The application of the doctrine of proportionality in South African courts

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1 Introduction

Can constitutional rights be limited where there is a functioning democracy and the rule of law? It has become generally accepted that limitations on constitutional rights generated by statutory or common law in democracies *are* constitutionally permissible *if* the principle of *proportionality* is applied. Succinctly put, in functioning democracies the *constitutionality* of such limitations are determined by *proportionality.*

In practice the principle of proportionality is a safeguard for the individual, over and above traditional methods of controlling the state's administration. It involves a *balancing act* between the competing interests and objectives of the *state* and the interests of the *individual* and embodies a sense of an *appropriate relationship* between the *ends* and the *means* of state action.

Proportionality demands that when an individual's rights are affected or threatened by state action, only such action shall be countenanced which is suitable, necessary and not out of proportion to the gains to the community. Proportionality can thus be seen to be a synonym for reasonableness.

The birthplace of proportionality is Germany, from whence it has migrated into many countries and legal systems. It migrated to various Western European states, to Canada, to England, to New Zealand, to Australia, to South Africa, to Israel, to Central and Eastern Europe, to Asian and to South American states.[1]

Prior to setting out the impact of the doctrine of proportionality on South African courts two jurisdictions will be examined. First, the jurisdiction of Germany as it is the jurisdiction where the proportionality doctrine had its origin and early development. Secondly, Canada, due to the fact that the limitation clause in South Africa's 1993

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[1]Barak *Proportionality, constitutional rights and their limitations* (2012). In this monumental work the author sets out the migration of proportionality from Germany to the rest of the world. He also sets out the sources, nature and function of the doctrine of proportionality, evaluates the doctrine and gives his views on the future of proportionality.

Interim Constitution and 1996 Constitution has been so heavily influenced by the general limitation clause (art 1) of the 1982 Canadian Charter of Rights and Freedoms and the interpretation of that clause by the Canadian Supreme Court.

It is ironic that nineteen years before the 1993 South African Interim Constitution Hiemstra CJ in *Smith v Attorney-General, Bophuthatswana*[2] applied proportionality when laying down guidelines for the interpretation of the fundamental rights of the Bophuthatswana Constitution – a constitution of an internationally unrecognised state. At issue was the interpretation of legislation infringing fundamental rights guaranteed by the Constitution. He declared that in terms of the principle of proportionality any interference with the fundamental rights guaranteed by the constitution would be *lawful* only if it was allowed by the Constitution; was capable of achieving the purported objective, was necessary to achieve the purported objective and it was clear that there was no lesser form of interference available. Lastly, if it was *reasonable* or *proportional* in the sense that the purported objectives of the interference with the rights were *adequate* and necessary and of equal or superior weight *when balanced* against the affected right.

In *S v Makwanyane*[3] Chaskalson P held that all limitations of rights should be subject to a *proportionality* enquiry. The 'limitations of rights' mentioned by Chaskalson P referred to section 36 of the South African Constitution, the general limitation clause of the Bill of Rights. Section 36 provides that the rights in the Bill of Rights may be limited only in terms of law of general application. Further that such limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. To determine whether the limitation is reasonable and justifiable all *relevant factors* must be taken into account 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 less restrictive means to achieve the purpose.[4]

This general limitation clause (which was also included in South Africa's Interim Constitution of 1993,[5]) for all practical purposes introduced the doctrine of

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[2] 1984 1 SA 182 (B). See Rautenbach 'Grondwetlike bepalings ter beskerming van die wese van menseregte' (1991) *TSAR* 403 at 411.

[3] 1995 6 BCLR 665 (C); 1995 3 SA 391 (CC) para 104: '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'.

[4] See Rautenbach and Malherbe *Constitutional law* (2004) 317 for an extensive discussion of these 'relevant factors'.

[5] Section 33. In *Roman v Williams NO* 1997 9 BCLR 1267 (C) which dealt with s 24(d) of the Interim Constitution the close link between proportionality, justifiability, rationality and reasonableness was demonstrated. Van Deventer J at 1275 held that s 24(d) 'imports the requirement of proportionality between means and end and the role of the courts in judicial reviews is no longer limited to the way in which an administrative decision was reached but now extends to its substance and merits'.

proportionality to our constitutional[6] jurisprudence. Woolman and Botha[7] refer to the South African Constitution's limitation clause as possessing a 'proportionality assessment' that demands at a minimum, that a *rational connection* exist between the *means* employed and the *objective* sought, that the means employed *impair* the right *as little as possible*, and that the burdens imposed on those whose rights are impaired to not outweigh the *benefits to society* that flow from the limitation.

It is generally accepted that the limitation clauses in South Africa's Interim and final Constitution were heavily influenced by German constitutional law[8] and the Canadian Charter on Rights and Freedoms.[9] Whereas the German Bill of Rights does not have a *general* limitation clause but attaches specific limitation provisions to many of the fundamental rights, the Canadian Charter on Rights and Freedoms contains a general limitation clause governing the limitations of those rights.

2 Proportionality in German public law

Proportionality as a legal concept made its appearance in the administrative law of Prussia at the latter part of the nineteenth century.[10] The term made its appearance in German administrative law at the end of the eighteenth century as *Verhältnis-mässigkeit*.[11] The term was developed mainly by the Prussian Supreme Administrative Court in the context of the law relating to the police where that court held that police action could be unlawful if it was disproportionate. The object was to curb the exercise of the discretionary powers of the police and to see to it that measures taken by the police did not exceed the intensity that was required by the object pursued. Fleiner[12] summarises the law of proportionality of that time as never using a cannon to kill a sparrow. At the centre of the concept of proportionality was the necessity to

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[6] The term 'constitutional' must be interpreted broadly as it also encompasses our administrative law. An example is *Dotcom Trading 121 (Pty) Ltd t/a Live Africa Network News v The Honourable Mr Justice King NO* 2000 4 All SA 128 (C); 2000 4 SA 973 (C) where it was held that the decision of the chairperson of a commission of inquiry into match fixing in cricket to ban radio broadcasts of the proceedings could not be justified with reference to the limitation clause. This was because no consideration was given by the chairperson to *less restrictive means.*

[7] 'Limitations' in Woolman, Bishop and Brickhill (eds) *Constitutional law of South Africa* (2002) ch 34 at 13.

[8] De Waal 'A comparative analysis of the provisions of German origin in the Interim Bill of Rights' (1995) 11 *SAJHR* 1; Blaauw-Wolf and Wolf 'A comparison between German and South African limitation provisions' (1996) *SALJ* 279.

[9] Barak (n 1) 197; Rautenbach and Malherbe (n 4) 319; Barrie 'Proportionality: Expanding the bounds of reasonableness' in Carpenter (ed) *Suprema lex* (1998) 23 at 31. Currie and De Waal *The Bill of Rights* (2005) 165 point out that the principal model for the South African Bill of Rights is the Canadian Charter of Rights and Freedoms.

[10] Blaauw-Wolf 'The 'balancing of interests' with reference to the principle of proportionality and the doctrine of *Güterabwagüng* – a comparative analysis' (1999) *SAPL* 178.

[11] Singh *German administrative law in common law perspective* (1985) 91.

[12] Fleiner *Institutionen des Deutsches Verwaltungsrecht* (1928) 404. In English law proportionality is premised on the principle that a person should not use a 'hammer to crack a nut' – *R v Goldsmith* 1983 1 WLR 151, 155.

protect human rights from the powers of the state.[13] An example would be the police closing an entire store because the owner violated his liquor license. The Prussian Supreme Administrative Court in such a case overruled the police order holding that the complete closure was a disproportionate sanction in that there was an option to revoke only the store's liquor license.[14] A further example would be the police ordering an owner to remove the entire fence around his property because the fence was not visible at night and created a risk to pedestrians. On similar facts the Prussian Supreme Administrative Court overruled the police holding that a less drastic measure such as installing proper lighting was more appropriate.[15]

By reviewing state action in this way proportionality achieved a firmer basis which continued throughout the Weimar Republic and only saw its demise with the rise of National Socialism. The proportionality principle however, saw a revival after World War II and developed into a legal principle in its own right. It became known as a principle prohibiting the excesses of unreasonable administrative measures despite the Basic Law (*Gründgesetz*) of the Federal Republic of Germany lacking any explicit provision referring to proportionality. The German Constitutional Court has been consequent in holding that all rights included in the Basic Law are bound by the concept of proportionality in all its manifestations. The only exception is the right to human dignity (*Würde des Menschen)* which is seen to be absolute. The German Constitutional Court is of the opinion that a court must find a *proper purpose* and a *rational connection* between the means used by a limiting statute and the proper purpose of the statute, that the question must be asked as to *less intrusive means* and that there must be a *proper balance*[16] between the limitation of the right and the benefit gained by the limiting statute. An example is the so-called case of the *Secret Tape Recordings*[17] where it was held that the use of a recording made without the knowledge and consent of the speaker as evidence in a court of law limits the free development of his personality as protected by article 2(1) of the Basic Law. The court held that the individual as part of the community must accept state intervention in his private life if community interests are overriding, but under the application of the *proportionality* principle such intervention may not violate the sphere of his private life.[18]

This approach of the German Constitutional Court has also permeated German administrative law decisions. The courts expect administrative authorities

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[13]Grabitz 'Der grundsatz der Verhältnismässigkeit in der Rechtsprechung des Bundesverfassungsgerichts' (1973) *AöR* 568; Hirschberg *Der Gründsatz der Verhältnismässigkeit* (1981); Jakobs *Der Gründsatz der Verhältnismässigkeit* (1985); Cohen-Eliya and Porat 'American balancing and German proportionality: The historical origins' (2010) *Int'l J Const L* 263; Stone, Sweet and Mathews 'Proportionality, balancing and global constitutionalism' (2009) *Colum J Transnat't L* 72.

[14]13 PrOVGE 424 as referred to by Barak (n 1) 179.

[15]13 PrOVGE 426 as referred to by Barak (n 1) 179.

[16]Blaauw-Wolf (n 10) 179.

[17]BVerfGE 34, 238 referred to in Barak (n 1) 180.

[18]For an English translation of this decision see Michalowski and Woods *German constitutional law: The protection of civil liberties* (1999) 127.

when exercising their discretion to strike a judicious balance between community and private interests and to abstain from taking action which puts material burdens on the existence of the individual.[19]

German courts have seen the principle of proportionality as having its foundation in the *Rechtsstaat* concept[20] in that the principle curbs the excesses of state authority (*Übermassverbot*). German courts nowadays see the principle of proportionality as consisting of three requirements: *Geeignetheit,* the suitability of the measures taken; *Erforderlichkeit*, the necessity of the measures and *Verhältnismässigkeit,* proportionality defined in a narrow sense. The latter requirement is approached by posing the question: could the same result not have been achieved by a less far-reaching restriction?[21]

The principle of proportionality as seen by German courts can be summarised as that the principle demands that all branches of government are bound by the fundamental rights (art 1(3) of the Basic Law) and that all state competencies must be exercised in that light. Regarding *restrictions* of individual rights, the principle of proportionality prohibits state activities which limits those rights to the extent that they are not in proportion to the object pursued.[22]

3 Proportionality in Canada

Prior to the Canadian Charter of Rights and Freedoms of 1982 (the Charter)[23] Canadian courts did not recognise the concept of proportionality.[24] With the advent of the 1982 Charter the situation changed. The Charter was seen to be a constitutional document which rendered any legislation conflicting with it as having no force and effect. Besides enumerating several human rights, a general limitation clause (art 1) subjects the guaranteed rights and freedoms 'only to such *reasonable* limits prescribed by law as can be demonstrably justified in a free and democratic society'.[25]

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[19]Singh (n 11) 91.

[20]Section 20 of the Basic Law. See Dürig 'Der Gründrechtssatz von der Menschenwürde' (1956) *Archiv des öffentlichen Rechts* 117; Isensee *Wer definiert die Freiheitsrechte* (1980) 29; Schlink 'Bemerkungen zum Stand der Methodendiskussion in der Verfassungsrechtswissenschaft' (1980) *Der Staat* 73; Gern 'Güterabwägung als Auslegungsprinzip des öffentlichen Rechts' (1986) *Die öffentliche Verwaltung* 426.

[21]Blaauw-Wolf (n 10) 194.

[22]Höger *Die Bedentung van Zweckbestimmungen in der Gesetzgebung der Bundesrepublik Deutschland* (1976). In the *G10-decision* (67BVerfGE 157) a German court had to decide whether an order to tap telephones and observe correspondence infringed the right to human dignity of a German citizen who regularly called relatives in the then German Democratic Republic. The question was whether such surveillance was *disproportionate* to the purpose of obtaining information of a possible attack on Germany. The court found that the surveillance supported the desired aim and was a suitable measure.

[23]Part I of the Constitution Act 1982.

[24]The Canadian Constitution Act 1867 did not have a chapter on human rights. In the 1960 Canadian Constitution, the Bill of Rights did not have any special status and its interpretation never included the proportionality concept. See Hogg *Constitutional law of Canada* (1985) 24.

[25]Emphasis is mine. See s 33 of the Interim South African Constitution and s 36(1) of the 1966 South African Constitution.

The words 'reasonable' and 'demonstrably justified in a free and democratic society' fell to be interpreted. Leading commentators suggested that the limitation clause of the European Convention on Human Rights be used as a guide in this regard.[26] It was strongly proposed by Hogg[27] that the reasoning followed in the *Sunday Times*[28] case by the European Court of Human Rights when interpreting the European Convention on Human Rights be followed. In the *Sunday Times* case the House of Lords issued an injunction against the publication of a newspaper article relating to a pending case in England. The injunction was based on the English common law concept of contempt of court. The European Court of Human Rights had to decide whether such a common law concept properly limited the right to freedom of expression guaranteed by article 10(1) of the European Convention on Human Rights. Question was whether the injunction (interference) complained of corresponded to a pressing social need and whether it was *proportionate* to the legitimate aim pursued. The court found that the restraint imposed on freedom of expression was not proportionate to the legitimate aim pursued. Hogg submitted that the word 'reasonable' in article 1 of the Charter implicitly contains the concept of proportionality. In the *Sunday Times* case the European Court of Human Rights accepted the legitimacy of governmental purpose but held that the suppression of all speech relating to ongoing litigation was a *disproportionately* severe restraint.

A year after Hogg put forward his view the Canadian Supreme Court decided *R v Oakes*.[29] Here the Supreme Court had to interpret the words in article 1 of the Charter which stated that Charter rights are subject to 'such *reasonable* limits prescribed by law as can be *demonstrably justified* in a free and democratic society'.[30] Dickson CJ, for a court that was unanimous, laid down the criteria that must be satisfied to establish a limitation that is reasonable and demonstrably justified in a free and democratic society.

These four criteria can be summarised as follows:

(i) The law must pursue an objective that is sufficiently important to justify limiting a charter right. (*The sufficiently important objective test*).

(ii) The law must be rationally connected to the objective. (*The rational connection test*).

(iii) The law must impair the right no more than is necessary to accomplish the objective. (*The less drastic means test)*.

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[26]Hovius 'The limitation clauses of the European Convention on Human Rights: A guide for the application of section 1 of the Charter' (1985) *Ottawa LR* 213; 'The limitation clauses of the European Convention on Human Rights and Freedoms and section 1 of the Canadian Charter of Rights and Freedoms: A comparative analysis' (1987) *Y B Eur L* 105. Beaudoin and Mendes (eds) *The Canadian Charter of Rights and Freedoms* (1996) 3.

[27]See (n 24) 687.

[28]*Sunday Times v United Kingdom* App No 6538/74, 2 EHRR 245 (1980); (1979) 2 EHRR 245.

[29](1986) 1 SCR 103.

[30]Emphasis is mine.

(iv) The law must not have a disproportionately severe effect on the persons to whom it applies. (*The proportionate effect test*).

The Canadian Supreme Court in effect adopted a form of a proportionality test closely following the approach of the European Court of Human Rights in the *Sunday Times* case[31] when interpreting the European Convention on Human Rights. Dickson CJ for all practical reasons held that reasonable limitations that can be demonstrably justified in a free and democratic society require a *sufficiently significant objective* and a *proportional means* to achieve it. That there will be a *significant objective* if it relates to pressing and substantial concerns. That three tests determined *proportionality.* Firstly, the means must be *rationally connected* to the objective. Secondly, the means *must impair* the right or freedom in question *as little as possible.* Thirdly, there must be a proportional relation between the *effects* on the rights of those affected and the importance of the objective.[32] This third test for proportionality was rephrased by Dickson CJ in *R v Edward Books and Art*[33] in saying that the effects of the limiting measures 'must not so severely encroach on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgement of rights'.

What proportionality in Canada requires in practice is a balancing of the objective sought by law against the infringement of civil liberties. It asks whether the Charter infringement is too high a price to pay for the benefit of the law.[34]

The proportionality adopted by Dickson CJ in the *Oakes* case closely followed the approach of the European Court of Human Rights in the *Sunday Times* case in interpreting the European Convention for the Protection of Human Rights and Fundamental Freedoms.

4 South Africa

As stated above South Africa's 1996 Constitution (s 36) has a general limitation clause (as did the Interim Constitution, clause 33). Both these clauses were clearly influenced by the general limitation clause of the Canadian Charter (art 1). The 1996 Constitution was in the whole also heavily influenced by German constitutional law.[35] Section 36(1)

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[31]See (n 28).

[32]This third element of proportionality in the words of the Court was said to require '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"' (139).

[33](1986) 2 SCR 713 at 768.

[34]Much has been written on the doctrine of proportionality in Canada following on *R v Oakes.* Recent publications of note are Weinrib 'Canada's Charter of Rights: Paradigm lost?' (2002) *Review of Constitutional Studies* 119; Choudry 'So what is the real legacy of Oakes? Two decades of proportionality analysis under the Canadian Charter's Section 1' (2006) *Sup Ct LR* 501; Grimm 'Proportionality in Canadian and German constitutional jurisprudence' (2007) *Toronto LJ* 383; Tremblay and Webber *The limitation of Charter Rights: Critical essays on R v Oakes* (2009).

[35]See (n 8).

of the South African Constitution is clearly influenced by its German counterpart. This article states that the rights in the Bill of Rights may be limited only in terms of a *law of general application.* Article 19(1) of the German Basic Law requires that any limiting legislation *apply generally* and not solely to an individual case. The question is how feature the above-mentioned Canadian and German influences in the way in which proportionality has been applied by South African courts?

'Law of general application' in section 36(1) of the South African Constitution must be interpreted broadly. As held by Kriegler J in *Du Plessis v De Klerk*[36] the clause draws no distinction between different categories of *laws of general application*. He held further that it is irrelevant if the rule is of the common law, is statutory, is regulatory, has a horizontal or vertical effect or is founded on the Twelve Tables of the Roman law or is based on a Placaet of Holland or a tribal custom.

It is important to note that in Germany, Canada and South Africa democracy has a constitutional status. Article 20(1) of the German Basic Law provides that Germany is a democracy ('*ein demokratischer Bundesstaat*'). Section 1 of the Canadian Charter refers to a 'free and democratic society'. Section 36(1) of the South African Constitution refers to an 'open and democratic society'.

Democracy entails explicitly or implicitly separation of powers, the independence of the judiciary and human rights. Democratic constitutions tend to interpret the concept of democracy in an expansive way and include the formal and substantive facets of democracy. Section 1 of the Canadian Charter, as seen above, refers to a free and *democratic* society. The German Constitutional Court has emphasised that the Basic Law is based on the idea of a free *democracy*.[37] Section 7(1) of the South African Constitution affirms the *democratic* values of human dignity, equality and freedom.[38] The South African Constitutional Court in *South African Association of Personal Injury Lawyers v Heath* has held that implicit features of democracy (such as separation of powers) have as much force as an express provision.[39]

Democracy and human rights go hand in hand. Human rights can however never be absolute. How does one balance the actions of the government put there by majority rule and the human rights of the individual or group? In what way may a democratic society *limit* a constitutional right? This is where *proportionality* appears on the stage. According to Canadian, German and South African constitutional law, as set out above, a limitation of a constitutional right is acceptable if it is *proportional.* As Dickson CJ held in *Oakes*:

> To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the *objective*, which the measures responsible for a limit on a Charter right or freedom are designed to

[36] 1996 3 SA 850 (CC) para 136.
[37] BVerfGE 5, 585.
[38] See Roux 'Democracy' in Woolman, Bishop and Brickhill (n 7) 33.
[39] 2001 1 SA 883 (CC). See *Doctors of Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC).

> serve, must be of sufficient importance to warrant overriding a constitutional protected right or freedom … Second, the party invoking section 1 must show that the means chosen are *reasonable* and demonstrably justified. This involves a form of *proportionality* test … (I)n each case courts will be required to balance the interests of society with those of individuals or groups.[40]

This is the approach adopted by the South African Constitutional Court in *Makwanyane*[41] where Chaskalson P held 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* … which calls for the *balancing of different* interests.[42]

These competing values are illustrated by Sachs J in *Prince v President of the Law Society of the Cape of Good Hope*[43] where he refers to the irresistible force of democracy and general law enforcement, against the immovable object of constitutionalism and protection of fundamental rights. What it requires, he says, is the maximum harmonisation of all the competing considerations.

An example of harmonising competing considerations is the South African Constitutional Court's decision in *Soobramoney v Minister of Health*.[44] Here an applicant claimed that his right to health was limited as he could not be connected to a dialysis machine (due to a shortage of such machines at that specific time). The court agreed that his right was limited but was also of the opinion that the limitation was justified based on the right of others to health. The Constitutional Court argued that by using the available dialysis machines according to the guidelines more patients are benefited than would be the case if they were used to keep alive persons with chronic renal failure as in the case of Soobramoney. Further that the outcome of the treatment is likely to be more beneficial because it is directed to curing patients, and not simply maintaining them in a chronically ill condition. The court held that the guidelines were *reasonable*, *fair* and *rational*.[45] The court here clearly applied the principles of proportionality.

One of the tests of proportionality is the *rational connection* test. The requirement is that the *means used* by the limiting law are rationally connected to the *purpose* of the limiting law. The *means chosen* must be pertinent to realise the *purpose* of the limiting law. If the means used does not contribute to the realisation of the laws purpose, such means would be disproportional. Section 21(1)(a)(i) of the Drugs and Drug Trafficking Act 140 of 1992 determined that when an individual was

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[40]See (n 29) 138 (my emphasis).
[41]See (n 3) para 104.
[42]My emphasis.
[43]2002 2 SA 794 (C) para 155.
[44]1998 1 SA 765 (CC). See Govender 'Administrative justice' (1999) *SAPL* 62 at 78.
[45]*Id* paras 24, 25, 29. See Moellendorf 'Reasoning about resources: *Soobramoney* and the future of socio-economic rights claims' (1998) *SAJHR* 327; Rautenbach and Malherbe (n 4) 346.

in possession of an illegal drug it was *presumed* that the possession was for the purpose of trafficking. In *S v Bhulwana*[46] the Constitutional Court held that there was no rational connection between the *purpose* of the war on drugs and the legislation that the mere possession of a *small amount* of an illegal drug may promote the war on drugs. The legislation clearly disproportionally limited the constitutionally protected right to the *presumption of innocence*. What the Constitutional Court in effect said was that there was no rational connection between the possession of the illegal drug and the presumption that the possession was with the intention to sell. The court could thus see no justification in the limitation of the presumption of innocence.

> In sum, therefore, the Court places the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds for justification must be.[47]

Similarly in *S v Mbatha*[48] the Constitutional Court examined a statute which declared that any person present, or occupying a premises, shall be presumed to be in possession of the unlawful weapons found on the premises until the contrary is proved. The court held that statute to be unconstitutional because it *disproportionately* limits the right to the *presumption of innocence.* The court held that there was no rational connection between the purpose of the campaign against the illegal possession of weapons and a person's fortuitous presence at the location where such unlawful weapons were found.

In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*[49] the Constitutional Court looked at a statute which denied same-sex couples certain benefits accorded to married couples. Although the court held that the *purpose* of the statute was *proper* in that it attempted to protect the traditional structure of the family, there was *no rational connection* between that purpose and the means of denying the benefits.

In *S v Manamela*[50] the Constitutional Court looked at a statute which established a reverse onus when the acquisition of stolen goods was concerned. The statute provided that anyone accused of acquiring stolen goods should bear

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[46] 1996 1 SA 388 (CC).

[47] *Id* para 14. See *S v Julies* 1996 2 SACR 108 (CC) at 111 f-g.

[48] 1996 2 SA 464 (CC).

[49] 2000 2 SA 1 (CC) para 56. In South Africa where the constitutionality of legislation is challenged the courts require that the means used by limiting law must be rationally connected to the purpose of the limiting law. See *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* 2007 4 SA 395 (CC); *Merafong Demarcation Forum v Minister of Transport* 2011 1 SA 400 (CC). In the latter case Moseneke J at para 35 held that there must be a rational nexus between the legislative scheme and the pursuit of a legitimate government purpose. He held further (at para 36) that when judicially scrutinising statutes that are challenged for reasons that they infringe fundamental rights, a proportionality analysis must be done.

[50] 2003 3 SA 1 (CC).

the onus of proving that the goods were not stolen. With reference to the *purpose* of the statute, the protection of the community from the dealing with stolen goods, the court held it was proper. But regarding the *means used*, the majority of the court held that the *test of necessity* was not fulfilled because the purpose could have been achieved by utilising a *less limiting* measure. Here again the doctrine of proportionality was applied. Justices Madala, Sachs and Yacoob held that the duty of a court is to decide whether or not the legislature has over-reached itself in responding to matters of great social concern.[51]

The *test of necessity*, being an inherent element of doctrine of proportionality, raised its head in *Christian Education South Africa v Minister of Education*.[52] Here a statute (s 10 of the Schools Act 84 of 1996) prohibited corporal punishment at schools. Parents petitioned the Constitutional Court asserting that their religious freedoms were violated because they had consented to such punishments which were in line with their religious beliefs. The court held that the policy and purpose of the statute was to unify educational methods countrywide. Further, that to create an exception would hamper the purpose of the statute. The statute was thus *necessary*. The court's view was that the prohibition of corporal punishment was a *justifiable limitation* of the right of freedom of religion. As seen by Rautenbach and Malherbe[53] persons belonging to a cultural or religious community have the right to enjoy their culture and practice their religion. These rights, however, may not be exercised in a way inconsistent with any provision of the Bill of Rights. This qualification was inserted to make it clear that these rights do not contain absolute guarantees and that harmful practices may be regulated.

In *Prince v President of the Cape Law Society*[54] it was held by the Constitutional Court that the use of cannabis for religious purposes was *justifiably limited* by a prohibition of the possession of cannabis. The court had to decide whether a failure to provide an exemption for religious use of prohibited drugs was a justifiable limitation of the right of freedom of religion. The applicant in the case had wanted to become a lawyer but his request was declined by the Law Society due to previous convictions for the use of cannabis. It was not contested that the applicant was in possession of cannabis for religious purposes. Prince argued that the relevant statute limited his religious rights *disproportionately* because there was no exception to the statutory ban regarding the possession and use of dangerous drugs for religious reasons. The court agreed that the statutory ban had a *proper purpose* in the ongoing battle against drugs. The court also accepted that the statutory ban limited the applicants freedom of religion (he was a Rastafarian). The question was did the ban not go too far in restricting religious freedom? The majority of the court held that the ban was justifiable

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[51] *Id* para 43. The Justices held that s 36 does not permit a sledgehammer to crack a nut.
[52] 52 2000 4 SA 757 (CC).
[53] See (n 4) 348.
[54] 2002 2 SA 794 (CC).

because it would be impossible to distinguish between Rastafarian use and other use. The ban was thus correct according to the test of *necessity*. The limitation was justified by the extremely pressing purpose (use of dangerous drugs) of the limitation which *necessitated* the limitation.[55] Once again proportionality was employed.

Proportionality has also been applied in South African administrative law decisions when determining reasonableness.[56] The dictates of section 33(1) of the Constitution (that everyone has the right to administrative action that is lawful, *reasonable* and procedurally fair) *implies* the proportionality principle. This is so because proportionality aims 'to avoid an *imbalance* between the adverse and beneficial affects … of an action and to encourage the administrator to consider both the *need* for the action and the possible use of *less drastic* or oppressive means to accomplish the desired end'.[57] The test for reasonableness: balance, necessity and suitability are paramount.

The South African Law Commission's draft Promotion of Administrative Justice Bill proposed the courts be able to review administrative action generally on grounds of disproportionality between the adverse and beneficial consequences of the action and the existence of less restrictive means to achieve the purpose for which the action was taken.[58] This proposal was not taken up in the Promotion of Administrative Justice Act 3 of 2000 (PAJA) but rather replaced with section 6(2)(h) which deals more pertinently with *reasonable effects* and does not specifically refer to proportionality. The gist of section 6(2)(h) is that a court or tribunal has the power to judicially review administrative action if the action taken was so unreasonable that no reasonable person would have so acted. It is submitted that proportionality can be read into section 6(2)(h) and is part and parcel of the interpretation of section 6(2)(h).

In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*[59] O'Regan J held that what is reasonable in a particular case depends on the circumstances and set out to list the factors relevant in deciding whether a decision is reasonable:

> The nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of competing interests involved and the impact of the decision on the lives and well-being of those affected.

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[55]Rautenbach and Malherbe (n 4) 331.

[56]Barrie (n 9) 23; De Ville 'Proportionality as a requirement of the legality of administrative law in terms of the new constitution' (1994) *SAPL* 360; Plasket *The fundamental right to just administrative action: Judicial review of administrative action in the democratic South Africa* PhD thesis Rhodes University (2002); Hoexter *Administrative law in South Africa* (2012) 343; Devenish, Govender and Hulme *Administrative law and justice in South Africa* (2001) 384; Burns and Beukes *Administrative law under the 1996 Constitution* (2006) 407.

[57]Hoexter 'Standards of review of administrative action: Review for reasonableness' in Klaaren (ed) *A delicate balance: The place of the judiciary in a constitutional democracy* (2006) 61 at 64. Emphasis is mine. See Currie and Klaaren *The Promotion of Administrative Justice Act benchbook* (2001) 171.

[58]Clause 7(1)(9).

[59]2004 4 SA 490 (CC) para 45.

O'Regan held that the administrative decision in the instance before the court was indeed reasonable as a reasonable equilibrium had been struck. Such an equal equilibrium is the essence of proportionality. O'Regan J's approach invites a proportionality inquiry and brings proportionality into the purview of section 6 of PAJA.

Ehrlich v Minister of Correctional Services[60] saw section 6(2)(h) of PAJA being applied. In this case the head of a prison had decided to deny a certain category of prisoners access to a gymnasium located in the prison. Plasket J inquired into the unreasonableness of the decision and found that one of the tests for unreasonableness is where a decision is unnecessarily onerous or *disproportionate*. He held that the decision was one that no reasonable decision-maker could have reached, that the decision was irrational and that it was totally disproportionate and unduly onerous. In *Head, Western Cape Education Department v Governing Body, Point High School*[61] it was found that in appointing a school principal, the decision-maker had not weighed equity considerations against the benefits of improving the teaching staff and had thus failed to reach a reasonable equilibrium between the various interests. In both these cases the proportionality approach was applied.

S v Makwanyane[62] however has become the benchmark for South African courts when considering the legitimacy of limitations of fundamental rights that are acceptable in an open and democratic society based on human dignity, equality and freedom. In addition to reasons being *acceptable*, they must be *reasonable* in the sense that they do not invade rights more than is necessary to achieve the purpose. The purpose must be constitutionally acceptable and there must be *proportionality* between the infringement of the fundamental rights (harm done by the law) and the benefits it is designed to achieve (the purpose of the law).

This was the approach followed by the Constitutional Court in *Makwanyane* where it was held that the limitation of constitutional rights (in the Interim Constitution) must be for a purpose that is reasonable and necessary after weighing up all the competing factors based on proportionality, that proportionality calls for the balancing of different interests; that in the balancing process relevant considerations include the nature of the right that is being limited, the importance of the right in a democratic society, the purpose why the right is being limited and the efficiency of the limitation. Finally, the question must be asked whether the desired ends could not reasonably have been achieved through other means less damaging to the right in question. For practical purposes the court placed the purpose, effects and importance of the limiting legislation on one side of the scales and the nature and effect of the limitation on the other.

Although *Makwanyane* was an analysis undertaken under section 33 of the Interim Constitution, it applies with equal force to the interpretation of section 36 of

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[60]2009 2 SA 373 (E) para 43-44.
[61]2008 5 SA 18 (SCA) para 16.
[62]See (n 3).

the 1996 Constitution. Section 36 sets out which relevant factors must be taken into account when a court considers the reasonableness and justifiability of a limitation of a right in the Bill of Rights. These relevant factors correspond exactly with the factors identified in *Makwanyane* as making out a proportionality inquiry viz the *nature* of the right, the importance and the *purpose* of the limitation; the *nature and extent* of the limitation; the *relation* between the *limitation* and its *purpose* and *less restrictive means* to achieve the purpose.

These relevant factors are not an exhaustive catalogue of what constitutes proportionality.[63] They are merely indications as to when a limitation would be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The limitation clause of the South African Constitution not only protects human rights it also enables their limitation. It indicates the relative nature of these rights. As stated in *Oakes*[64] a limitation clause is a peg on which the constitutional system places *balances*[65] between the individual and the community and between the individual and society. Proportionality is at the centre of this balancing act. Proportionality represents the idea that the individual lives in a society and is part of that society (with its own needs and traditions) and that the individual's human rights may be justifiably limited provided the limiting laws are proportional.[66]

In a nutshell, proportionality demands an inquiry weighing up the harm done by a law infringing a human right against the benefits that law seeks to achieve (the reasons for the law or its purpose).

This approach to the implementation of proportionality is illustrated forcefully in *Makwanyane*[67] which continues to influence all South African judgments[68] when applying proportionality. Because of its profound influence and importance, *Makwanyane's* approach to the *relevant factors* to be taken into account when determining proportionality in the facts of that case will be briefly discussed.

Makwanyane was concerned with the constitutionality of the death penalty. The *nature of the rights concerned* were the rights to life and dignity, which the Constitutional Court saw as the most important of all personal rights. The court accepted that the *importance of the purpose of limitation* was to deter violent crime, the prevent recurrence of violent crime and to serve as retribution. The court was of the opinion however that retribution was *not* a purpose fitting the type of society that the Constitution wished South Africa to be. Regarding the *nature and extent of the limitation* the court essentially said that a sledgehammer should not be used to

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[63]Currie and De Waal (n 9) 178.
[64]See (n 29) 135.
[65]Blaauw-Wolf (n 10) 197
[66]Barak (n 1) 165.
[67]See (n 3).
[68]Eg, *De Lange v Smuts* 1998 7 BCLR 997; 1998 3 SA 785 (CC) para 86; *S v Williams* 1995 3 SA 632 (CC) para 59; *Coetzee v Government of the RSA: Matiso v Commanding Officer PE Prison* 1995 4 SA 631 (CC); *Berstein v Bester* 1996 2 SA 751 (CC) para 54; *Mistry v The Interim National Medical Council and Dental Council for SA* 1998 7 BCLR 880 (CC) para 24.

crack a nut.[69] The court found that the death penalty had irreparable effects on rights such as life, dignity and freedom and renounces everything that is embodied in the concept of humanity.[70] On the *relation between the limitation and its purpose* the court could see that the purpose was deterrence and prevention of violent crime but could not agree that retribution was a suitable justification. According to the court there was no satisfactory evidence establishing a connection between the death penalty and a reduction of the incidence of violent crime.[71] Regarding the '*less restrictive means to achieve the purpose*' requirement of proportionality the court saw the effects of the death penalty as too drastic and saw life imprisonment as a less restrictive means which would achieve the same purpose.[72] In other words a law which invades rights more than is necessary to achieve its purpose is disproportionate. Examples would be a prohibition on *all* Defence Force members from any act of public protest,[73] a *blanket* prohibition on possession of marijuana[74] and a prohibition on anyone who is not clothed or partially clothed from performing *in any nature of entertainment* on premises where liquor is served.[75]

5 Burden of persuasion

Who bears the burden before the court to show that a constitutional right has been disproportionately limited by law? Who has the burden of persuasion and the burden of producing the necessary evidence? Does it lie with the party arguing that the right has been disproportionately limited or with the party submitting that no disproportionate limitation has occurred? Does the burden lie with the party arguing that there is no justification for limiting the right or does it lie with the party arguing in support of the justification?[76]

In *Makwanyane*[77] the South African Constitutional Court ruled that the burden of persuasion *lies with the party arguing for the existence of the justification.* It held that it was for the legislature, or the party relying on the legislation, to establish the justification, and not for the party challenging it to show that it was not justified. In the *Makwanyane's* case therefore, should the state wish to show that the death penalty deters violent crime, the state would have to adduce evidence in support of such a contention.[78]

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[69]Fleiner (n 12).
[70]The court (para 236) cited *Furman v Georgia* 408 US 238 (1972) 306.
[71]Didcott J para 184.
[72]Chaskalson P paras 123, 128.
[73]*South African National Defence Force Union v Minister of Defence* 1999 4 SA 469 (CC).
[74]See (n 54).
[75]*Phillips v Director of Public Prosecutions* 2003 3 SA 345 (CC); Currie and De Waal (n 9) 182.
[76]Barak (n 1) 435-454; Kokett *The burden of proof in comparative and international human rights law* (1998).
[77]See (n 3) para 102.
[78]*Id* para 86 per Didcott J. A similar approach was adopted by art 12 of the International Covenant on Civil and Political Rights 1966 (ICCPR) (999 UNTS 171, 6 *ILM* (1967) 368) and art 12A of the Siracusa

6 United Kingdom

Due to the fact that South African constitutional and administrative law is heavily influenced by English sources,[79] it would not be inopportune to briefly set out the position of proportionality in that jurisdiction. The concept of proportionality is not well established in the United Kingdom except in the field of administrative law regarding the concept of 'unreasonableness'. In the United Kingdom the courts in defining the proper boundaries of reasonableness within administrative law will intervene if the unreasonableness is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at such a decision.[80] This is also known as the *Wednesbury*[81] test. Halsbury's *Laws of England*[82] sees proportionality as meaning that the courts will quash exercises of *discretionary powers* in which there is not a reasonable relationship between the objective which is sought to be achieved and the means used to that end, or where punishment imposed by administrative bodies are wholly *out of proportion* to the relevant misconduct. It states further that lack of proportionality is regarded in English law as *one indication of unreasonableness* and not as a separate ground of review.

An example of this is *R v Barnsley MBC, ex parte Hook*[83] where proportionality was applied in the context of a penalty imposed by an administrative authority. Here a stall-holder had his license revoked for urinating in the street and using offensive language. Part of the decision was struck down because the penalty was excessive and out of proportion to the offence.

In 1998 the United Kingdom adopted the Human Rights Act (HRA).[84] This Act gave effect in the United Kingdom to those rights set out in the European Convention

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Principles on the Limitation and Derogation of Provisions in the ICCPR (1984) which declares that the burden of justifying a limitation upon a right guaranteed by the ICCPR lies with the state (1985) 7 *Hum Rts Q* 3. See *S v Zuma* 1995 2 SA 642 (CC); *Moise v Greater Germiston Transitional Local Council* 2001 4 SA 491 (CC) para 19. According to the European Convention on Human Rights and Fundamental Freedoms (213 UNTS 222) the burden of justifying a limitation on one of the rights is the party alleging that the limitation is justified (ss 8(2), 9(2) and 10(2). According to the United Kingdom Human Rights Act 1998 the burden of justification lies on the party arguing that the limitation is compatible with the provisions of the Human Rights Act.

[79] Hoexter (n 56) 3; Baxter *Administrative law* (1984) 30.

[80] *Council of Civil Service Unions v Minister for the Civil Service* 1985 AC 374, 410.

[81] *Associated Provincial Picture Houses v Wednesbury Corporation* 1948 1 KB 223. Akehurst 'The application of general principles of law by the Court of Justice of the European Communities' (1981) *BYIL* 29 at 38; *R v Secretary of State for the Home Department, ex parte Brind* 1991 1 AC 696 (HL); *Wheeler v Leicester City Council* 1985 AC 1054 (HL); *R v Secretary of State for Foreign Affairs, ex parte World Development Movement Ltd* 1995 1 WLR 386; Laing 'Judges and decision-makers: The theory and practice of Wednesbury review' (1996) *Public Law* 59.

[82] 1989 vol 1 144.

[83] 1976 WLR 1052.

[84] 1978 Human Rights Act 1998 (c) 42 (Eng).

for the Protection of Human Rights and Fundamental Freedoms. Accordingly English courts may declare whether primary or subordinate legislation is compatible with those rights. The HRA in this way introduced proportionality into English law[85] and it is expected that the concept of proportionality as applied by the European Court of Human Rights,[86] the European Court of Justice[87]and various Western European states[88] will influence United Kingdom courts. An example is *R (Alconbury Development Ltd) v Secretary of State for the Environment, Transport and the Region*[89] where Lord Slynne, with reference to the principle of proportionality, stated:

> I consider that even without reference to the Human Rights Act 1998 the time has come to recognise that this principle is part of English administrative law not only when judges are dealing with Community acts but also when they are dealing with acts subject to domestic law.

In the same year Lord Steyn held in *R (Daly) v Home Secretary*[90] that the doctrine of *proportionality* may require the reviewing court to assess the *balance* which the decision-maker has struck, not merely whether it is within the range of *rational* or *reasonable*[91] decisions. Wade and Forsyth[92] see proportionality requiring the court to judge whether the action was *really needed* as well as whether it was within the range of courses of action that could *reasonably* be followed.

It can be expected that United Kingdom decisions on proportionality in administrative law and on applying proportionality when interpreting the HRA will have great persuasive value on South African courts when proportionality is an issue.

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[85]Barak (n 1) 193; Feldman 'Proportionality and the Human Rights Act 1998' in Ellis (ed) *The principle of proportionality in Europe* (1999) 117; Clayton 'Regarding a sense of proportion: The Human Rights Act and the proportionality principle' (2001) *Eur Hum Rts L Rev* 504; Craig *Administrative law* (2008).
[86]86 *Internationale Handelsgesellschaft mbH v Einfuhr-und Vorratsstelle für Getreide und Futtermittel* 1970 ECR 1125; Emiliou *The principle of proportionality in European law: A comparative study* (1996).
[87]*Handyside v United Kingdom* 1 EHRR 737 (1979) para 47 where the court held, regarding freedom of expression, that every formality, condition, restriction or penalty imposed in this sphere must be proportionate to the legitimate aim pursued.
[88]The concept of proportionality has been accepted in Spain, Portugal, France, Italy, Greece, Switzerland and Turkey. In art 13 of the Constitution of the Republic of Turkey and art 5(2) of the Federal Constitution of Switzerland, the concept of proportionality was explicitly included as part of a constitutional limitation clause in the chapters on human rights.
[89]2 WLR 1389 at 1406.
[90]2001 2 AC 532 at 547. See *R v Secretary of State for the Environment, Transport and the Regions* 2001 2 All ER 929; *Huang v Secretary of State for the Home Department* 2007 UKHL 11; Cohen 'Legal transplant chronicles: The evolution of unreasonableness and proportionality review of the administration in the United Kingdom' (2010) *AM J Comp L* 583.
[91]See Barrie 'In die hersieningsgrond "rasionaliteit" in artikel 6(2)(f)(ii) van Wet 3 van 2000 van toepassing op huishoudelike dissiplinêre tribunale?' (2012) *TSAR* 361; Maré '*'n Kritiese analise van die begrip "Administratiewe geregtigheid" in die Grondwet met besondere verwysing na die konkretisering daarvan in die Wet op die Bevordering van Administratiewe Geregtigheid* PhD thesis University of the Free State (Bloemfontein) (2008) 300.
[92]*Administrative law* (2004) 366.

7 Conclusion

Mureinik,[93] in introducing the interim Bill of Rights in the Interim Constitution, said that it would lead to a 'culture of justification', a culture in which every exercise of power is expected to be *justified*. This has transpired with the application of the doctrine of proportionality by our courts who demand that limitations on the individual's fundamental rights must be *justifiable*.

As succinctly put by Chaskalson P in *Makwanyane*,[94] capital punishment imposed a limitation on the *right* not to be subjected to cruel and inhuman punishment. Capital punishment failed the proportionality test in that it did not constitute a *justifiable* limitation on that right.[95]

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[93]'A bridge to where? Introducing the interim Bill of Rights' (1994) *SAJHR* 31.
[94]See (n 3).
[95]*Id* paras 129-31. See Van der Walt *Law and sacrifice* (2005) 105.