how much weight [will be] attached to the different rights and interests at stake."[37]

I think that many of the concerns about what is taken into account and how various principles are weighed could be eliminated if courts would adequately explain how they are balancing and, in their opinions, clearly state the principles being balanced and why they are attaching varying degrees of importance to one or the other. Besides serving as a justification for their balancing exercise, thus not giving the illusion that it is a "whitewash for some [unfair] process,"[38] it also reveals the importance how the court views particular rights and values with regard to their social importance, which may or may not accurately reflect the degree of importance held by the society at large. If courts are balancing based on a false sense of the social importance of the competing values there should be some opportunity for lawmakers or the public at large to correct that false perception so that the judgments more accurately reflect the views held by the general society, when it can without sacrificing a minority upon the alter of the court. No such correction could ever take place however if neither the lawmaker nor the general public knows what the court believes that society thinks.

While I do believe that better explanation of the specific balancing process is needed however, I do agree with the above idea that some out parameters or structure, can and should be established to specific balancing which would provide greater clarity and certainty to both law-makers and potential litigants without adversely effecting the ad hoc and flexible nature of the test. For example a both lawmakers and potential litigants should know if the court in going to

[37] Stefan Scottiaux & Gerhard van der Schyff, Methods of International Human Rights Adjudication: *Towards a More Structures Decision-Making Process for the European Court of Human Rights*, 31 HASTINGS INT'L & COMP. L. Rev. 115, 137 (2008).
[38] Gottlieb, *supra* note 6 at 840.

balance at a high level of generality (*in abstracto*) or more concretely (*in concreto*). This was one of the disagreements between the majority and minority in *Leyla Sahin v. Turkey,*[39] which addressed regulations regarding the wearing of Islamic headscarves. The dissent wrote that the review should be conducted *in concreto*, which would have looked at the how the limitation affected the litigant in particular, instead of the abstract review embarked on by the majority which focused on the overall general situation in a fashion somewhat detached from the litigant standing before them.[40]

It is quite obviously preferable for courts to balance at the most narrow level possible, at the point of conflict,[41] as the term is used, and it is more protective of rights generally. The state bears a greater burden when it has to address specific facts instead of making general arguments that are "not open to any real dispute."[42] Nevertheless, there may be instances where a more abstract review is warranted because the nature of the dispute is the statutes general effect.[43] A court may also disregard the particulars of a given case and instead address the litigant's complaint and the limitation of the right more abstractly "when their aim is providing guidance for future cases." This is most likely tied to how deferential the court is to the legislative body. When a legislature enjoys substantial deference regarding the means it chooses to place a limitation on the protection of a right, the court is less likely to focus on particulars than it is general issues.[44] Nonetheless, the key point here is that a court should be clear from the beginning what type of situations may warrant such a balancing exercise. Perhaps this could be

[39] *Leyla Sahin v. Turkey*, 2005-XI Eur. Ct. H.R. (Grand Chamber).
[40] *Id*. at ¶ 2 (dissenting opinion)
[41] Barak, PROPORTIONALITY I, *supra* note 7 at 349
[42] Scottaiux & Schyff, *supra* note 37 at 143.
[43] Schlink, *supra* note 30 at 726 (discussing the level of generality a court examine an instance where a legislative minority is challenging the constitutionality of a legislative measure passed by the majority).
[44] *Id*. at 727

accomplished through the formulation of some form of balancing principle or rule. Such an idea would be an interesting topic to explore in greater detail but it would not be appropriate to do so here. For now I only wish to point out that it would appear possible, and perhaps even desirable, to establish parameters or rules that govern ad hoc balancing and that those rules need not undermine its flexible nature or diminish judicial discretion.

Chapter 2. PROPORTIONALITY REVIEW AS MANAGED BALANCING

The relationship between the individual and the state and between rights and democracy requires more than that a limitation on a constitutionally protected right and the realization of other values is balanced according to their relative weights. Were it to be otherwise, constitutions need only say "The legislature may do as it pleases so long as it is proportional" (meaning balanced in the narrow sense). A proper, desirable, and admirable purpose alone cannot be the basis for constitutionality. The relationship also recognizes that some means of attempting to achieve that balance are unacceptable. Where certain means are not categorically prohibited, governments have an obligation to select one that is best suited to accomplish the intended aim while not placing unnecessary burdens on society or its individual members.[45] This necessarily entails some form of means-ends analysis. This is the role of proportionality analysis.

Proportionality review is both "methodological tool"[46] and an "analytical structure."[47] It is a systematized approach that "emphasizes the need to rationally justify a limitation on a constitutionally protected right"[48] by first identifying the end of a challenged measure and then turning to an "inquiry of that measure's quality as a means to that end"[49] giving the rather

[45] *See* Jeremy Kirk, *Constitutional Guarantees, Characterisation and the Concept of Proportionality*, 21 MELBOURNE UNIV. L. REV. 1, 4 (1997) (proportionality balances "the achievement of some legitimate government end and the protection of rights and interests from undue government regulation").
[46] Barak, PROPORTIONALITY I, *supra* note 7 at 132.
[47] Sweet & Mathews, *supra* note 2 at 74-75.
[48] Barak, PROPORTIONALITY I, *supra* note 7 at 458.
[49] Schlink, *supra* note 30 at 721.

abstract notion of proportionality a concrete quality.[50] It does this by requiring four distinct yet interrelated components to be analyzed in stages: proper purpose (the legitimacy), rational connection (the fitness or suitability of the measure), necessary means (the necessity of the measure) and "a proper relation between the benefit gained by realizing the proper purpose and the harm caused to the constitutional right" (the proportionality of the measure).[51] A legislative measure must pass each of these elements to be constitutional. By centering a means-ends analytical structure on balancing, proportionality review can ensure that the means is examined both in relation to the purpose sought and in relation to the constitutional right implicated thus requiring that a valid measure withstand both.[52]

2.1 THE ELEMENTS OF PROPORTIONALITY REVIEW

Proportionality review is triggered once a prima facie case is made that a constitutionally protected right has been infringed by a legislative measure.[53] As mentioned earlier, the analysis consists of four stages, which should be conducted sequentially. This way the decision maker is required to "think in stages…distinguish[ing] between questions relating to the right's scope and those relating to the justification of limits on its realization and its protection."[54] It also forces the decision maker to "think analytically," ensuring that things that should be considered are, and

[50] Barak, PROPORTIONALITY I, *supra* note 7 at 132.
[51] *Id*.; Gonzalo Villalta Puig, *Abridged Proportionality in Australian Constitutional Review: A Doctoral Critque of the Cole v. Whitfield Saving Test for Section 92 of the Australian Constitution* 11, presented at the VIIth World Congress of the International Association of Constitutional Law, Athens (2007).
[52] Barak, PROPORTIONALITY I, *supra* note 7 at 132; Gunn, *supra* note 3 at 469-70
[53] Sweet & Mathews, *supra* note 2 at 75.
[54] Barak, PROPORTIONALITY I, *supra* note 7 at 460; *see also* M. Khosla, *Proportionality: An Assault on Human Rights? A Reply*, 8 I. CON. 298 (2010).

that they are deliberated in their proper time and place.[55] Before a court begins proportionality review, it must satisfy three preliminary steps.[56] Because proportionality review is applied when there are conflicting interests,"[t]he first two steps are to identify each of [those] interests."[57] The third step involves determining the "level of intensity with which the test will be applied" as each stage of the test may be assessed either "rigorously or deferentially."[58]

2.1.1 *Proper Purpose*

The proper purpose stage is an assessment of the legislative measures validity. It is a threshold requirement. It recognizes the notion that "not every purpose can justify a limitation on a constitutional right."[59] It seeks only to answer the question of whether the specific right in question can be limited to realize the value underlying the legislative measure.[60] It does not involve an examination of the scope of the limitation, the means used, or the relationship between the benefit gained and the injury incurred.[61] It therefore does not involve balancing.

For the purpose of the legislative measure to be proper it requires a constitutional foundation, which may be either explicitly or implicitly found in the constitutional text.[62] Explicit proper purposes are found in the constitutional text as part of the limitation clause, as is the case of the Canadian Charter of Rights and Freedoms[63], the Constitution of the Republic of

[55] Barak, PROPORTIONALITY I, *supra* note 7 at 461.
[56] Kirk, *supra* note 45 at 4.
[57] *Id*.
[58] *Id*.
[59] Barak, PROPORTIONALITY I, *supra* note 7 at 245;
[60] *Id*. at 246-47; Sweet & Mathews, *supra* note 2 at 75.
[61] Barak, PROPORTIONALITY I, *supra* note 7 at 246.
[62] *Id*. 246, 251
[63] "The Canadian charter of rights and freedoms guarantees the rights and freedoms south out in it subject only to such reasonable limits prescribed by law as can be *demonstrably justified in a*

South Africa[64] and the European Convention on Human Rights and Freedoms.[65] Explicit improper purposes may also be found in the constitutional text in the form of absolute rights such as freedom from torture or slavery, which are categorically excluded a proper purposes. Implicit purposes are as "constitutionally valid…as an explicit [purpose] is…[and are] evident from the principles of democracy and the rule of law."[66] Such implicit proper purposes may be those related to free and fair elections, separation of powers, national security, public order, the continued existence of the democratic state itself and other "collective goals of fundamental importance" to the proper functioning of the democratic state.[67]

Legislative measures rarely fail proportionality review at this stage.[68] This is no doubt in part to the fact that legislatures are generally not inclined to engage in the time consuming

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free and democratic society." CANADIAN CHARTER OF RIGHTS AND FREEDOMS § 1 (emphasis added).

[64] "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is *reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom*…" Const. S. Afr. Sec. 36.1 (emphasis added).

[65] "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are *necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary*." Council of Europe, **CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS**, Art. 10, Nov 4, 1950, 213 U.N.T.S. 222 (emphasis added).

[66] Barak, PROPORTIONALITY I, *supra* note 7 at 246.

[67] *R. v. Big M Drug Mart Ltd*., [1985] 1 S.C.R. 295, 352 (Can.).

[68] *See, e.g.*, Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 U. TORONTO L.J. 383, 388-93 (2007) (comparing the application of this step by German and Canadian Courts, Grimm notes that even though Canada has a more strict approach to this first stage of analysis, requiring a "purpose of sufficient importance" as opposed to the German approach which requires only that the purpose not be prohibited by the constitution, measures rarely fail at this early stage in either jurisdiction); Aharon Barak, *Proportional Effect: The Israeli Experience*, 57 U. TORONTO L.J. 369, 371 (2008) (noting that the Israeli Supreme Court has never invalidated a law for lacking a legitimate purpose) [*hereinafter* Barak, *Israeli Experience*];

process of drafting and passing measures that manifestly serve no legitimate purpose or pursue transparently unconstitutional ends such as discrimination toward a particular ethnic or religious group.

2.1.2 *Rational Connection (also referred to as the suitability or fitness stage)*

A legislative measure that seeks to limit the protection of the constitutionally protected right can only pass proportionality review "if it is truly helpful and contributes to achiev[ing] the [desired] end."[69] For the purposes of this thesis we mean that it must truly advance the conflicting constitutionally recognized value that the legislative measure has as its intended purpose. There is no requirement that the means fully realize this.[70] The measure may contribute significantly to the advancement of the purpose or make a smaller contribution, so long as it is not marginal, negligible or "fails altogether to contribute to achieving the end"[71] The requirement therefore is that the legislative measure "sufficiently advance" the intended ends,

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While I happen to disagree with the following approach, some have suggested that a certain degree of leniency at this stage is strategically beneficial from a judicial standpoint given the controversy regarding the role of courts and judges in many democratic societies. *See* Sweet & Mathews, *supra* note 2 at 89. By moving on to the subsequent stages of analysis the court can in effect signal to the losing party (or general public) that it acknowledges the importance of the interests rather than immediately dismissing it as illegitimate. *See Id*. This allows the court to "credibly claim that it shares some of the loser's distress in the outcome" but that it nevertheless had to make a decision. *Id*. In my view this is not appropriate. The proper purpose of a legislative measure must follow from the constitution alone An enacted measure should not be held as being proper merely to avoid offending a legislative body or to make the court appear sympathetic for the purposes of appeasing the loser in litigation. Such behavior prevents the proper application of proportionality review and in effect says that determining when it is proper to place a limitation on a right is secondary to our public image or relationship to the legislature. An approach I find wholly inappropriate for a judicial body.

[69] Schlink, *supra* note 30 at 723.

[70] Barak, PROPORTIONALITY I, *supra* note 7 at 305.

[71] Schlink, *supra* note 30 at 473; Barak at 305.

meaning that it have some positive influence on its realization but not so minimal as to practically have no effect."[72].

Whether a measure significantly advances the intended ends is a "factual test" based on "empirical questions regarding the ability of the means used by the limiting law to advance or realize the proper purpose."[73] As Bernhard Schlink notes, "whether extracting cerebrospinal fluid to determine a person's mental capacity or whether draconian sentences deter future crimes, are matters of fact, not norms."[74] They thus require an empirical assessment. When some of the facts are difficult or impossible to determine the decision maker must decide whom to grant the benefit of the doubt regarding those particular facts but the assessment "nevertheless…requires a review of actual facts."[75] As a factual assessment it cannot consider "whether the means are proper or correct or whether there are…more [adequate], proper and correct means available.[76] These are not factual issues. Similarly it does not evaluate the efficiency of the means nor its fairness or arbitrariness.[77] These may be indicative of an improper purpose in which case they should fail on the first stage of the analysis. But arbitrary or unfair measures may not always serve an improper purpose nor may they fail to advance the legislative measures intended ends.[78] These are issues for later stages of proportionality review in so far as they do not relate directly

[72] Barak, PROPORTIONALITY I, *supra* note 7 at 305.
[73] *Id*. at 305; Schlink, *supra* note 30 at 473.
[74] Schlink, *supra* note 30 at 473.
[75] *Id*.; *but see* Gunn, *supra* note 3 at 467 (stating that in the absence of facts "a theoretical ability can suffice).
[76] Barak, PROPORTIONALITY I, *supra* note 7 at 305; *see also James and Others v. United Kingdom*, 98-B Eur. Ct. H.R. (ser. A) (1986) at ¶ 51 ("It is not for the court to say whether the legislation represented the best solution for dealing with the problem or whether the legislative discretion should have been exercised in another way").
[77] Barak, PROPORTIONALITY I, *supra* note 7 at 307.
[78] *Id*. at 306-307

to the ability of the measure to advance the ends sought, which is the only pertinent question at this stage.

2.1.3 *Necessity*

The necessity test of proportionality review is based on the premise that the legislative measure that is imposing the limitation on the constitutional right is required only if the measure's purpose cannot be achieved any other way.[79] If another means exists which that would intrude less upon the constitutionally protected right, "then the state has no good reason to use the more rather than less intrusive means [when] the less intrusive means serves the citizens interest better and…the states just as well."[80]

While the determination of "whether the alterative means is less intrusive is a value judgment,"[81] the test is first and foremost an empirical one.[82] The alternative measure must actually work in precisely the same way as the original measure.[83] Thus the test does not require an alternative means that is less or even the least intrusive if it "cannot achieve the purpose to the same extent as the means chosen [by the original measure]."[84] The alternative must be able to

[79] *See Id*. at 317; Kirk, *supra* note 45 at 7.
[80] Schlink, *supra* note 30 at 724; *see also* Sweet & Mathews, *supra* note 2 at 95 (discussing Alexy's Theory of Constitutional Rights which imposes on judges a "duty to balance and optimize conflicting principles." When the government infringes on a right "more than is necessary…to realize any second principle" the right is not optimized because the rights holder "would have been better off if the government [had chosen] the least onerous means"); *see also* Christoffersen, *supra* note 1 at 113-112 (Arguing that the obligation to strike to the maximum extent possible a fair balance requires the less restrictive means be applied).
[81] Schlink, *supra* note 30 at 724.
[82] *Id*.
[83] Id.; Barak, PROPORTIONALITY I, *supra* note 7 at 324 (The limiting law is unnecessary only in cases where the fulfillment of the laws purpose is achieved through less limiting means, when all other parameters remain unchanged.").
[84] Barak, PROPORTIONALITY I, *supra* note 7 at 321.

"fulfill the [original] law's purpose at the same level of intensity and efficiency"[85] If there is no such alternative then the law is deemed necessary for the purposes of the necessity test. Similarly the alternative measure must actually achieve the same specific purpose. For example, warning labels on cigarettes do not serve the same purpose as a measure that prohibits smoking. Although it is undoubtedly a less intrusive means it cannot serve as an alternative means because it does not achieve the intended purpose of the original measure, which was to prevent people from being able to smoke.

As can be surmised from above, the necessity test essentially contains a two-part sub test. First a determination must be made as to whether the alternative is identical in all to respects to the original measure. That is to say that the only difference between the original measure and the alternative is that the specific right in question is limited to a lesser extent, leaving all other conditions as well as the intended results unaltered.[86] These conditions include things like "financial means dedicated to the advancement" and "the specific rights limited." An alternative that imposes a greater financial burden on the state is not an alternative means for the purposes of the necessity test. This is quite different from the interpretation of necessity found in general international law, which does not, for example, permit actors to plead necessity when derogating from international obligations where "there are other (otherwise lawful) means available, even if they may be more costly or less convenient."[87] Nevertheless the rational is sound. A change in financial burden changes the issue. It becomes one of whether the state's decision to avoid the additional expense is justifies the additional intrusion. Similarly a change in the specific right being limited becomes a question of whether the legislatures decision to limit right A to a lesser

[85] Id. at 323.
[86] Id. at 325.
[87] Christoffersen, *supra* note 1 at 111-12.

extent instead of limiting right B to a greater extent, or vice-versa, can be justified in light of the limitations imposed. These are questions for which the necessity test cannot resolve. They require weighing and balancing the alternatives and must therefore be determined in the proportionality *stricto sensu* stage of the analysis.

The second part of the subtest examines whether the alternative means will limit the specific right in question to a lesser degree. The test requires comparing the effect of the original measure on the specific right in question to the effect of the alternative on the specific right in question.[88] This involves an examination on "the scope of the limitation, its effect, its duration, and the likelihood of its occurrence."[89] A short-term limitation is not as intrusive as a long-term limitation.[90] A limitation that is applicable to a few is not as intrusive as one that is applicable to all.[91] If the alternative limits some aspects of the right more than the original measure and some aspects of the right less than the original measure then the alternative cannot be to limit the right to a lesser extent.[92] In such an instance, the measure must be determined necessary for the purposes of the necessity test and its fate determined within the balancing framework of proportionality *stricto sensu*.[93] The second part of the sub-test is necessarily an objective test. Special and unique circumstances to a particular individual cannot play a role in the determination of whether an alternative limits a specific right.[94] A legislative measure cannot possibly fathom the myriad of personal circumstances of every individual within its society. It

[88] Barak, PROPORTIONALITY I, *supra* note 7 at 326.
[89] *Id*.
[90] *Id*. 328.
[91] *Id*.
[92] *Id*. at 327
[93] *Id*.
[94] *Id*.

must therefore be the comparison of the effect of the legislative measure "on the typical rights holder."[95]

It is important to note what the necessity test does not contain. Like the previous steps it does not, and should not, involve balancing. When the examination reveals that the less limiting alternative measure does not advance the law's purpose to the same extent as the original measure or that alternative measure places a limitation on a different right of the person in question or on others, or otherwise effects the general public differently, the court should not engage in a balancing exercise to determine whether the alternative is better nevertheless. These are issues that the necessity test is not equipped to resolve and must be considered in the proportionality *stricto sensu* stage of the analysis. The same is true for issues of over-inclusiveness where an over-inclusive measure is the only way to advance the purpose. An over-inclusive law, which could achieve the intended ends without being over-inclusive, can quite obviously be deemed to be unnecessary. But sometimes an over-inclusive law is the only option for achieving the desired purpose. When that is the case, the over-inclusive nature of the law must be considered necessary for achieving its purpose and therefore satisfies the necessity test.[96] Whether it is desirable or justified in light of the purpose is a matter to be balanced at the next stage.

2.1.4 *Proportionality Stricto Sensu (Balancing)*

[95] *Id*.
[96] *Id*. at 335.

The final test of proportionality review is the "proportional result."[97] It is central to proportionality review and consequently the most important of the tests.[98] Unlike the previous four steps, which are an examination of the relationship between the legislative measure's purpose and the means chosen to achieve it, proportionality *stricto sensu* is an examination of the laws purpose as compared to the constitutional right.[99] It seeks to the determine acceptability of the legislative measure's result when compared to the effect it has on the specific right in question, by weighing the benefits gained by the measure and the harm which will be suffered by the right.[100] Deiter Grimm's example of a hypothetical law that allows the police to use deadly force if necessary to prevent him from stealing property highlights the importance of this last step.[101] The law as described by Grimm, serves a proper purpose (prevention of theft), is rationally related to that purpose (advances the proper purpose), and necessary to advance the intended interest (triggered only when no other means exist). It is only through balancing the importance of protecting property to the harm caused to the right to life can it be said to be disproportionate. Sometimes a law that seeks a proper purpose, advances that purpose and is necessary is still unacceptable. "The least intrusive means may yet be too intrusive."[102]

To further highlight the importance of this step we can take the example of *Korematsu v. United States*,[103] from the jurisprudence of American constitutional law. During World War II, the United States instituted a number of measures, by both Executive Order and in the form of

[97] *Id*. at 340.
[98] *Id*.; *see also* Alexy Balancing, supra note 17; Matthias Kumm, *What do you have in virtue of having a constitutional right? On the place and limits of proportionality requirements* in LAW, RIGHTS AND DISCOURSE. THE LEGAL PHILOSOPHY OF ROBERT ALEXY (George Pawlakos ed. 2007).
[99] Barak, PROPORTIONALITY I, *supra* note 7 at 344.
[100] *Id*. at 368.
[101] Grimm, *supra* note 68 at 396.
[102] Schlink, *supra* note 30 at 724.
[103] *Korematsu v. United States*, 323 U.S. 214 (1944).

legislatively enacted law that restricted the rights of people with Japanese ancestry regardless of their citizenship. These measures included curfews as well as exclusion and forced removal from some areas of the west coast of the United States. The states purpose of the measures was that "the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities"[104] Toyosaburo Korematsu, an American citizen of Japanese descent, was convicted for remaining in his home which was located in a designated "military area."[105] The conviction was upheld in what has been commonly referred to as the most disgraceful Supreme Court decision since Plessy.[106]

Nevertheless, despite its historical revilement, a *Korematsu*-like situation today would survive both the U.S. Supreme Court's strict scrutiny test and the first three stages of proportionality review. Under the American strict scrutiny test, the measure must be justified by a compelling government interest (the prevention of espionage and sabotage), be narrowly tailored to achieve that interest (exclusion and of persons of Japanese decent from areas of particular military significance as the result of an "uncertain number of disloyal" Japanese Americans within the population[107]), and the least restrictive means available ("impossible to bring about the immediate segregation of the disloyal from the loyal"[108]). Similarly we can see proper purpose (prevention of espionage and sabotage), rational connection (exclusion and removal advances the proper purpose) and necessity (inability to segregate the loyal from the disloyal leaves no other means of achieving the intended purpose with the same degree of

[104] *Id.* at 217.
[105] *Id*. at 215.
[106] *Plessy v. Ferguson*, 163 U.S. 537 (1896).
[107] *Korematsu*, *supra* note 103 at 218-19.
[108] *Id*. 219.

intensity and result). Where the two differ however is at proportionality *stricto sensu*. Here a determination could be made that the measures are nonetheless disproportionate. If the number of unidentified disloyal Japanese Americans was estimated at 2 in every 1000 or 5000 or 10,000 could the measure be said to be proportional? Likely not. If it were 8 in 10 or 80 out of every 100 then possibly yes. Of course numerous other factors would be considered besides mere numbers, the point is that American strict scrutiny does not require the balancing of these factors as where proportionality review does. Should a *Korematsu*-like situation ever reappear before the U.S. Supreme Court, it would likely be forced to either change the test or manipulate it in a way that gives the just result. There would be no need for that under proportionality review.

2.2 THE STRUCTURE OF PROPORTIONALITY REVIEW

There is a particular logic to the structure of proportionality review. Beginning with an inquiry into the legitimacy of the end makes sense. "If there is no legitimate end there can be no legitimate means."[109] Similarly, the structure requires testing facts before balancing values.[110] This is because value judgments rely on factual knowledge.[111] It also requires making factual assessments before examining "factual alternatives and comparisons."[112] It has been argued nevertheless that the "sequence of the inquiry and performance of the tests if of minor importance."[113] I do not believe this to be the case. Order matters. Requiring the decision maker to "think in stages," prevents blending of questions that should be addressed separately. Such as those relating to the scope of the right and the justification of limits on its

[109] Schlink, *supra* note 30 at 725.
[110] *Id*.
[111] *Id*.
[112] *Id.*
[113] *Id*.; *but see* Grimm, *supra* note 68 at 397 (arguing that the order has a "disciplining and rationalizing effect…").

realization, questions relating to the means chosen and its relationship to the proper purpose and questions relating to the benefit of advancing the purpose and the harm to the right.[114] The decision maker should think analytically and consider the questions in their proper place in the analysis.[115] Both the order and adherence to addressing the proper issues at the proper stages in important to the proper application of proportionality review.

2.3 DEFERENCE AND THE MARGIN OF APPRECIATION

Proportionality review leaves an area of discretion tot eh legislator. The relationship between the measure's purpose, the means for attaining that purpose and the limitations that may be imposed on constitutional rights are defined by the legislator so long as they comply with the rules of proportionality of which the outer boundaries are determined by the courts.[116] This is commonly referred to as deference, which must be distinguished from the "margin of appreciation." The margin of appreciation "affords an area of discretion to national bodies" resulting from the recognition that "there is no international consensus regarding the relative social importance of public interests and individual rights."[117] Consequently an international court must take into account the importance that has been assigned to the right and the conflicting interest in the state where the law is being challenged.[118] It assumes a "supervisory function" which it exercises consistent with the values and spirit of the relevant international

[114] Barak, PROPORTIONALITY I, *supra* note 7 at 461
[115] *Id*. at 461
[116] Barak, PROPORTIONALITY II at 748 (The zone of proportionality is the domain of the legialtor. Maintaining the boundaries of that zone is the domain of the judge").
[117] Id.
[118] Id.; *see Goodwin v. United Kingdom*, 1996 I Eur. Ct. H.R. ¶ 40 ("[I]t is in the first place for the national authorities to assess whether there is a pressing social need for the restriction) [hereinafter *Goodwin*]

agreement or charter.[119] It is ultimately for the court to decide how much deference it is willing to afford to other government bodies, be it in the context of a national or international court. It must however not afford a degree of deference that exceeds the limitations of the principle of proportionality as contained in its four step analysis.

[119] *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) ¶ 26 (1976) [hereinafter *Handyside*] ("The Court's supervisory functions oblige it to pay the utmost attention to the principles characterizing a "democratic society"); *see also, Goodwin*, supra note 118 at ¶ 40 ("[T]he national margin of appreciation is circumscribed by the interest of a democratic society…").

Chapter 3. THE CASE LAW

3.1 THE EUROPEAN COURT OF HUMAN RIGHTS

After verifying that a properly enacted legal measure has interfered with the right,[120] the European Court of Human Rights (ECtHR) engages in a proportionality assessment to determine if the measure is nevertheless justified by being "necessary in a democratic society."[121] The test consists of three prongs (I will use this term to distinguish when I'm referring to the Court's test as opposed to the components of proportionality generally). First, the measure must correspond to a "pressing social need"[122] Second the measure must be proportionate to the aim pursued.[123] Finally, the reasons given by the national authorities to justify the interference must be relevant and sufficient.[124]

Before embarking on a review of the case law, we should first compare the four-stage analysis outlined in the previous chapter to the prongs of the "democratic necessity" test. The European Court of Human Rights considers the identification of the proper purpose a preliminary measure and is not considered part of the proportionality assessment. The proper purpose is found within the specific limitation clauses attached to the applicable articles. For our purposes we are concerned with Article 10. This article provides limitations only for the specified proper purposes of "national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the

[120] The preliminary steps of the analysis require the identification of an infringement on the specific right in question and that the infringement be "prescribed by law."
[121] *See Handyside*, *supra* note 119 at ¶ 48 (discussing what it means to be "necessary in a democratic society).
[122] *See Id*.
[123] I*d*. at ¶ 49
[124] *Id*. at ¶ 50.

reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."[125]

The requirement that there be a rational connection is not explicitly stated but could perhaps correspond to the final prong, although at first glance, appears to more closely correspond to proportionality *stricto sensu*, as it addresses the weight of the government's argument. This would be consistent the definition provided in *Coster*,[126] as well as *Klien*[127] (discussed infra). It would also be consistent with the application of this prong in those two cases, which amounted to little more than the overall persuasiveness of the government's argument. In *Handyside*, the Court described the prong, as "whether the reasons given by the national authorities to justify the *actual measures of 'interference'* they take are relevant and sufficient under Article 10 para. 2."[128] If "actual measures of interference" means the "interfering laws," this definition could relate to a rational connection assessment if we assume that "relevant and sufficient" refers to showing that the interfering law can advance the purpose claimed under Article 10(2). However, one could also read the explanation given in *Handyside* to mean that "actual measures of interference" is referring to degrees of interference or intensity of interference resulting from the law. Meaning that the reasons given by the national government are relevant and sufficient to justify the degree of limitation it is imposing in light of the purpose claimed under Article 10(2). This would again suggest a balancing test, which

[125] ECHR, *supra* note 11 Art. 10 (2).
[126] *See Coster v. the United Kingdom* [GC], no 24876/94 (2001) ¶ 104 ("While it is for the national authorities to make the initial assessment of necessity, the final evaluation as to whether the reasons cited for the interference are relevant and sufficient remains subject to review by the Court…").
[127] *Klien v. Slovakia*, infra note xx at ¶ 47 ("The test of whether the interference complained of was 'necessary in a democratic society' requires the Court to determine…whether the reasons given by the national authorities to justify it are relevant and sufficient.");
[128] *Handyside*, *supra* note 119 at ¶ 50 (emphasis added).

would be inappropriate to a determination of rational connection and therefore should be part of the proportionality *stricto sensu* component. Remember, that rational connection component is concerned only with the relationship between the purpose and the means not with the relationship between the means and the specific right in question. The first prong – that the measure "correspond" to a pressing social need - would seem to implicate the rational connection component as well, by suggesting that the measure must relate to the particular society's need to realize the proper purpose.

Similarly, the necessity component also does not appear as an explicit requirement, however, the test itself "necessary in a democratic society" would seem to imply it exists. At the outset however, it should be noted that the Court has not interpreted the "necessary" in "necessary in a democratic society" to mean that a measure must be the less restrictive of the various options that can achieve precisely the same purpose as the offending measure, although it has engaged in a least-restrictive-means analysis on a handful of occasions.[129] Necessity, if we assume that the Court's test includes all of the components of proportionality, could only correspond to the first step in the analysis – the existence of "pressing social need" – as the second prong is by definition proportionality *stricto sensu* and the third prong is either rational connection or proportionality *stricto sensu* again. But this prong is not consistent with the necessity component of proportionality review. Necessity in proportionality review "relates to the means chosen by the legislator to achieve the purpose and not to the need to achieve those purposes."[130] The existence of a "pressing social need" would relate to the latter. The existence of a "pressing social need" would seem to relate more to proper purpose but that has already

[129] *See e.g. Campbell v. United Kingdom,* 233 Eur. Ct. H.R. (ser A) at ¶ 48; *Peck v. United Kingdom*, 2003-I Eur. Ct. H.R. at ¶ 80.
[130] Barak, PROPORTIONALITY I, *supra* note 7 at 326.

been determined in the preliminary steps of the analysis. Rational connection would not apply here because that component requires an examination of the relationship between the measure in question and its purpose – namely the measure's ability to advance the purpose. The existence of a pressing social need is not related to that relationship. We are left then with proportionality *stricto sensu.* If we consider how the determination is made that a pressing social need exists, this could perhaps make sense. It is after all a judgment made regarding the importance of advancing the realization of a particular value in a particular society at a particular time. An assessment made under the basic rule of balancing.

Although it is unclear how from just looking just looking at the steps of the analysis how the prongs are applied if we consider them as 3 distinct steps we are left with three possibilities. The Court's proportionality review consists of three proportionality *stricto sensu* steps; itt consists of two proper purpose steps and two proportionality *stricto sensu* steps; or it consists of proper purpose, rational basic and two proportionality *stricto sensu* steps. Since it makes little sense to have two separate determinations of whether there is a proper purpose, only the first and the last options seem viable. At this point we should perhaps turn to the case law to see how this rather confusing formulation works in practice.

3.1.1 *Müller and Others v. Switzerland*[131]

Josef Müller was a painter who frequently exhibited his work in private galleries and museum throughout Switzerland. In 1981 the unnamed applicants organized an exhibition of contemporary art entitled "Fri-Art" as part of the 500th anniversary celebration of the Canton of Fribourg's entry into the Swiss Confederation. They invited several artists, each of whom was

[131] *Müller and Others v. Switzerland* (application no. 10737/84) (chamber) 24 May 1988.

allowed to invite another artist of their own choosing. The artists were to make free use of the space allocated to them where they would create their displayed works on the spot. The exhibition was advertised in the press and on posters and was open to all without charge. For the exhibition, Müller produced three large paintings entitled "Drei Nächet, drei Bilder ("Three Nights, Three Pictures), which was described by the appellate court as portraying "vulgar images of sodomy, fellatio between males, bestiality, erect penises and masturbation."[132] The principle public prosecutor of the Canton of Fribourg, acting on information from a man whose daughter had "reacted violently" to the three paintings, reported to the investigating judge that the paintings appeared to come within the provisions of the Criminal Code that prohibited obscene publications and required that they be destroyed. The paintings were subsequently seized and Müller and the organizers were convicted for publishing obscene material. They were each sentenced to a fine of 300 Swiss francs, which were to be deleted from their criminal records after one year. The three paintings ordered to be kept in the Art and History Museum of Canton of Fribourg for safekeeping. They were never destroyed and were returned to Müller in 1988 upon court order that stated, inter alia, "While the restriction was necessary in a democratic society in 1982 and was justified by the need to safeguard and protect morality and the rights of others, the court considers…that the order may now be discharged."[133]

Before the ECtHR, the applicants claimed that their conviction and the confiscation of the paintings violated their right to free expression as guaranteed in Article 10 of the Convention.

[132] *Id*. at ¶16. (All the persons depicted are entirely naked and one of them is engaged simultaneously in various sexual practices with two other males and an animal. He is kneeling down and not only sodomizing the animal, but holding its erect penis in another animal's mouth. At the same time he is having the lower part of his back – his buttocks, even -fondled by another male whose erect penis a third male is holding towards the first male's mouth. The animal being sodomized has its tongue extended towards the buttocks of a fourth male, whose penis is likewise erect").
[133] *Id* at ¶ 19.

The court held that the purpose of the law in question was proper as it was "designed to protect public morals," a permissible limitation found in the in Article 10(2).[134] In applying the law in the instance case, the national authorities "relied above all on the reaction of a man and his daughter who visited the 'Fri-Art 81' exposition."[135] The Court then moved to make a determination whether the law was "necessary in a democratic society." The court noted that it "has consistently held that in Article 10 §2 the adjective necessary implies the existence of a pressing social need" but that while the court enjoys supervisory jurisdiction "[t]he contracting states have a certain margin of appreciation in assessing whether such a need exists…"[136] Here, the Court found the convictions sufficient to satisfy this test. Stating that "[s]tate authorities are in principle in a better position than an international judge" to determine "the necessity of a restriction or penalty…" the court noted that the existence of a "genuine social need…was affirmed in substance by all three of the Swiss courts which dealt with the case." Given that the exhibition "sought to attract" the public at large, the Court found that the Swiss courts' determination that the paintings were "liable grossly to offend the sense of sexual propriety of persons of ordinary sensitivity" was not unreasonable.[137] Giving due regard to the importance of free expression in a democratic society[138] the "Swiss courts were entitled to consider it necessary for the protection of morals to impose a fine on the applicants for publishing obscene material."[139]

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[134] *Id.* at ¶ 30.
[135] *Id.*
[136] *Id.* at ¶ 32.
[137] *Id.* at ¶ 36.
[138] *Id.* at ¶ 33-34 ("[T]he Court must reiterate that freedom of expression….constitutes one of the essential foundations of a democratic society, indeed one of the basic conditions for its progress and for the self-fulfillment of the individual…{i}n considering whether the penalty was 'necessary in a democratic society' the court cannot overlook this aspect of the matter").
[139] *Id.* at ¶ 36.

With regard to the confiscation of the paintings in questions, the arguments focused on the restrictive nature of the means used. The applicants argued "less draconian" measures" could have been chosen by the courts, while the Swiss government argued that "by declining to take the drastic measure of destroying the paintings, [they] took the minimum actions necessary." The Court held that the same reasons that justified the measure in the previous analysis applied here.[140] The "purpose was to protect the public from any repetition of the offence."[141] Müller's conviction represented the existence of the "genuine social need" for achieving that purpose.[142] Although the confiscation prevented him from showing his paintings for eight years "in places where the demands made by the protection of morals are considered to be less strict than in Fribourg," the district court had stated that the confiscation "was not absolute but merely of indeterminate duration" leaving Müller with the option to request the confiscation order be discharged, which it was in 1988, after the district court found that the confiscation "had fulfilled its function" which was to "ensure that [the] paintings were not exhibited in public again without any precautions."[143] The Swiss courts were thus entitled to hold that the confiscation was "necessary"[144] for the purpose of preventing repetition of the offense for which there was a genuine social need as evidenced by Müllers conviction of publishing obscene material.

In a dissenting option, Judge Spielmann addressed both the "relativity of the notion of obscenity" and the "criterion of necessity."[145] Judge Spielmann was of the opinion that if the state authorities are in a better position to determine the "content of the requirements in Article

[140] *Id.* at ¶ 42.
[141] *Id.*
[142] *Id*. at ¶ 43.
[143] *Id.*
[144] *Id.*
[145] *Müller and Others v. Switzerland* (application no. 10737/84) (chamber) 24 May 1988 (dissent of Speilmann, J.) at ¶ 9.

10," then the state "should take greater account of the notion of the relativity of values in the field of the expression of ideas" and not "leave such an assessment to a municipal authority." Seeming to suggest that in a Convention composed of states; the presence of a pressing social need must relate to the state and be a determination made by the state not in a single municipality based on a single incident. Indeed, Müller had displayed paintings similar to the ones in question throughout Switzerland in the past without incident and the particular paintings in question had themselves been "on display for ten days without giving rise to any protests."[146] Judge Spielmann also had difficulty with the court's exercise of its supervisory role in the determination of whether the confiscation was necessary. He found it particular troubling that what was necessary in 1982 suddenly became no longer necessary in 1988.[147] As Judge Spielman believed that the fine and confiscation were indistinguishable, he therefore concluded that Article 10 had been violated in both instances.[148]

3.1.2 *Klein v. Slovakia*[149]

In 1998 the film "The people vs. Larry Flynt" was released to cinemas in Slovakia. Prior to that, the film was promoted, *inter alia*, by means of posters placed in the streets that portrayed the main character with a flag of the U.S.A. around his hips being crucified on a woman's pubic area dressed in a bikini. Prior to the film's release, "The Common Declaration of Ecumenical Council of Churches and the Slovak Bishops Conference" was published. The declaration protested the display of the posters and being a profanation to God. A few weeks after the

[146] *Id.* ¶17
[147] *Id.* ¶ 9
[148] *Id.* ¶ 4 ("I believe the two matters are indistinguishable. Either there has been a violation of the Convention both in respect of the fines and the confiscation, or there has been no violation at all).
[149] *Klein v. Slovakia* (Application no 72208/01) Fourth Section 31/1/2007.

issuance of the Declaration, Archbishop Mon. Ján Sokol made a declaration on public television where he requested that the government take measures to withdraw the posters and the film. Shortly after the televised appearance, the weekly *Domino Efekt*, which was a publication that focused largely on political commentary, published an article written by the applicant entitled "The falcon is sitting in the maple tree; Larry Flynt and seven slaps to the hypocrite." In the article the applicant criticized the Arch Bishop for his position in protesting the posters and the film by making, *inter alia*, the following statement:

> This principle representative of the first Christian church has not even as much honor as the leader of the last gypsy band in his bow. I do not understand at all why decent Catholics do not leave the organization which is headed by such an ogre…"[150]

Following the publication of the above-mentioned article, two associations complained that the article had offended the religious feelings of their members. The applicant was convicted of an offense under the criminal code[151] on the grounds that he had violated the act by "defam[ing] the highest representative of the Roman Catholic Church in Slovakia and thereby offended members of that church."[152] In particular, the District Court noted that the applicant's statement in which he wondered "why decent members of the church did not leave it" had blatantly discredited and disparaged a group of citizens for their Catholic faith and that the applicant "should have been aware that his article was capable of offending the interests of other persons protected by the law."[153] Particularly "given that a high proportion of the citizens of Slovakia were Catholic"

[150] Id at ¶ 14.
[151] Article 198 Slovakian Criminal Code Defamation of Nation, Race and Belief: "A person who publicly defames: a) a nation, its language or a race or b) a group of inhabitants of the republic for their political belief, faith or because they have no religion shall be punished by up to one year's imprisonment or by a pecuniary penalty.
[152] *Id*. at 21.
[153] *Id.*

which consequently resulted in harming "the religious feelings of a considerable number of persons."[154] The applicant was sentence to a fine of 15,000 Slovakian korunas to be converted into on month's imprisonment in the event that he deliberately attempted to avoid payment of the sum.

Before the Fourth Section, the government argued that the article had been published before Easter, which was "at a time when the Catholic believers were about the recall the crucifixion and resurrection of Jesus Christ."[155] Because the applicant had, in his article, "attacked not only the supreme representative of the Roman Catholic Church in Slovakia, but also the religious feelings of believers" that accounted for approximately 69% of the population.[156] Given the demographics of the country and the timing of the article, the government argued that there was a "pressing social need to protect the feelings of the persons concerned."[157] Moreover, the government argued that the article "did not indicate the context in which is should be read, and it was impossible for a reader to distinguish which parts of the statement referred to the character in the film [The People vs. Larry Flynt] and which concerned the person of [the] Archbishop."[158] It was also argued that the article "contained practically no arguments, and its form clearly exceeded the limits of acceptable criticism and tolerance…[a]ccordingly, the interest in protecting the rights of the persons whose religious feelings the applicant had grossly offended outweighed his right to freedom of expression."[159] Moreover, the government concluded that since the fine imposed was relatively low and because

[154] *Id.*
[155] *Id.* at 35.
[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] *Id.*

the applicant had the right to ask for expunging of his conviction, the penalty was not disproportionate.

For his part, the applicant argued that the article "had no relationship to the Catholic religion as such."[160] His purpose, he argued, was to "attract reader's attention to the moral integrity of a public figure and, in particular, to point out the unacceptability of his activities involving (i) an appeal to ban the film and remove the posters and (ii) his co-operation with the secrete police of the communist regime."[161] While his article may have "shocked and offended believers who held the Archbishop in great esteem, it did not interfere with the right of believers to express and exercise their religion nor did it denigrate the content of their religious faith" but was rather a "reflection of his indignation in respect of the Bishop."[162] Moreover, the applicant noted that his arrest and conviction has "considerably reduc[ed] his prospects of finding employment on the journalistic market."[163] In support of this assertion he noted that had "been unable to publish any articles for three years and that Radio Free Europe has stopped co-operating with him" following the article's publication. [164]

In the Court's assessment, it quickly acknowledged an interference with the applicant's Article 10 right to free expression and noted that the criminal code in question had a the proper purpose of protection of the rights of other persons.[165] The only question left to determine was whether it was "necessary in a democratic society." The Court began by stating that the national authorities are afforded "margin of appreciation" in determining the existence of a

[160] *Id.* at 38.
[161] *Id.*
[162] *Id.* at 40.
[163] *Id.* at 43.
[164] *Id*. at 18.
[165] *Id.* at 45.

pressing social need and the measures needed to address it.[166] The Court's supervisory role was to determine whether the restriction is reconcilable with the right protected by the Convention.[167] This required an analysis of whether the action was proportional and whether the reasons given by the national authorities for the restriction were relevant and sufficient. The Court noted that the publication was one was aimed at "intellectually oriented readers" and as such supported the applicant's claim that "he had meant the article to be a literary joke."[168] The Court was not persuaded by the claim that an article that exclusively criticized one person could have the effect of "discredit[ing] and disparage[ing] a sector of the population on account of their faith."[169] Moreover the court did not see how the article could have "unduly interfered with the right of believers to express and exercise their religion" when it "did not denigrate the content of their religious faith."[170] The Court determined that "despite the tone of the article…it [could] not be concluded that by its publication the applicant interred with all other persons' right to freedom of religion in a manner justifying the sanction."[171] The reasons given by the government for the interference were simply "too narrow" and "insufficient."[172] Accordingly, the Court held that there had been a violation of Article 10.

3.1.3 *Analysis of the "Necessary in a Democratic Society Test*

At the outset it should be pointed out that there is a notable difference in the manner that an international court can apply any method of adjudication. If it has the authority to strike down a national law it would be loathe to do so except in the most extreme of circumstances.

[166] *Id.* at 47.
[167] *Id.*
[168] *Id.* at 48.
[169] *Id.* at 51.
[170] *Id.* at 52.
[171] *Id.* at 54.
[172] *Id.* at 52.

Nevertheless if we replace the phrase "is the law that has been enacted proportional" with the phrase "is the action taken by the state proportional," the analysis remains the same. That being said, the "necessary in a democratic society" test suffers from significant infirmities in both form and application. As a matter of form, it does not comply with the requirements of a proper proportionality test. There is no necessity component, and arguably no rational connection component. The "necessary in a democratic society test" identifies the proper purpose and then proceeds directly to a proportionality *strico stensu* analysis. To the extent that a rational connection is considered at all it seems to be either enveloped within the identification of the proper purpose or determined in in the balance. In Müller the court apparently found that the law was designed to promote the proper purpose of protecting public morals and thus bore a rational connection to that aim, which of course would be a reasonable assessment if the law's design alone could satisfy the requirements of the component. The rational connection component however requires that the law is actually capable of advancing the proper purpose. Arguably, preventing the repeat of a single incident could satisfy the rational connection requirement but no assessment was made as to how likely such a repeat was once the court engaged in balancing which would have to naturally follow. In Klein, the finding of a violation seemed to be entirely about whether the action taken by the state bore a rational connection to the proper purpose of protecting the rights of the Slovakian religious community but it was done so in the context of a balancing assessment not a rational connection assessment. The absence of the necessity component, despite the frequent use of the phrase, is significant. It arguably would have changed the outcome in Müller by determining that the confiscation was not necessary to prevent another public showing of the paintings in question. Assuming the dissent is incorrect that the fine and the confiscation are indistinguishable; the implementation of a proper necessity

assessment would likely have concluded that the confiscation was unnecessary because the fine, standing on its own, would accomplish precisely the same purpose that the state sought.

The "necessary in a democratic society" test bears all the hallmarks of an unstructured and open-ended balancing test. The determination whether the action was proportional is a balancing assessment. The relevance and sufficiency of the arguments advanced by the government is likewise a balancing assessment. Indeed even the determination that a pressing social need exists is, in principle, a balancing assessment, although the court never seems to see the need to engage is that step, deferring instead to the assessment of national authorities.

Despite its inconsistency with the principle components of proportionality review, the Court further suffers from an apparent inability to apply its own formulation. The requirement that a pressing social need exists becomes meaningless if that determination is always left to the national authorities. It becomes more meaningless when one determines that the "pressing social need" needn't actually be "pressing" but simply "genuine." Indeed one wonders when the Court would ever have occasion to consider this portion of the test. If we presume that the entire exercise is one of balancing then we should also presume that it would follow the basic rule of balancing. In neither opinion however was there an assessment as to the importance of the competing values. The importance of the right was reiterated in standard form and was presumably taken into account, but neither discussed the importance of the competing values in the respective societies, except to elude that such was a determination best left to the national authorities. Nor did the Court properly illustrate an assessment of their relative importance to each other within that society. If we recall the following rule from chapter 1:

The limitation on a right is justified if:

A. The harm caused by the limitation, taking into account
    a. The degree (intensity) of the intrusion and;
    b. The importance of the specific right in question to the particular society and;
    c. The role of the right in relationship to other constitutionally protected right

is less than

B. The benefit to be gained by the legislative measure taking into account:
    a. The importance the particular society attached to the specific constitutional value in question and;
    b. The degree of realization that the legislative measure intends to achieve and;
    c. The likelihood that the measure will attain its intended aim and;
    d. The temporal societal need for the specific constitutionally recognized interest to be to be realized.

We find few of these factors expounded by either opinion. At best we can locate the degree of intrusion (the penalty imposed), statements of the importance of the right (written as a matter of formality), and the importance that the particular society attaches to the conflict value (as recognized by the margin of appreciation). There is no discussion however as to how they actually factor into the balancing assessment or if they did at all.

One could perhaps argue that the ambiguity of the Court's balancing is simply the result of poor articulation. That it does indeed take these considerations into account when making a ruling but that the balancing process does not adequately translate into their written opinions. I doubt that is the case, but assuming it has some merit it raises another problem with the Court's application of "proportionality." The strength of proportionality review is that it is designed to demonstrate that limitations placed on rights are actually justified; that they are both proper and

necessary; that the means chosen are appropriate; and degree of limitation is no more than the competing value requires. If a Court cannot properly show this, it also cannot show that it is properly engaging in proportionality analysis.

3.2 THE SUPREME COURT OF CANADA

Unlike the specific limitations provided in the European Charter of Human Rights, the Canadian Charter of Rights and Freedoms contains a general limitation clause that applies to all rights therein contained. Charter's limitation clause provides:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.[173]

The Canadian Supreme Court in *R. v. Oakes* formulated the modern proportionality test used to interpret when a limitation is justified under this clause.[174] Chief Judge Dickinson explained the test as having two parts. The initial question to be answered was whether the statute was "of sufficient importance to warrant overriding a constitutionally protected right or freedom."[175] This was further described as requiring "at a minimum, that it objectively relate to the concerns which are pressing and substantial in a free and democratic society."[176] If the statute satisfied this condition, it must be shown that the "means chosen [were] reasonable and

[173] CANADIAN CHARTER OF RIGHTS AND FREEDOMS § 1.
[174] *R. v. Oakes* [1986]1 S.C.R. 103 (Can.); *see also* Sujit Choudhry, *So What is the Real Legacy of Oakes? Two Decades of Proportionality Analysis under the Canadian Charter's Section 1*, 34 S.C.L.R (2D.) 501 (2006).
[175] *R v. Oakes*, *supra* note 174 at 138-39
[176] *Id.* at 139.

demonstrably justified."[177] According to Judge Dickson, this assessment of the means contained three components:

> First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair 'as little as possible' the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of sufficient importance"[178]

This formulation possesses, quite clearly, all four components of proper proportionality review and in the proper order needing little explanation. I would only note however the rational connection component. A measure that does not truly contribute to realizing its proper purpose cannot, by definition, be said to be rationally related to achieving that proper purpose. If "carefully designed" is merely referring to the intent of the law, then it would not be sufficient to pass a proper rational connection test.

3.2.1 *R. v. Keegstra*[179]

James Keegstra was a high school teacher charged under a provision of the Criminal Code with "unlawfully promoting hatred against an identifiable group"[180] by communicating anti-Semitic statements to his students. Mr. Keegstra's teachings attributed very evil qualities to Jews, which he described to his pupils as "treacherous," "subversive," "sadistic," "money-loving," "power hungry" and "child killers."[181] He taught in his classes that Jewish people seek to destroy Christianity and are responsible for depressions, anarchy, chaos, wars and

[177] *Id.* at 139
[178] *Id.*
[179] *R v. Keegstra,* [1990] 3. S.C.R. 697 (Can.).
[180] *Id.* at 697.
[181] *Id.* at 697.

revolution.[182] According to Mr. Keegstra's teachings, "Jews created the Holocaust to gain sympathy" and, in contrast to the open and honest Christians, were said to be deceptive, secretive and inherently evil.[183] Mr. Keegstra expected his students to reproduce his teaching in class and on exams reducing grades where students failed to do so.

The question before the court was whether the relevant provision of the Criminal Code of Canada was an infringement of freedom of expression as guaranteed by§ 2(b) of the Canadian Charter of Rights and Freedoms, which provides, inter alia, that everyone has the fundamental right of "freedom of thought, belief, [and] opinion…"[184] If so, could it then be justified under § 1 as a reasonable limit that is demonstrably justified in a free and democratic society. The determination as to whether there has been a violation of one's free expression rights is determined by a two-part test formulated in *Irwin Toy*.[185] The first step of the test is to determine whether the conduct constituted non-violent activity that conveys or attempts to convey a meaning.[186] The next step was to consider whether the effect or purpose of the government action was to restrict freedom of expression. If the purpose of the law is to restrict freedom of expression, it necessarily constitutes a violation.[187] If however, the restriction is the "effect of the action, rather than the purpose of the action" then the expression guarantee of Section 2(b) is not implicated "unless it can be demonstrated by the party alleging the infringement that the activity supports rather than undermines the principles and values upon which freedom of oppression is based."[188] Dickson determined that "[c]ommunications which

[182] *Id.*
[183] *Id.*
[184] Canadian Charter of Rights and Freedoms § 2(b).
[185] *Irwin Toy Ltd. v. Quebec (Attorney* General**)**[1989] 1 S.C.R. 927 (Can.).
[186] *Id*. at 704.
[187] *Id.* at 705.
[188] *Id.*

willfully promote hatred against an identifiable group without a doubt convey a meaning, and are intended to do so by those who make them."[189] The type of meaning conveyed, its invidiousness and obnoxiousness is not relevant to the inquiry as to whether the constitutional guarantee of free expression is implicated.[190] As such, Mr. Keegstra's clearly feel within the scope of the protection. As to the second part of the analysis, Judge Dickson determined that "the prohibition…aims directly at words…that have as their content and objective the promotion of racial or religious hatred."[191] Consequently the purpose of the law's purpose was to "restrict the content of expression by singling out particular meanings that are not to be conveyed" and therefore "overtly seeks to prevent the communication of expression."[192]

Next Judge Dickson began the proportionality analysis under the *Oakes* test to determine if the restriction was justified in a free and democratic society. In establishing that the law in question had the objective "an objective of pressing and substantial concern in a free and democratic society," Judge Dickson engaged in a thorough discussion of both the "harm caused by hate propaganda as identified by the Cohen Committee[193] and subsequent study groups"[194] and this objective in various international human rights instruments and foreign domestic law.[195]

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[189] *Id.*
[190] *Id.*
[191] *Id.*
[192] *Id.*
[193] Canada, SPECIAL COMMITTEE ON HATE PROPAGANDA IN CANADA. REPORT OF THE SPECIAL COMMITTEE ON HATE PROPAGANDA IN CANADA (1966).
[194] Canada. HOUSE OF COMMONS. SPECIAL COMMITTEE ON THE PARTICIPATION OF VISIBLE MINORITIES IN CANADIAN SOCIETY. EQUALITY NOW! (1984).
[195] *e.g.* ECHR, *supra* note xx; INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION, Can. T.S. 1970 No. 28 Arts 4, 5.; INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 999 U.N.T.S 171 (1966) Arts. 19, 20; Penal Code (INDIA) ss. 153-A, 153-B; Penal Code (NETHERLANDS), ss. 137c, 137d, 137e; Penal Code (SWEDEN) c. 16, s. 8; Public Order Act 1986 (U.K), 1986 c. 64 ss. 17-23; Race Relations Act 1971 (N.Z.), No. 150 s. 25; Racial Discrimination Act, 1944, S.O. 1944 c. 51 s. 1; Sasketchewan Human Rights Code, S.S. 1979, c. s-24.1, s. 14.

The key question for Judge Dickson was "whether the amount of hate propaganda in Canada causes sufficient harm to justify legislative intervention of some type. Judge Dickson noted that the studies reveal, "Increased immigration and periods of economic difficulty have produce an atmosphere…ripe for racially motivated incidents,"[196] "an increase in the prevalence and scope of hate propaganda in Canada,"[197] and an increase in exportation of hate propaganda from Canada to other countries.[198] He also noted the harmful effects of hate propaganda in society, namely the injury that it inflicts on minority groups and the various ways they respond to it such as avoiding activities with non-members, damage to an individual's sense of self-worth and acceptance and a feeling that they must blend in with the majority.[199] These, Judge Dickson concluded, "bear heavily on a nation that prides itself on tolerance and the fostering of human dignity through, among other things respect for the many racial, religious and cultural groups within our society."[200] A second harmful effect Judge Dickson found relevant was the ability for hatred to spread through propaganda.[201] The evidence led Dickson to the conclusion that there was "a powerfully convincing legislative objective…to justify some limit on freedom of

[196] *Keegstra, supra* note 179 at 711.
[197] *Id.* ("There has been a recent upsurge in hate propaganda. It has been found in virtually every part of Canada. Not only is it anti-semitic and anti-black, as in the 1960s, but is also now anti-Roman Catholic, anti-East Indian, anti-aboriginal and anti-French. Some of this material is imported from the United States but much of it is produced in Canada.")
[198] *Id.* at 713 ("Most worrisome of all is that in recent years Canada has become a major source of supply of hate propaganda that finds its way to Europe…").
[199] Id at 712.
[200] *Id.*
[201] *Id.* ("It is thus not inconceivable that the active dissemination of hate propaganda can attract individuals to its cause, and in the process create a serious discord between various cultural groups in society").

express."[202] Specifically, the objective of "protecting target groups members and fostering harmonious social relations in a community dedicated to equality and multiculturalism."[203]

Next the Court needed to address the second part of *Oakes* - whether the measure was proportional. As was mentioned above, for a measure to be proportional it must be rationally related to the objective, it must impair the right as little as possible and the effects of the measure must be proportional to the objective sought. Dickson, concluded that "the criminal prohibition of hate propaganda obviously bears a rational connection to the legitimate Parliamentary objective of protecting target group members and fostering harmonious social relations in a community dedicated to equality and multiculturalism."[204] He noted that there were "three primary ways" that the effect of the law in question could be seen to "undermine any rational connection between it and Parliament's objective," which he addressed in turn. First, it had been argued that a prohibition could actually encourage the cause of hate mongers by "earning them extensive media attention," turning them into martyrs and "generating sympathy from the community." Second, "the public may view the suppression of expression by the government with suspicion, making it possible that such expression - even be it hate propaganda- is perceived as containing an element of truth."[205] Finally, it could be argued that such laws are ineffective and do little to prevent the spread of hatred.[206] Media attention, Judge Dickson reasoned, actually "serves to illustrate to the public the severe reprobation with which society holds

[202] *Id* at 718.
[203] *See Id*. at 718-721.
[204] *Id.* at 721.
[205] *Id.*
[206] *Id.* ("Germany of the 1920's and 1930's possessed and used hate propaganda laws similar to those existing in Canada, and yet this laws did nothing to stop the triumph of a racist philosophy under the Nazis").

messages of hate."[207] The use of criminal law provides "many Canadians who belong to identifiable groups…a great deal of comfort from the knowledge that the hate-monger is criminal prosecuted and his or her ideas rejected" as well as reminds "the community as a whole…of the importance of diversity and multiculturalism in Canada."[208] Evidence also suggests that "governmental disapproval…does not invariably result in dignify the suppressed ideology," pointing to pornography and defamatory statements.[209] In concluding his critique of the of the arguments that no rational connection exists between the law and its intended purpose he noted that hate propaganda laws in themselves can not avert tragedy they are but one part of an effort to spread hate and racism.[210] Prohibitions on hate propaganda exist in "a great many countries" and international instruments which support the notion that they are not futile or counter-productive. Judge Dickson held that the means chosen to further the proper purpose were "rational in both theory and operation."[211]

The final stage of the *Oakes* test is a determination that the prohibition impairs the right as little as possible. The main argument, he noted, was that "it creates a real possibility of punishing expression that is not hate propaganda."[212] Dickson then address issues of overbreadth and vagueness that could lead to unnecessary infringements of or chilling effects on the exercise of free expression. He dismissed the notion of overbreadth and vagueness in a careful dissection of the statute's language addressing in particular the specific *mens rea* and *actus reas* requirements and then embarked on an investigation of alternative means available. Of this component Judge Dickson noted:

[207] *Id.* at 722.
[208] *Id.*
[209] *Id.*
[210] *See supra* note 195 and accompanying text.
[211] *Id.*
[212] *Id*. at 724.

> I should not operate in every instance so as to force the government to rely upon only the mode of intervention least intrusive of a Charter right or freedom. It may be that a number of courses of actions are available in the furtherance of a pressing and substantial objective, each imposing a varying degree of restriction upon a right or freedom. In such circumstances, the government may legitimately employ a more restrictive measure, either alone or as part of a larger programme of action, if the measure is not redundant, further the objective in ways that alternative responses could not, and is in all other respects proportionate to a valid s. 1 aim.[213]

He concluded that although the criminal law may not be prudent in all circumstances it is prudent in some, and that the state should have it at its disposal for those instances where it is necessary. The "narrowly confined offence" contained in the statute therefore places a minimal impairment on the right.[214] As for the argument that other modes are available which "eclipse the need for criminal sanctions," it is "eminently reasonable to utilize more than one type of legislative tool" to achieve the state's objective.[215]

Having concluded the minimal impairment test, Judge Dickson proceeded to balance the "importance of the state objective against the limits imposed" upon the right to free expression. Relying largely on the studies[216], the harms of hate propaganda in Canadian society and society generally,[217] the importance of freedom of expression and the values underlying Section 2 of the Charter,[218] the "enormous importance" of the objective sought,[219] and the narrow prohibition

[213] *Id*. at 729.
[214] *Id*. at 730.
[215] *Id.*
[216] *See supra* notes 193-195 and accompanying text.
[217] *See supra* notes 199-201and accompanying text
[218] *See Keegstra*, supra note 179 at 709.
[219] *Id*. at 720.

contained in the statute,[220] he concluded that the infringement constituted a reasonable limit in a free and democratic society.[221]

3.2.2 *Ford v. Quebec*[222]

Ford v. Quebec addressed the issue of whether a measure which required all public signs, posters and commercial advertising to be in the French language only and that only the French version of a business name may be used. Petitioners alleged, *inter alia*, that the measure infringed on the freedom of expression guarantee in s. 2(b)[223] of the Canadian Charter of Rights and Freedoms. The petitioners were five business owners located in Quebec. The threshold question was whether freedom of expression as contained in the Charter included the freedom to express one's self in the language of one's choice. The Court determined that "language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice."[224] After some discussion it was also determined to extend to the petitioner's commercial advertising. The analysis then turned to the limitation clause and the *Oakes* test to determine if the restriction was nevertheless justified.

The court began the analysis in the order laid out by *Oakes*, first determining whether the objective that the measure was designed to promote was of sufficient importance to warrant overriding a constitutional right by bearing on a pressing and substantial concern. The court acknowledged as a "serious and legitimate" concern - the provincial government concern about

[220] *See supra* note 212-213 and accompanying text.
[221] *Id.* at 743.
[222] F*ord v. Quebec* [1988] 2 S.C.R. 712 (Can.).
[223] *See supra* note 184 and accompanying text.
[224] *Id.* at 732-33.

the survival of the French language and the perceived need for adequate legislation to preserve it.[225] This acknowledgement was based on a number of studies that indicated the "vulnerable position of the French language in Quebec and Canada."[226] The threatened position was the result of a number of factors including: (a) the declining birth rate of Quebec francophones resulting in a decline in the Quebec francophone proportion of the Canadian population as a while; (b) the decline of the francophone population outside of Quebec as a result of assimilation; (c) the greater rate of assimilation of immigrants to Quebec by the Anglophone community of Quebec; and (d) the continuing dominance of English at the higher levels of the economic sector."[227] This created a concern that "the French language was threatened and that it would ultimately disappear" from Quebec society.[228] Both parties in dispute stipulated to the importance of the laws objective.

The Court also found a rational connection between the objective of protecting and preserving the French language and "assuring that the reality of Quebec society is communicating through the '*visage linguistique*.'"[229] However, the Court rejected the necessity of the measure noting that the government was unable to "demonstrate that the requirement of the use of French only is either necessary for the achievement of the legislative objective or proportionate to it,"[230] both of which the party defending the measure bears the burden. In addressing alternatives the court wrote:

> [R]requiring the predominant display of the French language, even its marked predominance, would be proportional to the goal of promotion and maintaining a French

[225] *Id.* at 745.
[226] *Id.* at 744.
[227] *Id.*
[228] *Id.* at 745.
[229] *Id.*
[230] *Id.*

> "visage linguistique" in Quebec and therefore justified under the Quebec Charter and the Canadian Charter, requiring the exclusive use of French has not been so justified. French could be required in addition to any other language or it could be required to have greater visibility than that accorded to other languages. Such measure would ensure that the "visage linguisique" reflected the demography of Quebec: The predominant language is French. This reality should be communicated to all citizens and non-citizens alike, irrespective of their mother tongue. But exclusivity for the French language has not survived the scrutiny of a proportionality test and does not reflect the reality of Quebec society.[231]

The court concluded that "it has not been demonstrated that the prohibition of the use and use of any other language other than French…is necessary to the defence and enhancement of the status of the French Language in Quebec or that it is proportionate to that legislative purpose."[232] Consequently, the limit imposed on freedom of expression is not justified under the Canadian Charter.

3.2.3 *Analysis of the Oakes Test*

The Canadian variation of proportionality as formulated in the *Oakes* test is most consistent with the structure of proportionality review outlined in Chapter 2. It contains all four components – proper purpose, rational connection, necessity and proportionality *stricto sensu* – and each component operates in the general manner described. The test is applied in a systematic fashion, taking each step at a time in proper order.

The presence of a general limitation clause, as opposed to specific limitation clauses like those found in the ECHR, would seem at first thought to create an area readily acceptable to criticism pertaining to proper purpose. Indeed one could argue that the protection of the French language is not sufficiently important to limit a constitutional right (although this could

[231] *Id.*
[232] *Id*. at 754.

perhaps be explained by unique relationship between Canada and the Province of Quebec). Nevertheless the Court is seemingly able to create defensible judgments as to when a proper purpose exists. The investigation into determining whether something is a proper purpose is thorough and comprehensively articulated. The rational connection assessment, which I expressed possible misgivings about at the beginning of this section, appears to be a test of the measures ability to achieve its objective in practice, rather than just an assessment of what it was "designed to do." The Court in both *Keegstra* and *Ford* spent considerable time discussing the impugned law's actual relationship toward the proper purpose. The necessity component is applied in precisely the fashion described in the previous chapter, included the evaluation of available alternative means, which requires that the less intrusive means achieve precisely the "same objective as effectively" as does the impugned measure.[233] Although the Ford court did not have occasion to engage in proportionality *stricto sensu*, have dismissed the action at the necessity stage of the analysis, the *Keegstra* court embarked on a discussion in great detail, covering some 20+ pages of the Court's opinion, meticulously identifying the factors being considered and how it was attaching degrees of weight and importance to them. The resulting opinions of both cases are easily defensible and provide a thorough and proper explanation of the justification for the limitation.

3.3 THE SOUTH AFRICAN CONSTITUTIONAL COURT

During the 1990s, South Africa underwent a rapid social and political transformation as they transitioned from the apartheid regime. The first interim constitution was ratified in November of 1993 and "contained an extensive catalog of fundamental rights," along with a

[233] *See R. v Chaulk*, [1990] 3 S.C.R. 1303, 1341 (Can.).

limitation clause not dissimilar to section 1 of the Canadian Charter of Rights and Freedoms.[234] In *State v. Makwanyane*,[235] the newly formed Constitutional Court addressed a challenge to the death penalty. In ruling the death penalty as an unconstitutional violation of the right against cruel, inhuman, and degrading punishments, the court injected proportionality into South African constitutional jurisprudence by declaring that "the limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality."[236] The court then laid out a list of factors to be considered including, the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question."[237] When South Africa adopted its permanent constitution in 1996, the proportionality test outlined in *Makwanyane* was "elevated to the status of a constitutional principle"[238] and written into the constitutional text[239]:

> 1. The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -
>
> a). the nature of the right;
>
> b). the importance of the purpose of the limitation;

[234] Sweet & Matthews, *supra* note 2 at 124.
[235] *S v. Makwanyane & Another* 1995 (3) SA 391 (CC) (S. Afr.).
[236] Id at 436.
[237] *Id.*
[238] Sweet & Matthews, *supra* note 2 at 127;
[239] CONT. S. AFR. (1996) § 36.

c). the nature and extent of the limitation;

d). the relation between the limitation and its purpose; and

e). less restrictive means to achieve the purpose.

2. Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

When the test was incorporated into the constitutional text there were initial objections that Section 36(1) did not contain a "necessity" requirement.[240] The limitation clause provides only for limitations that are "reasonable and justifiable." The court rejected the criticism by noting that the test as outlined in Section 36, even without the using the word necessity, nevertheless was structured to conform to the general interpretation of that component.

It is also important to note that in addition to the general limitation clause contained in Section 36(1), as indicated by the phrase "or any other provision of the Constitution" in Section 36(2). Relevant to our topic we see, in addition to the general limitation clause, a specific limitation clause placed in the free expression guarantee of Section 16:

1. Everyone has the right to freedom of expression, which includes -

a. freedom of the press and other media;

b. freedom to receive or impart information or ideas;

c. freedom of artistic creativity; and

d. academic freedom and freedom of scientific research.

2. The right in subsection (1) does not extend to -

a. propaganda for war;

b. incitement of imminent violence; or

[240] Sweet & Matthews, *supra* note 2 at 127.

c. advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

The limitations found in 16(2) function more like absolute prohibitions rather than permissible limitations in that the categories of expression contained in 16(2) are considered beyond the scope of the right.

The proportionality test outline above contains a combination of element from both proportionality review outlined in Chapter 2 and the basic law of balancing outline in Chapter 1. The "relation between the limitation and its purpose" (1d) would seem to correspond with a rational basis assessment. The least restrictive means requirement (1e) is a correlation to necessity. Factors 1a-c are balancing factors, which we have explicitly mentioned in Chapter 1. The components are all present and even some required parameters for proportionality *stricto sensu*. Although the South African Constitutional Court has "borrowed extensively from Canadian limitations jurisprudence" it has not constructed a test that flows in the same fashion as the Canadian *Oakes* test.[241] For one thing, the test is not conducted in sequential steps but rather as part of an overall "non-mechanical assessment."[242] The Court also does not always separate out the factors for consideration independently. A review of some cases will highlight how this test works in practice.

3.3.1 *The Islamic Unity Convention v. The independent Broadcasting Authority*[243]

The Islamic Unity Convention ran a community radio station under a broadcasting license issued by The Independent Broadcasting Authority. In May of 1998, the station

[241] *Id.* at 129.
[242] *Id.* at 129-30.
[243] *The Islamic Unity Convention v. The Independent Broadcasting Authority*, [2002] (5) BCLR 433 (CCT36/01).

broadcast a program entitled "Zionism and Israel: An in-depth analysis" in which an interview featuring a historian and author expressed views which, in alia, questioned the legitimacy of the state of Israel and Zionism as a political ideology. He also engaged in holocaust denial by asserting that Jewish people died of infection disease and not as the result of gas chambers. As a result of a compliant the Islamic Unity Convention was found to be in violation of a section of the Code of Conduct for Broadcasting Services which provided that "[b]roadcasting licensees shall…not broadcast any material which is indecent or obscene or offensive to public morals or offensive to the religious convictions or feelings of any section of the population or likely to prejudice the safety of the State or the public order or relations between sections of the population."[244] The court was confronted with the question of the constitutionality of the clause in this code.

In identifying the purpose of the measure, the Court noted that the complaint was based entirely on the portion of the clause that refers to material that is "likely to prejudice relations between sections of the population."[245] The prevention of disturbing relations between sections of the population appears to be accepted as the measures intended purpose. The first inquiry the court embarked upon was to determine whether the purpose limited freedom of expression as guaranteed in Section 16(1) or addressed a category of non-protected speech in Section 16(2). The Court held that "[t]he prohibition against broadcasting material and is 'likely to prejudice relations between sections of the population' self-evidently limits the right in section 16 of the Constitution."[246] "Segments of the population" was too broad of phrase to fit within Section

[244] *Id.* at ¶ 5.
[245] *Id.* at ¶c 24.
[246] *Id.* at ¶ 35.

16(2)(c) which specified "race, ethnicity, gender or religion."[247] The prohibition also did not apply only to behavior that amounted to advocacy of hatred.[248] Having concluded that the prohibition applied to free expression as guaranteed by Section 16(1) the court turned its inquiry to whether or not the limitation was justified.

The court began the inquiry with a summary of the requirements for limiting a constitutional right:

> The limitation must be by means of law of general application and determining what is fair and reasonable is an exercise in proportionality involving weighing-up of various factors in a balancing exercise to determine whether or not the limitation is reasonable and justifiable in an open and democratic society founded on human dignity, equality and freedom.[249]

The Courts first attempt appears to have been to interpret the right in a way that could make it consistent with the constitution but was unable to do so the difficulty was that the phrase was so broad. "The prohibition against the broadcasting of any material which is 'likely to prejudice relations between sections of the population is cast in absolute terms; no material that fits the description may be broadcast…[i]t is so widely-phrased and so far reaching that it would be difficult to know beforehand what is really prohibited or permitted."[250] The court appeared to be concerned that people would self censor in the absence of clear guidelines, which would "deny both broadcasters and their audiences the right to hear, form, and freely express and disseminate their opinions and views on a wide range of subjects.[251] Next, the court addressed the Authority's arguments that the restriction was justifiable "in the interests of human dignity and equality, which are founding values of the Constitution and national unity and that the

[247] *Id.* at ¶36.
[248] *Id.* at ¶35.
[249] *Id.* at ¶ 38.
[250] *Id.* at ¶ 44.
[251] *Id.*

"impact of the prohibition [was] not extensive." The assertions supporting the latter claim were that it only applied to broadcasters not the public at large and that it was administrative, there were not criminal sanctions. The court addressed each. The limited ambit of the prohibition was undermined by the fact that it applied to radio and television, both extremely powerful media responsible for "shaping opinion and informing the public."[252] The infringement is therefore not "rendered less significant because it only applies to broadcaster."[253] The lack of a corresponding criminal sanction was undermined by the fact that the administrative sanction could include the rescission of the individuals broadcasting license, in effect taking away their livelihood.

The Court concluded "the effect of the limitation is substantial, affecting as it does the right of broadcasters to communicate and that of the public to receive information, views and opinions."[254] Taking the relevant factors into account, the prohibition "is far too extensive" given the grounds that have been advance by the Authority to support it. "It [was] not shown that the very real need to protect dignity, equality and the development of national unity could be adequately served by the enactment of a provision which is appropriately tailored and more focused."[255]

3.3.2 *State v. Mamabolo*[256]

In *Mamabolo*, the defendant, an official in the Department of Correctional Services, was tried and sentenced for contempt of court as the result of comments he published as a

[252] *Id.* at ¶ 47.
[253] *Id.*
[254] *Id.* at ¶50
[255] *Id.* at ¶51
[256] *State v. Mombolo*, [2001] 10 BHRC 493 (CCT 44/00).

spokesperson for the Department of Corrections that criticized an order issued by the court. The comments, which were published in a local paper, were that the judge had made a mistake regarding a bail hearing and that it had contributed to confusion within the Department of Corrections. The judge who had given the order read a newspaper report based on the departmental press release containing the comments and ordered the Mr. Mamabolo to appear before him and explain his actions. The judge found that the press release constituted scandalous comment, largely because the press release stated that the judge's "error in granting bail" was a fact not a matter of opinion.[257] The judge ruled that the comment intended to discredit the dignity, honor and authority of the court.[258] Momobolo was subsequently convicted of "scandalizing the court," a form of contempt.

The Constitutional Court recognized that the aim of the offense was to preserve the capacity of the judiciary to fulfill its role under the constitution.[259] Noting that "[t]he institution of contempt of court has an ancient and honourable, if at times abused, history…the need to keep the committal proceedings alive would be strong because the rule of law requires that the dignity and the authority of the courts, as well as their capacity to carry out their functions, should always be maintained."[260] The Court stressed the particular importance of preserving the integrity of the rule of law in South Africa. The Justices found that the "importance of enhancing and protection [the judiciary's] moral authority was significant.[261] The Constitution itself outlines, in numerous sections, the role and importance of the judiciary. Courts must inspire public confidence in order to properly carry out its function. Regarding the limits of the

[257] *Id.* at ¶ 11.
[258] *Id.*
[259] *Id.* at ¶ 16,-19
[260] *Id.* at ¶ 14
[261] *Id.* at ¶ 17.

intrusion, the court noted that the purpose is to "protect the fount of justice by preventing unlawful attacks upon individual judicial officers or the administration of justice in general which are calculated to undermine public confidence in the courts."[262] Noting however, that "[t]the category of cases where the existence of the crime of scandalizing the court still poses a limitation on the freedom of expression is now so narrow, and the kind of language and/or conduct which it will apply will have to be serious, that the balance of reasonable justification clearly tilts in favor of the limitation"[263] Consequently, the crucial test had to be whether the offending conduct was likely to damage the administration of justice.[264] On balance, the court held that while freedom of expression is of fundamental importance in an open and democratic society, there were strong countervailing interests in not ruling the offense of scandalizing the court unconstitutional.[265] In the instant case however, "what was published did not in any way impair the dignity, integrity or standing of the judiciary or of the particular judge."[266] Consequently, the Court held that Momabolo was wrongfully convicted on the merits.

3.3.3 *The 36(1) Proportionality Test*

The South African proportionality test is essentially a balancing test. The components of a proper proportionality test are there – proper purpose, rational connection, necessity, and balancing, but instead of discrete steps in an analytical framework, they are factors placed along side other factors that the court may deem relevant, in non-hierarchical order, to be evaluated. While certainly the weight attributed to the various factors changes from case to case, it is unclear if any of the elements outlined in 36(1) are given a particular level of importance in the

[262] *Id.* at ¶ 24.
[263] *Id.* at ¶ 48.
[264] *Id.* at ¶ 25.
[265] *Id*. at ¶ 48.
[266] *Id.* at ¶ 61.

analysis. The availability of least restrictive means seems to get considerable attention, and indeed was a very influential factor in the *Islamic Unity Convention* case. The least restrictive means assessment also appears to apply even when it is hypothetical. That is to say, the Court could conceivably determine that a less restrictive means is available, even when it cannot point to any other specific alternatives. It would be quite surprising if either the ECHR or Supreme Court of Canada took such a step.

Another interesting observation is that it is unclear from the opinions if the Court is using a particular order to conduct its analysis. The two opinions above seem to establish a rational connection, then engage in balancing the various factors and finishing with an analysis of whether there were less restrictive means. Two cases however, are not enough to determine if the court typically follows this pattern. Despite my assertions that proportionality analysis should proceed in stages and in a particular order, the courts application of the 36(1) test leave little to criticize, at least based on the two cases above. Perhaps the cases were too easy. The test no doubt becomes far more complex and confusing when socio-economic rights are implicated. Nevertheless in the present cases it appears unlikely that the analysis would have been substantially different if the formulation described in Chapter 2 was utilized.

CONCLUDING THOUGHTS

Proportionality review should be both methodical and analytical. It seeks to be a managed and systematized approach to rationally justifying limitations placed on the protection of a constitutionally protected right by identifying the rights and values at stake and then turning to an inquiry that fully examines the need for both the means and the ends. By requiring that a legislative measure, which places a limitation on the protection of a constitutionally protected right, satisfies each of the components of proportionality the decision-maker can be sure that both the means utilized and purpose sought are properly scrutinized. Of the three jurisdictions examined, only Canada used a proportionality test that complied with the requirements of proportionality review. The Court's opinions are thorough, and provide detailed insight into their application of the test. The European Court of Human Right's "necessary in a democratic society" test on the other hand is little more than a one step balancing test that merely uses the term "proportionality" as a phrase to indicate that they think they've "struck a fair balance" between the competing interests. It is not a true proportionality analysis. Combined with their inability to articulate how they are applying the test, their judgments appear incoherent, confused, and hardly defensible. The South African Constitutional Court has taken a unique approach both in that the proportionality test is built into the constitutional text itself and in how it applies the test. There is no structure *per se*, and it is similar to a balancing test with constitutionally required factors that must be taken into account. Even though it is applied as a non-mechanical balancing test, it produces far more defensible and articulated judgments than the ECtHR. Unfortunately the narrow subset of case law examined in this thesis does not provide enough information to recognize patterns or an unofficial or habitual structure to the test's application.

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