Proportionality and Deference

Constitutional Rights and the Separation of Powers

Juha Tuovinen

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

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European University Institute
Department of Law

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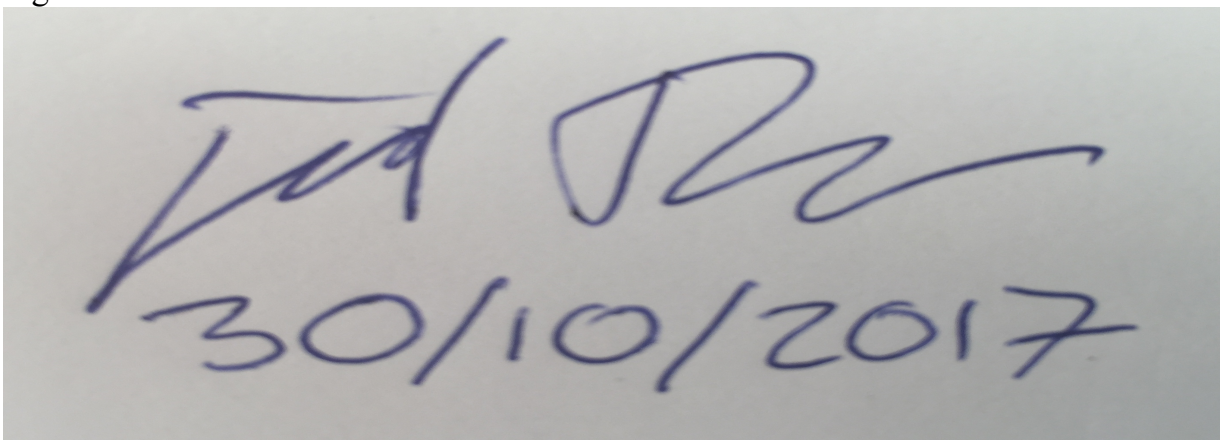

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Abstract:

This thesis presents a phenomenology of deference in proportionality. There is a relatively broad consensus that proportionality balancing as a method for resolving conflicts of fundamental rights in cases of judicial review needs to be coupled with some kind of doctrine of deference. Although there is a significant literature on many aspects of this question, thus far one of the more basic ones, namely what deference looks like in cases of proportionality, has received less attention. In order to analyze this question, this thesis analyses the case law of four courts – the German Federal Constitutional Court, the Supreme Court of Canada, the Constitutional Court of South Africa and the European Court of Human Rights – with regard to three sets of rights – freedom of expression, the right to privacy and freedom of religion. From this analysis a number of points emerge: In the first place it shows that deference in balancing takes place through adapting the normative and empirical arguments required by that exercise to the institutional limitations attendant to courts. Further, we find a variety of similarities and differences in how deference operates between different rights and different courts. Here we can observe that proportionality is often constructed in a similar fashion among the same right between the different courts. This means that, the way in which courts balance is, often, very similar in Canada, South Africa, Germany and the ECtHR. We can further observe, that there are differences in the practice of balancing between the different rights. The normative and empirical questions that occupy courts with regard to different rights pose different institutional challenges and require courts to balance differently.. Behind these two general observations there are more subtle and nuanced differences and similarities about each of the courts and rights that all contribute to a richer understanding of what deference looks like in proportionality cases.

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1. Introduction

It is undeniable that courts, both national and international, play an important role in shaping the laws of a state. Sometimes they strike down an entire policy such as the death penalty,[1] gay marriage,[2] the right to euthanasia,[3] prisoner-voting rights,[4] the right to place a crucifix on a classroom wall,[5] or the right to wear a headscarf to work.[6] Beyond these headline-making cases, courts also modify smaller parts of a law, such as sections of criminal[7] or civil procedure, rules relating to the funding of political campaigns,[8] rules relating to the storage and safe keeping of collected data.[9] Sometimes, and just as controversially, they uphold the right to wear a headscarf at work or in public,[10] the right to consume cannabis,[11] or the right to be free from the risks of nuclear power.[12] The list goes on.

Sometimes this is highly controversial and citizens, politicians and academics feel that the courts have over-stepped their legitimate role. Some of the harshest criticism has probably been directed at the South African Constitutional Court, which is frequently criticized in strong terms by politicians when the court finds against them and by citizens and activists when they feel the court should have

[1] *S v Makwanyane* 1995 (3) SA 391 (CC).
[2] *Minister of Home Affairs v Fourie and Another* [2005] ZACC 19; 2006 (1) SA 524 (CC).
[3] *Carter v Canada (Attorney-General)* [2015] 1 SCR 331.
[4] *Hirst v the United Kingdom (No 2)* [2005] ECHR 68.
[5] *Lautsi v Italy* App. No. 30814/06 Judgment of 19 March 2011; BVerfGE 93,1 (*Crucifix*)
[6] BVerfGE 138, 293 (*Headscarf II*).
[7] See e.g. *S v Zuma and Others* [1995] ZACC 1; 1995 (2) SA 642; *Coetzee v Government of the Republic of South Africa, Matiso and Others v Commanding Officer Port Elizabeth Prison and Others* [1995] ZACC 7; 1995 (4) SA 631.
[8] *Harper v Canada* [2004] 1 S.C.R. 827.
[9] BVerGE 65, 1 (*Census Act*).
[10] *SAS v France* Application no 43835/11 judgment of 1 July 2014; *Eweida v UK* Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10, judgment 27 May 2013.
[11] *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 792; BVerfGE 90, 145 (*Cannabis*).
[12] BVerfGE 49, 89 (*Kalkar I*).

decided in their favor.[13] Similarly, after the United Kingdom lost the prisoner voting rights case, it threatened to pull out of the European Convention on Human Rights altogether.[14] Even courts in legal systems that are generally more favorably disposed towards judicial review, such as Germany and Canada, have had their share of public controversy. After handing down the judgment that prohibited the placing of crucifixes in Bavarian classrooms, the Chief Justice of the Federal Constitutional Court wrote a newspaper editorial setting out why it was necessary to respect the court's decision even if a majority disagreed with it.[15]

This thesis explores the limits of judicial power. It asks questions about how far courts can go in striking down laws passed by democratically elected representatives and when must it leave a law to stand. Importantly, it asks these questions within a particular legal paradigm. Since the Second World War, proportionality has become the main legal device through which courts adjudicate constitutional rights [16] cases. [17] What is problematic is that proportionality often requires that a balance be struck between competing rights and interests on the basis of an engagement with substantive reasons.[18] This kind of optimization of rights may pose a challenge for courts for reasons of institutional capacity and legitimacy.[19] Consequently, there is already a relatively broad consensus that proportionality as a method for resolving conflicts of fundamental rights must be coupled with some kind of doctrine of deference.[20] It

[13] The most comprehensive study of the politics of the South African Constitutional Court is T Roux *The Politics of Principle*: *The First South African Constitutional Court, 1995-2005* (2013).
[14] Although the United Kingdom has thus far remained within the Convention system, senior politicians continue to threaten with withdrawal from time to time.
[15] Tellingly, Niels Petersen introduces the idea of judicial activism in his new book with the same story about the Bavarian Crucifix Case. N Petersen *Proportionality and Judicial Review* (2017) at 1.
[16] I use the term constitutional rights here broadly to include also those rights which are not strictly constitutional, for example, rights in international treaties, such as the European Convention on Human Rights.
[17] A Stone Sweet & J Matthews 'Proportionality, Balancing and Global Constitutionalism' *Columbia J Transnational L* (2007) 73; D Beatty *The Ultimate Rule of Law* (2004); A Barak *Proportionality* (2012).
[18] This is elaborated on in some length in chapters 2 and 3 that follow.
[19] See part 1.2 and 1.3 below.
[20] R Alexy *Theory of Constitutional Rights* (1985, transl 2002); M Klatt & M Meister *The Constitutional Structure of Proportionality* (2012) at 135-146; M Klatt & J Schmidt 'Epistemic discretion in constitutional law' *International journal of constitutional law* 10.1 (2012): 69-105; S

is, however, the form that this relationship between proportionality and deference takes that is challenging. The problem has been crystalized bz Julian Rivers as follows; '[w]hat the courts are looking for is a general account of the separation of powers in a context in which responsibility for the substance of the law has shifted dramatically. The doctrine of proportionality has become the framework within which a new theory of the separation of powers must be realized.' [21]

This thesis is a study of how courts take their institutional position into account when adjudicating constitutional rights cases. It is an account seeking to describe the relationship between proportionality and deference.

These issues are explored on two levels. First on a general level and then through three chapters dealing with specific rights. The first chapter sets the scene with an outline of the broader questions at stake, elaborating why it has been so difficult to marry proportionality with the separation of powers. The second chapter proposes a way to do this by deconstructing the proportionality equation into its constituent parts and locating deference in the different parts of the proportionality and balancing equations. On this general level, we find a number of significant similarities and differences. While there is a great number of differences between the approaches of the different courts in terms of both deep philosophical issues as well as more superficial matters of style and rhetoric, we find two crucial points of similarity. The first of these is that proportionality requires substantive reasoning (rather than legal interpretation). This means that courts analyze the various policy reasons in determining whether a law or action is proportionate rather than attribute meaning to words as is the case in traditional interpretation. The second similarity is what has already been alluded to, namely that deference finds its place in the way in which the courts treat these substantive arguments – that is

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Choudhry 'So What is the Real Legacy of Oakes? Two Decades of Proportionality Analysis under the Canadian Charter's Section 1' (2006). *Supreme Court Law Review* 34 501; J Rivers Proportionality and variable intensity of review." *The Cambridge Law Journal* 65.01 (2006) 174-207.

[21] Rivers 'Variable Intensity of Review' at 176.

by adjusting the standard of review which it applies to the various arguments before it.

These two theoretical chapters lead into three substantive ones that analyze the application of the proportionality principle and doctrines of deference in the area of three different rights –freedom of expression, the right to privacy and freedom of religion – by four different courts – the Constitutional Court of South Africa, the Supreme Court of Canada, the Federal Constitutional Court of Germany and the European Court of Human Rights. The question in the three chapters is how those doctrinal instruments developed on the general level find application in the adjudication of cases. Here a complex picture emerges. In the vast majority of cases, courts do not explicitly consider their institutional position alongside the substantive reasons, rather deference is latent in the way in which the court reasons.

The exercise then becomes one of tracing how the courts construct the space that is left for government in the application of proportionality. This analysis brings with it theoretical and comparative insights. In the first place it shows that the structure of proportionality and balancing is similar in the four jurisdictions. Secondly, the analysis allows us to sharpen our understanding of how the institutional position of being a court influences the way in which courts make the normative and empirical judgments that they are required to make in a proportionality exercise.

Further, from a comparative perspective, we can draw some conclusions about the way in which the different courts engage with the different institutional challenges they face. This again allows us to challenge two diametrically opposed arguments, namely one that argues that proportionality takes, or should take, largely the same form in all jurisdictions and conversely that the application of proportionality is heavily dependent on the culture in which the court applies it. The view advanced here proposes that there is some truth to both views in that there are both a great deal of similarities and differences in the way in which proportionality is applied by courts. Finally, the account presented here allows

us to reflect on what makes a court's application of proportionality and balancing more or less institutionally sensitive. The argument in the final place will be that the more sophisticated the normative and empirical evaluations needed to strike a balance, the more institutionally precarious the court's position.

Chapter 1: Setting the Scene – Judicial Review, Proportionality and Separation of Powers

1. Introduction – The Most Dangerous Branch or Juristophobia?

This chapter paints the contours for the rest of the thesis. As such, its substantive purpose is two-fold. In the first place it briefly considers what the criteria for evaluating the legitimacy of a political system and are, more particularly, how judicial review fits into this picture. This first part is intended to set the scene as to why discussing the legitimacy of judicial review is meaningful and what that debate should focus on. The second part concentrates on what the challenges of proportionality based judicial review to a legitimate political system are. Put slightly differently, the second part of this chapter sets out some of the fundamental questions that arise from the application of proportionality and the specific problems these raise for justifying the application of proportionality. Finally, the chapter considers the reasons for the need for exercising institutional sensitivity in applying the principle of proportionality.

As far as the practice of judicial review goes, it seems that the debate is well and truly over. Rights-based judicial review is considered a feature of liberal democracy and courts enjoy wide powers to amend or even strike down legislation. This has generated an unsurprisingly high level of commentary that the power of the courts must be tempered in some manner as well as criticism that it has already gone too far. Representative of the latter genre, Ran Hirschl speaks of the creation of juristocracies where previously political issues are transferred to judicial elites.[22] Similarly, and in fact before Hirschl popularized the term, Ernst-Wolfgang Böckenförde warned of the *Richterstaat*, a state

[22] R Hirschl *Towards Juristocracy: The Origin and Consequences of the New Constitutionalism* (2004). Hirschl's thesis essentially contests that as previously politically dominant groups lose their political power they shift decision-making to courts where they still retain a hegemonic position.

governed by judges.[23] A number of similarly concerned – what might a little facetiously be called be juristophobic – statements have been made warning of the 'usurpation of the legislative prerogative of Parliament'[24] and 'judicial legislation by the backdoor'[25]. However, even less-concerned commentators have remarked on the need to leave a space of 'due'[26] or 'constitutional'[27] deference to the legislator and to 'respect'[28] the different institutional roles of the different branches of government.

This chapter presents the different sides of the debate. Ultimately, the question in this chapter is whether judiciaries have become 'the most dangerous branch' of government[29] and whether those writing about a juristocracy or *Richterstaat* are right to fear a '*gouvernement des juges*' or whether their powers can be curtailed in a way that makes their fears seem like an irrational fear of a legitimate practice.

2. The Legitimacy of Judicial Review

The legitimacy of judicial review is an ever-green chestnut that continues to fascinate constitutional lawyers.[30] It is neither necessary nor desirable to revisit all the arguments for and against judicial review of legislation.[31] Instead, here I want to simply recap some of the best arguments as they are found in the

[23] E-W Böckenförde *Staat, Verfassung und Recht* (1991) The work is in many ways a criticism of Alexy's *Theory of Constitutional Law* which appeared in German six years prior in 1985.
[24] G Wong 'Towards the Nutcracker Principle: Reconsidering Objections to Proportionality' *Public Law* (2000) 92 at 98.
[25] R Clayton 'Regaining a Sense of Proportion: The Human Rights Act and the Proportionality Principle' *European Human Rights Law Review* (2001) at 516.
[26] A Kavanagh 'Defending deference in public law and constitutional theory' *Law Quarterly Review* 2010, 126 222-250.
[27] K McLean *Constitutional Deference, Courts and Socioeconomic Rights in South Africa* (2009).
[28] D Dyzenhaus 'The Politics of Deference: Judicial Review and Democracy' in W Taggart *The Province of Administrative Law Determined* (1997) 279; see also H Corder 'Without Deference, with respect: A Response to Justice O'Regan' 121 *SAJHR* 438 (2004).
[29] With apologies: AM Bickel *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1986).
[30] Especially American constitutional lawyers have been pre-occupied with the question. For a history of the scholarship, see B Friedman The birth of an academic obsession: The history of the countermajoritarian difficulty, part five. *Yale Law Journal*, (2002) 153-259.
[31] For an overview of the most common theories, see N Petersen *Verhältnissmäßigkeit als Rationalitätskontrolle* (2015) at 15-28.

literature in order to frame the debate within which proportionality-based review must be justified. Here, the most compelling arguments have for a long time been those of Jeremy Waldron[32] and, arguing in a similar vein, Richard Bellamy[33].[34] Some of the best defenses of judicial review in general, and proportionality-based judicial review in particular, have been developed by Mattias Kumm[35] and those following him more or less closely, such as Alec Walen[36] and Kai Möller,[37]

2.1 Evaluating the Legitimacy of Political Institutions

The first question is about what standards ought to be deployed to decide whether any political system is legitimate in the first place. In this regard there is some agreement between the main opponents of judicial review and those who defend it. Although Waldron and Bellamy come from different theoretical backgrounds – Waldron from liberalism and Bellamy from republicanism – they arrive at very similar criteria for legitimate political system based on process and outcome. Procedural reasons 'are reasons for insisting that some person make, or participate in making, a given decision that stand independently of considerations about the appropriate outcome'[38]. Outcome-based reasons, on the other hand, 'are reasons for designing the decision-procedure in a way that will ensure the appropriate outcome'[39]. Even those who reject Waldron's and Bellamy's conclusions on judicial supremacy seem to accept their views on the

[32] J Waldron 'The Core of the Case Against Judicial Review' *The Yale Law Journal* (2006): 1346-1406.
[33] R Bellamy *Political Constitutionalism* (2007).
[34] Bellamy and Waldron are by no means the only theorists to argue against judicial review, see e.g. C Mac Amlaigh 'Putting Constitutional in Its Place' *International Journal of Constitutional Law* (2016) 14(1): 175-197; D Bello Hutt 'Against judicial supremacy in constitutional interpretation' *Revus. Journal for Constitutional Theory and Philosophy of Law* (2017).
[35] M Kumm 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' Vol 4. Iss.2 *Law and Ethics of Human Rights* (2010) 141..
[36] A Walen 'Judicial review in review: A four-part defense of legal constitutionalism A review essay on Political Constitutionalism' *International Journal of Constitutional Law* (2009): 329-354..
[37] K Möller *The Global Model of Constitutional Rights* (2012).
[38] Waldron 'Core of the Case Against Judicial Review' at 1372.
[39] *Ibid* at 1373.

correct considerations for evaluating the legitimacy of political institutions, either explicitly[40] or more often implicitly[41].

Outcome-based reasons were most strongly championed by Joseph Raz, who saw them as the sole determinant for the legitimacy of a political system. It is on Raz' arguments that Waldron also relies in this respect. The starting point for the argument for outcomes-based reasons is straight-forward. As Raz states, and Waldron quotes, '[the] natural way to proceed is to assume that the enforcement of fundamental rights should be entrusted to whichever political decision-procedure is, in the circumstances of the time and place, most likely to enforce them well, with the fewest adverse side effects'[42]. Thus, if courts produce good political decisions, that is to say good outcomes, they are legitimately entitled to do so.

There is a question about what counts as a positive outcome. Outcome-based reasons are beset by the problem that the design of decision-making procedures 'must be independent of the particular decision it seeks to settle'.[43] Designing a system based on a preferred outcome (here Waldron uses the example of pro-life or pro-choice in the abortion debate) does not settle the conflict satisfactorily, it would 'simply reignite[…] it'.[44] Nevertheless it is possible to prefer certain decision-making designs over others based on general considerations about how political institutions, such as legislatures and courts, make decisions about rights.

As Aileen Kavanagh puts it:

> '[W]e do not need a precise account of what rights we have and how they should be interpreted in order to make some instrumentalist [i.e., outcome-related] claims. Many instrumentalist arguments are not based on knowledge of the content of any particular rights. Rather, they are based on general institutional considerations about the way in which

[40] Kumm 'Socratic Contestation' 157-9.
[41] Petersen at 32.
[42] Raz as quoted in *Waldron* 'The Core of the Case against Judicial Review' at 1346.
[43] *Ibid* at 1373.
[44] *Ibid* at 1373.

> legislatures make decisions in comparison to judges, the factors which influence their decision and the ways in which individuals can bring their claims in either forum.'[45]

What matters, then, is the general competence of an institution to deal with certain types of questions, not the answers it would produce with regard to a particular policy question.

Process-related reasons, on the other hand, relate to the process through which a decision has been taken. Here, again, there are no absolute parameters as to what processes exactly qualify as legitimate but it is clear that the processes matter in some way. Waldron gives the example that generally people would be unhappy if their laws were completely without their participation.[46] This seems certainly true and it cannot be denied that processes would not play some significant role in law-making.

Bellamy's test for the legitimacy of a political system is nearly identical, with the sole distinction that he runs the two prongs of the test into one, with processes and outcomes often overlapping to a significant degree. The first is that 'a citizen must feel that there is no difference in status between them and the decision-makers' and that 'the reason that more weight wasn't given to a particular citizen's opinion cannot be based on the contention that the 'winners' held an objectively 'correct' answer on the matter at hand'.[47] This seems identical to Waldron's account, if we consider that his outcomes-based reasons ultimately become reasons about how the process is to deal with certain questions.

The problem, then, is to design a system that adequately takes both – process and outcome-related reasons – into account. The debate about judicial review is a debate about how to best satisfy these two demands.

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[45] A Kavanagh 'Participation and Judicial Review: A Reply to Jeremy Waldron' 22 *Law and Philosophy* 451 (2003) at 461.
[46] Waldron *The Core of the Case Against Judicial Review* at 1375.
[47] Bellamy at 164-5.

2.2 The Case Against Judicial Review

The answer for Waldron and Bellamy is that outcome-related reasons are uncertain and do not establish a case for judicial review while the process-related reasons are 'one-sided' and count against judicial review.[48] Waldron considers a number of arguments for judicial review: the orientation towards a particular case, the orientation towards the text of the constitution and reason giving.[49] He dismisses all of these on the ground that courts are far from the ideal institution to give effect to the three considerations.[50] Rather the political process is better suited to satisfy the same points.[51]

Legal rights, for Waldron, are ultimately a subversion of the political process and trust among fellow citizens. As he sums up his position as follows:

> To embody a right in an entrenched constitutional document is to adopt a certain attitude towards one's fellow citizens. That attitude is best summed up as a combination of *self-assurance and mistrust*: self-assurance in the proponent's conviction that what she is putting forward really *is* a matter of fundamental right and that she has captured it adequately in the particular formulation she is propounding; and mistrust, implicit in her view that any alternative conception that might be concocted by elected legislators next year or the year after is so likely to be wrong-headed or ill-motivated that her own formulation is to be elevated immediately beyond the reach of ordinary legislative revision.[52]

The lack of political equality, then, seeps into the basic attitudes of the citizens towards one another, creating an atmosphere of mistrust. In a population that is wedded to protecting rights in the ordinary course of politics, constitutional rights would then be a destructive force on the relationship among citizens.

It may seem strange to have begun with setting out the case against judicial review before considering the case for it (or given the continued and ever growing support which it enjoys to consider the question at all). The fact that I

[48] *Ibid*.
[49] *Ibid*. at 1379-84.
[50] *Ibid*.
[51] *Ibdi.*
[52] Waldron 'Right-based critique' at 27.

do so here has probably more to do with history – that is how political institutions developed and how scholarly argument has evolved – than with anything else. For Waldron and Bellamy, the above considerations lead to the inescapable conclusion that parliamentary supremacy is the only legitimate form of government.

2.3 Political Failures: The Case for Judicial Review

Skepticism about democracy can be traced as far back as Plato and continues to this day.[53] It is, then, hardly a surprise that there is a long line of argument for judicial review on the basis that it improves democracy. This is the line taken by some of the canonical contributions to American constitutional law, such as Alexander Bickel and John Hart Ely. More recently authors have shifted to making similar interventions, although in general broader and more tailored to proportionality-based judicial review, outside of the US context. Mattias Kumm's argument centers on judicial review removing certain pernicious reasons from political decisions. Niels Petersen considers a number of different scenarios in which judicial review may be more or less appropriate but ultimately his considerations are also based in failures of the political system.[54]

The arguments follow broadly similar lines about certain ways in which politics can fail. For John Hart Ely, this meant that courts would only police the processes through which laws had been adopted.[55] Alexander Bickel is remembered not only for coining the phrase 'the countermajoritatian problem' but also for praising the 'passive virtues' of the judiciary that advocated for judicial restraint.[56] Since then this list has expanded. Petersen envisages two scenarios

[53] Writing in his *Republic* Plato considers the people themselves to be the biggest threat to democracy. Very recently similar themes have been picked up by political scientists, see e.g. CH Aachen & LM Barterls *Democracy for Realists* (2016).
[54] I will limit myself to consideration of arguments in favor of judicial review rather than further arguments about how judicial review should be implemented, as are sometimes found in the literature. See, e.g. S Gardbaum *The New Commonwealth Model of Constitutionalism: Theory and Practice* (2012), M Tushnet *Weak Courts, Strong Rights* (2008), D Kyritsis *Where Our Protection Lies: Separation of Powers and Constitutional Review* (2017).
[55] JH Ely *Democracy and Distrust* (1980).
[56] A Bickel *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1986); A Bickel, 'Foreword: The Passive Virtues' (1961)' *Harvard Law Reveu* 75: 40.

where politics may fail: the protection of minorities[57] and the protection of majorities against clientelism or the capture of the legislative process against minority interests[58]. Kumm lists a number of pathologies of politics, such as moral panic and capture of the legislature, that often make majoritarian political decisions not as ideal as they may be imagined.[59]

Kumm also proposes that the reason why the judiciary can improve on these outcomes is because of their skill in asking questions. Judicial review is then a form of Socratic contestation.[60] Kumm uses the UK prohibition of gay men in the military that was successfully challenged in *Lustig & Prean v UK* before the ECtHR in order to argue that what rights-based proportionality review does is to remove laws based on certain unacceptable reasons. In the example, these unacceptable reasons would have related to the traditions and culture in the military. In Alec Walen's phrase, the job of the court would be to 'flush out' bad reasons in law-making. Petersen makes a similar case, arguing that in the protection of minorities, what matters is that majorities may misunderstand the position of minorities. Minorities as such do not deserve protection, rather they deserve protection because the political majority may misunderstand their needs. It is important to note and to emphasize that the same rationale has been applied to justify international human rights courts.[61]

The idea that politics is a flawed enterprise leads to the defense of judicial review. The idea on the general level is straight-forward: the role of judicial review is to improve those decisions where majoritarian politics has failed, in whatever way that may be. While judicial review is still inferior in the procedural sense in that it does not give every participant an equal voice, it can be superior in the outcomes it produces. In this sense, it is important to note that Waldron stipulates that his arguments can only work in a society that satisfies certain

[57] Petersen at 34-40.
[58] Petersen at 40-43.
[59] Kumm 'Socratic Contestation' at 157-64.
[60] *Ibid*.
[61] Such an argument is set out, for example, by A Føllesdal. 'Much Ado About Nothing? International Judicial Review of Human Rights in Well Functioning Democracies' in A Follesdal, J. Schaffer & G Ulfstein (ed.s) *The Legitimacy of International Human Rights Regimes*. (2013) 272-299.

basic conditions.[62] It may well be that these conditions are not satisfied and as such Waldron's arguments would not apply to politics as they play out in everyday life. In such a situation the defense of majoritarian politics would be even weaker. However, even where Waldron's conditions are satisfied judicial review would be desirable if it improves on the outcome of political decisions sufficiently to overcome the detriment to political equality.

2.4 Conclusion

Ultimately, the battle for the legitimacy of judicial review will be won in the kind of decisions courts take. Evaluating the respective benefits of each decision-making system conclusively is probably impossible as it would require extensive analysis of political decisions in different contexts. At an extreme it could mean having to prove counter-factual claims about what would have been a better decision-making procedure. My proposed solution to taking these questions further in the context of proportionality-based review is to study what kind of decisions courts take and the kind they leave to other branches. While this does not resolve the dilemma, it will give us a better picture of where courts themselves feel the line should be drawn.

There is, however, one further point that has not received much attention. This is that the arguments for the legitimacy of judicial review do not seem to address the actual practice of judicial review much at all. The concern seems largely with questions of principle, which are of course important, but there is much less attention being paid to the plethora of different types of cases that are decided by courts on a day-to-day basis. The next two sections of this chapter set out the kind of type of judicial review proportionality sets up in general. It lays out the abstract considerations that proportionality sets up as the test for constitutionality. The third section makes some methodological remarks about how the question will be answered in the subsequent chapters.

[62] Waldron 'The Core of the Case Against Judicial Review' at 1359-1366.

2. Proportionality and Separation of Powers

The problem of asking questions about separation of powers – deference or the margin of appreciation – is about how we construct proportionality in order to accommodate concerns arising from the separation of powers. The problem has arisen as a consequence of the most plausible account of proportionality, which was constructed in an institutionally neutral manner. But followed through to its logical conclusion, this account of proportionality leaves no room for the legislature, which in effect creates a juristocracy. While in practice the application of proportionality has in fact been moderate, theory has yet to capture the connection in a satisfactory manner. Below I consider the two conflicting sides to the story. First the rest of this chapter gives an account of proportionality and then moves on to consider the other side, the considerations that limit the courts' capacity to apply it in full.

2. Proportionality – What is the Problem?

It may be asked why it is desirable to reconstruct the relationship between proportionality and deference. This question is in fact two questions. The first question is about the relationship between proportionality and deference. What is it about this relationship that requires us to reconstruct it – and research it further than has been done already? The second is about the general importance of the question. If there is something to be said about proportionality and deference, why should it matter and why we care about it?

The answer to the first question is complex and has at least three different general components. The first relates to what proportionality requires of courts in terms of enforcing rights. The second relates to the kind of reasons courts have to engage in in reaching their decisions. Finally, the third relates to what form deference should take in all of this.

2.1 What is Proportionality?

The ways in which courts have constructed rights is not readily apparent from the text of the legal instruments. Often rights instruments resemble ordinary statutes but they give rise to a radically different type of reasoning. As a consequence, although certain features of the new paradigm have become generic elements of global constitutional practice, there is no universally agreed formulation of the different elements.

I use a two-fold division of the elements. First, I divide the entire process of adjudicating a rights claim into two steps. The first step determines whether a right has been limited and the second asks whether that limitation is justifiable. The importance of the first part is to determine which interests are legal and the limitation of which requires a justification analysis. The second part then determines whether the limitation, if any, was justified. The main part of the second step is the proportionality exercise. I follow those who count its prongs as four: legitimate aim, suitability, necessity and balancing.[63] The German Basic Law also includes the idea of an inviolable core which would require its own analysis prior to a balancing approach. In addition, outside of the proportionality framework, a limitation is required to be in accordance with a law of general application.[64]

2.1.1 The First step: Rights as interests

If that is the structure of the proportionality, then what is it that is being balanced? Proportionality in particular inherently imply that rights are to be conceived of, at least to some extent, as interests. This has led to significant criticism that rights would lose their special character as 'trumps' over other less

[63] The four prong structure is used by, at least: Klatt and Meister at 8, Möller at 181-203., Kumm 'Review Essay of *A Theory of Constitutional* Rights' at .579. But Alexy for example, only counts three prongs, amalgamating legitimate aim and suitability into one prong. The ECHR lists legitimate aim (and enumerates those aims) explicitly in articles 8-11, for which reason commentators on the ECHR sometimes do not consider the legitimate aim requirement to be part of proportionality but count it as a separate element of the justification analysis but one that falls outside of the proportionality framework.
[64] See, e.g., section 36(1) of the Constitution of South Africa.

significant considerations.[65] This is arguably only partially true since the proportionality framework is capable of giving effect to the kind of deontic thinking required where appropriate in setting absolute limits for government action within the proportionality framework.[66] Be this as it may, the crucial point is that rights under the new paradigm are to a significant extent considered as interests that can be balanced.

If rights are interests, the next question is which interests qualify to be considered as part of the proportionality structure. One answer is that all rights ought to be protected in this way. The German Federal Constitutional Court takes this approach and has included a variety of extremely mundane interests in the cadre of interests protected, such as the right to feed birds in the park. On this basis, Kai Möller argues that all interests should be *prima facie* eligible to go into the proportionality framework. This includes extremely mundane claims, such as the aforementioned right to feed pigeons in the park, to extravagant but also claims for luxury items and even seemingly deeply immoral acts like committing serious crimes.[67] The standard account argues that the first step has become essentially meaningless since rights cover all human activity, and that all the analytical work is done at the second stage.

2.1.2 Rights as Principles: The Limitation of Rights

How does proportionality work? The key to understanding how proportionality operates lies in a theory postulated by Robert Alexy in his 1985 *Theorie der Grundrechte* (translated in 2002 by Julian Rivers as *A Theory of Constitutional Rights*). It is necessary to revisit Alexy's theory briefly in order to understand why rights have the 'totalizing' character contended for.

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[65] J Habermas *Between Facts and Norms* (1992); Dworkin has expressed his ideas in a number of works, two of the more important ones relating to the idea of trumping seem to be R Dworkin 'Rights as Trumps' in J Waldron (ed.) *Theories of Rights* (1984) and R Dworkin *Taking Rights Seriously* (1977).
[66] M Kumm 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights Based Judicial Review' *Law and Ethics of Human Rights* 4 (2010) 2 139-175.
[67] Möller *The Global Model* at 57-72.

Alexy argues that constitutional norms come in two varieties: rules and principles.[68] Alexy's contribution to the debate, the meaningfulness of this distinction between rules and principles, which has been debated in legal theory since its inception by Ronald Dworkin who leveled it as a criticism against legal positivism, was the recognition that while rules operate in a binary fashion, principles are optimization requirements. Then, the way in which a rule is applied is that it was either followed or not.[69] For example, a driver either overtook another driver correctly on the left-hand side, or she did not. In terms of rules it is always possible to determine whether a rule was followed or not.

Principles are different: a principle requires that it be satisfied to the greatest extent possible and unlike a rule they may be satisfied to a greater or lesser degree.[70] In his characterization of optimization principles, Alexy states:

> [T]he decisive point in distinguishing rules from principles is that principles are norms which require that something be realized to the greatest extent possible given the legal and factual possibilities. Principles are optimization requirements, characterized by the fact that they can be satisfied to varying degree, and that the appropriate degree of satisfaction depends not only on what is factually possible but also on what is legally possible. The scope of the legally possible is determined by opposing principles and rules.[71]

The nature of principles as optimization requirements may also be captured in the idea that the satisfaction of principles is characterized by the dimension of weight. It follows that

> [i]f two principles compete, for example if one principle prohibits something and another permits it, then one of the principles must be outweighed. This means neither that the outweighed principle is invalid nor that it has to have an exception built into it. On the contrary, the outweighed principle may itself outweigh the other principle in certain circumstances. In other circumstances the question of precedence may have to be reversed. This is what is meant when it is said that principles have different weights in different cases and that the more important

[68] Alexy *Theory of Constitutional Rights* at 44. 'Every norm is either a rule or a principle.' (at 48).
[69] Alexy at 49.
[70] Alexy at 45-46
[71] Alexy at 47-48.

> principle on the facts of the case takes precedence. Conflicts of rules are played out at the level of validity; since only valid principles can compete, competitions between principles are played out in the dimension of weight instead.[72]

In turn, what is legally possible is determined by conflicting rules or principles. A conflict between norms occurs if two norms, each taken on its own, require mutually incompatible actions. A conflict among rules necessarily leads to one or the other rule being declared invalid. As rules apply in an either-or fashion, both cannot be followed simultaneously and one must give way to the other. Principles are different in this respect. If two principles collide, both must be satisfied to the greatest extent possible.

This has two significant consequences: the first is the inevitability of proportionality as the method for resolving conflicts between rights and the second is the 'totalizing' effect of the Constitution.

If it is necessary to satisfy each of the principles to the greatest extent possible, then this at least, theoretically seems to pre-determine policy to the 'highest point'. The highest point here means the policy satisfies both principles to the greatest extent possible. This is where the image of the total constitution comes in: like a totalitarian state, the constitution determines all human relations, including those between private individuals.[73]

The logical consequence of this is the requirement of proportionality. As Alexy describes, 'the relationship between principles and proportionality could not be any more intimate'.[74] What this means is that one implies the other; if rights are principles, then conflicts between them must be resolved through a proportionality exercise.[75] Proportionality then requires that both of the

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[72] Alexy at 50.
[73] M Kumm 'Who's Afraid of the Total Constitution-Constitutional Rights as Principles and the Constitutionalization of Private Law' *German Law Journal* 7 (2006): 341.
[74] Alexy *Theory* at 128.
[75] As a consequence, the charge of circularity has been leveled against Alexy's theory: C Jestaed 'Proportionality – Its Strengths and Weaknesses' in Pavlakos (ed.) *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (2007).

conflicting rights are satisfied to the highest degree of satisfaction possible. One way to understand the 'long division' that happens in the final stage of proportionality analysis is that both interests are brought as closely together as possible.

As the next chapter will argue this case, based purely on an abstract norm-theoretic account of rights, is 'too much', which even Alexy admits[76] and a number of others agree.[77] But the principles theory is a powerful and coherent way to give proportionality a theoretical underpinning. Even if it would ultimately be undesirable to have a 'total constitution' that pre-determines all policy decisions, the principles theory provides a basis against which proportionality is applied.

Furthermore, the origin of proportionality in principles (as understood as optimization requirements) has an important consequence. Namely, that deference must take place within the proportionality framework because proportionality is the key to resolving any conflicts of principles and as such nothing falls outside of it. The rest of the thesis is dedicated to creating a framework is able to do just that.

2.2 Proportionality

If proportionality is underpinned by a theory of rights as optimization requirements, then what does it look like as a legal doctrine? Below is a basic overview of the central elements of proportionality.

2.2.1 Legitimate aim

[76] See the Postscript to *Theory of Constitutional Rights*.
[77] Two pieces considering this in some depth are: J Rivers 'Translator's Introduction' in R Alexy *A Theory of Constitutional Rights* (2002). Taking rights less seriously. A structural analysis of judicial discretion. *Ratio Juris*, *20*(4), 506-529.

The legitimate aim test requires that a policy pursues an objectively verifiable interest. Speaking of aims of policies is somewhat misleading as policies, like inanimate objects, cannot have states of mind, which what talking about an aim is.[78] What courts then look for in the first stage of proportionality is whether the policy can arguably be said to pursue an objective that is permissible. This is ultimately a normative question about the kind of types of regulation that the state can exercise over individuals. It is very rare that a case would be decided on this peg, after all most laws serve some purpose that is legitimate. By way of example of a law that may fail, it has been suggested that an overly paternalistic law, such as one requiring citizens to attend church on a Sunday, would not pursue a legitimate aim given that views of the transcendental are rightfully left to the individual themselves.

2.2.2 Suitability

Suitability, or rational connection as it is sometimes called, requires that the policy is capable of achieving the aim defined under the previous prong. This in turn is a factual question that tests whether the policy can be said to do what it sets out to do. This is a relatively straight-forward matching of the aims and potential outcomes. Suitability does, however, require that a court evaluate whether a policy can achieve its desired end. This necessarily requires an assessment of future outcomes. A court must assess whether there is a prospect of the policy doing what it is supposed to do. It is in this evaluation that a court may be faced with having to take its institutional role into account when deciding whether a policy is suitably tailored to meet its ends.

The legitimate aim and suitability stages of the proportionality test do rather little actual work. Rather than posing significant hurdles for government to satisfy, they weed out policy options for the two subsequent tests. As such very few questions about the separation of powers have arisen with regard to the first two steps of proportionality.

[78] Möller at 182.

2.2.3 Necessity

The third prong of proportionality, necessity, interrogates whether the policy in question is needed to achieve the goal. There has been surprisingly little general writing on the necessity test.[79] The necessity test, which is also sometimes called the less restrictive means test or the minimal impairment test, requires that 'the legislator has to choose – of all those means that may advance the purpose of the limiting law – that which would least limit the human right in question'.[80] The test is rooted, like all elements of the principle of proportionality, in the idea of rights optimization discussed in the previous section.[81] If rights are to be fulfilled to the greatest degree possible, then it follows that there can be no justification for not using the means that would achieve this end.

Although, the language used to define the test differs slightly, the essence of the test appears to be very similar in all jurisdictions. In Germany, the Federal Constitutional Court stated that a law 'is necessary if the legislator could not have chosen a different means which would have been equally effective but which would have infringed on fundamental rights to a lesser extent or not at all'.[82] The Canadian Supreme Court defined the necessity test in terms that a law 'should impair "as little as possible" the right or freedom in question'.[83] The South African Constitutional Court, although it seems to employ the test,[84] often also refuses to describe it in abstract terms and instead opts for the language of balancing, even where the decision has been taken in terms of the necessity test.[85] These definitional differences, however, seem to have very little impact on

[79] The reasons for this probably vary. In Germany the test never found much popularity with most decisions being taken at the balancing stage. In South Africa there has been very little general theorization about the proportionality framework as a whole. The Canadian literature has as whole been more concerned with elucidating the question of evidence following the judgment in *R v Oakes*, but less so from the perspective of necessity test. For an exception to this rule, see D Bilchitz 'Necessity and Proportionality: Towards a Balanced Approach?' in (ed.s) L. Lazarus, C. McCrudden and N. Bowles *Reasoning Rights (2014*).
[80] A Barak *Proportionality* (2012) at 317.
[81] R Alexy *A Theory of Constitutional Rights* (2002).
[82] BVerfGE 90, 145 at 172.
[83] *Oakes* at para 70.
[84] This is at least how Aharon Barak understands the case law. See Barak *Proportionality* at 318-320.
[85] See N Petersen 'Proportionality and the incommensurability challenge in the jurisprudence of the South African Constitutional Court' *South African Journal on Human Rights* 30(3) (2014) 405-

the actual practice of applying the test, which varies throughout the practice of each court depending on the particular context.

The test itself focuses solely on the means to achieve a legislative aim. That is, it presumes that there exists a legitimate aim and that the law has a rational connection to it. The necessity test is essentially empirical in nature and does not allow for trade-offs between say a less restrictive means that is more expensive and a more restrictive but less expensive measure. These kinds of trade-offs are generally considered to be part of the balancing test proper in the next step, where the existence of less restrictive means can also be taken into account, at least in certain circumstances. Then, unlike balancing *stricto sensu* which is argued to require the comparison of incommensurable goods, the necessity test requires the comparison of means to serve the same end. The necessity test is, then, much less controversial than balancing which requires the ascription of moral values to acts and effects.[86]

Problems with the necessity test arise when it comes to its actual application. While the ideal form may be uncontroversial, in reality very few policy choices simply maximize all interests in every respect than the alternative proposed by government. This is why the German Federal Constitutional Court rarely finds that laws violate this leg of the proportionality test.[87] This is also why the Canadian Supreme Court, although it often purports to apply the less restrictive means test, in fact come closer to balancing competing interests.[88] South Africa and the ECtHR also have a complicated relationship with the test and on occasion it is applied but in a less than clear manner.

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429. Even in a case like *S v Manamela* where the court expressly discusses the existence of less restrictive means, it does not define what it means. In my view the necessity test should be kept strictly separate from balancing *stricto sensu* for two reasons. The first is that if a preferable alternative exists then there is no reason to take other considerations into account. The second is that balancing *stricto sensu*, being an evaluation of the costs and benefits of a policy, cannot take counterfactual hypotheticals into account.

[86] Of the many criticisms leveled against proportionality, on this point in particular see G Webber. 'Proportionality, balancing, and the cult of constitutional rights scholarship' *Canadian Journal of Law and Jurisprudence* 23 (1) (2010).

[87] For a rare counter-example, see the case regarding imitation chocolate Easter bunnies. BVerfGE 53,135.

[88] Möller at 195- 916.

In the end, the less restrictive means stage does also less work than might be expected. The practical consequence of this is that the most of the burden of making the decision falls onto the final peg of proportionality, balancing or proportionality *stricto sensu*.

2.2.4 Balancing stricto sensu

Balancing *stricto sensu* is at the heart of proportionality. It requires that a court determine whether the social gains of the policy outweigh the adverse effects to the rights of the individual. This idea has been expressed as the law of balancing in the following way: 'the greater the degree of non-satisfaction of, or detriment to, on principles, the greater the importance of satisfying the other'.[89]

Alexy has developed what he calls the 'weight formula' to assess whether an infringement is justifiable in terms of the final element of proportionality.[90] Alexy conceived of a mathematical formula which allows for an evaluation of the weights of three factors: the abstract weight of the two principles, the respective intensity of the interferences. The relative weight of these factors, then, would give the weight of the infringement, ultimately revealing the justifiability of the limitation.

The weight formula institutes a particular type of scale between the rights limitation and the general gain emanating from the policy, namely the comparison between the sizes of the trade-offs. As Afonso da Silva explains, 'What Alexy tries to show with this scale is that, no matter which principles are at stake, what should be compared is the trade-off between the satisfaction of one principle and the non-satisfaction of the other one.'[91] The balancing takes place by first determining the respective weights of the rights limitation and the social gain and then determining which is greater.

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[89] Alexy *Theory of Constitutional Rights* at 102.
[90] See the Postscript to his *Theory of Constitutional Rights*.
[91] VA da Silva 'Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decisions' *Oxford Journal of Legal Studies* Vol. 30 No.2 (2011) 273-301 at 287.

The crucial question for the court is to determine the different elements that make up the weight formula in order to determine two things: first, the different elements that make up the respective weights and secondly, the appropriate finesse of the scale. The second leg may be necessary if there is a stalemate at the first stage of balancing. Alexy argued that the comparison was between *small, medium* and *large* violations but that this could be infinitely refined if necessary to range from *small small* to *medium small* to *medium large* and ultimately *large large* or even further if necessary.

There is no blue-print to specify what has to go into the balancing equation in order to determine the weights and indeed weights can be determined differently. The ways in which courts determine the elements of the balancing equation are explored in a later chapter. Suffice it to say, courts are already allowed to point to, or not point to, different moral arguments that determine the weights of the interests and further that they may determine whether those moral arguments merely add to the weight of the individual elements or whether those moral arguments are in fact decisive in the balancing exercise.[92]

2.3 Reasoning in Proportionality

How are the scales determined? An enormous amount of criticism has been directed at the possibility of balancing constitutional rights and interests. The most central one fixes on the irrationality of balancing incommensurable goods.[93] Here, I do not wish to rehash those arguments and their counter-arguments[94] but propose to side-step them and proceed along another line of inquiry, namely how do courts in fact decide on the scales that they employ.

This has received much less attention in the literature. In order to appreciate what the reasoning within proportionality looks like, it is important to keep in

[92] See, e.g. the different types of balancing identified by Kai Möller in *Global Model of Constitutional Rights* at 137-140.
[93] The most thorough criticism is by Bernhard Schlinck. B Schlinck *Abwägung im Verfassungsrecht* (1976).
[94] On this, too, there is a significant literature. The leading defense is Robert Alexy's in his *Theory of Constitutional Rights* (1985).

mind that balancing is in some senses always a symbolic representation of what is going on. As Mattias Kumm puts it:

> The metaphor of balancing should not obscure the fact the last prong of the proportionality test will, in many cases, require the decision maker to engage in theoretically informed practical reasoning as opposed to mere intuition-based classification. In evaluating the relative importance of the general interest in relation to the liberty interest at stake, such weights may be assigned and priorities established as required by the correct substantive theory of justice. [95]

Thus, although balancing invokes the image of 'weighing' in a physical sense, this still requires that courts engage in potentially sophisticated theorization about what the weights should be. Advocates of a liberal political philosophical perspective often refer to the need for public reasoning in balancing.[96] In South Africa this type of reasoning is generally referred to as substantive reasoning,[97] following the distinction between formal and substantive reasons in RS Summers' and PS Atiyah's comparative law work on different reasoning in English and US American law.[98] I prefer the latter expression (and will continue use it) as it does not attract the same controversy as public reason often does.

Rather than attempt an account of substantive reasoning in proportionality, I will sketch the relevant characteristics. In the first place, it is relatively uncontroversial that balancing requires the evaluation of abstract principles of justice.[99] So, a court faced with evaluating the limitation of a particular right or the concomitant benefit to a public good must consider the general principles for the protection of the right or public good. For example, in relation to freedom of

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[95] M Kumm 'Review Essay of *Theory of Constitutional Rights*' 2 *International Journal of Constitutional Law* 574 (2004) at 592.
[96] Kumm 'Socratic Contestation' at 142.
[97] A Cockrell 'Rainbow jurisprudence' (1996) *South African Journal of Human Rights* 13; C Roederer 'Judicious engagement: Theory, attitude and community' (1999) *South African Journal of Human Rights* 486; S Woolman 'The amazing, vanishing bill of rights' (2007) *South African Law Journal* 762.
[98] PS Atiyah & RS Summers *Form and Substance in Anglo-American Law* (1987).
[99] This is part of Alexy's weight formula referred to above, for example and also part of the quote by Kumm cited on the previous page.

religion ECtHR's pften argues that, '[t]he pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. That freedom entails, inter alia, freedom to hold or not to hold religious beliefs and to practice or not to practice a religion.'[100] In protecting and upholding freedom of religion, the court opines that the '[s]tate's role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and has stated that this role is conducive to public order, religious harmony and tolerance in a democratic society'.[101]

These broad arguments anchor the case specific arguments regarding the costs and benefits of a law or act. These specific arguments are usually longer and primarily focus on a discussion of the actual impact of the impugned law. They also tend to be more diverse in the arguments they consider. This is hardly surprising since the specifics of a case vary much more than the broad overarching themes. There will, of course, be some general questions that arise as similar social questions tend to repeat themselves.

This arguably does reflect a rather significant shift in the way in which courts adjudicate cases as it means the traditional techniques – such as the development of the common law and the canons of interpretation on which courts have rested their expertise and arguably significant degree of institutional legitimacy – has given way to a much less legal way of reasoning.[102] Importantly, it also gives courts immense powers when determining the applicable scales posing a new kind of challenge to the powers of courts.

2.4 What about Deference?

This thesis is about the relationship between proportionality and deference. Thus far, we have mostly focused on what the former means while hardly

[100] *Kokkinakis v Greece* 260 Eur. Ct. H.R. (ser. A) at para 31.
[101] *SAS v France* at para 127; *Refah Partisi (the Welfare Party) and Others v Turkey* [GC], Application no.s 41340/98 at para 91.
[102] Mattias Kumm has called this the shift from interpretation to justification. Kumm 'Socratic Contestation' at 142.

referring to the latter. There is a problem with this, namely if taken to its logical conclusion, proportionality requires that courts ensure that policies are perfect and leave no room for government discretion. Hence, they are described as optimization principles. However, no court can actually operate like this in actual practice nor would it be legitimate for them to not leave any discretion to government.

For Alexy the answer lies in the uncertainty that comes with balancing, what he refers to as epistemic discretion. With the existence of structural discretion being highly questionable, then the second type of discretion, suggested by Alexy, is epistemic discretion. Alexy defines epistemic discretion as a situation in which 'what is commanded, prohibited, or left free by constitutional rights is uncertain'.[103] Epistemic uncertainties are then concerned with uncertainties in either the normative or empirical premises of the balancing equation.[104] Where there are uncertainties, then, there would also be discretion and the court would defer to the legislator.

As we shall see in the next chapter, each court has adopted its own way of leaving an appropriate level of discretion to the legislator. Usually the answer relates to the level of justification that is required and the standard of review that is employed. In the most general terms, rather than requiring that laws be optimal to pass the proportionality test, courts should merely test that they are reasonable.[105]

Part of the difficulty and the reason why it is necessary to explore and reconstruct the relationship between proportionality and deference is that our understanding of substantive reasoning in proportionality is still under-developed. As I argued in the previous section, courts employ substantive reasons in determining the correct balance between competing rights and interests but so far we do not have a strong view of how exactly these operate.

[103] Alexy at 414.
[104] *Id.*
[105] Reasonable here should not be confused with the English administrative law standard of reasonableness.

Consequently, it is difficult to understand how deference can operate in applying those reasons. The subsequent chapters lay this out in some detail, first in a general sense, then in more detail.

2.5 Conclusion

Proportionality poses a unique challenge to courts. By giving courts the discretion to choose the criteria according to which it balances the competing interests, it gives them seemingly almost entirely unrestricted authority to decide cases in its preferred way. This chapter has made out a case that this is a practice that ought to be curbed as courts are not ideally placed to decide all political conflicts before it.

What is then often called proportionality as a simple short hand implies a significant shift in how rights claims are adjudicated. The optimization of rights and the substantive reasoning needed to achieve an optimal balance give courts extremely wide powers to decide political issues. And while there is nothing in itself wrong with optimizing rights, there might conceivably be a problem in that it is courts who are doing the balancing.

The problem for courts is this that there are reasons related to their institutional capacity and procedural legitimacy that limit their power to adjudicate rights claims, the way in which these claims have come to be adjudicated has given courts great power to do so. How they resolve this dilemma is the subject of the next four chapters. Before turning to those questions, the rest of this chapter looks some of the methodological questions raised by the comparison.

4. Methodological Remarks – The Comparative Approach

Before turning to the substantive chapters, it is necessary to comment briefly on the approach taken here, which consists of comparing the application of

proportionality by four courts across three different sets of rights. Comparing any two things raises questions about the sensibility of such comparisons. Even comparing two items of fruit – such as apples and pears – raises questions as to whether it is possible. The question is of course one of the meaningfulness of the criteria that one uses to compare. Comparing apples and pears makes perfect sense if one is interested in the nutritional content of each respective fruit; it also makes sense if one wants to make a fruit pie and is interested in how the fruit tastes when cooked. Comparative law is no different.

The previous parts of this chapter have set out to explain why proportionality poses a novel institutional challenge. The remaining part of this chapter explains why the comparison of the four courts and three rights is a plausible approach to the question. In other words, this section seeks to place the research into the broader picture of comparative constitutional law and to justify some of the methodological choices that have been made.

The first part sets out to demonstrate what is involved in comparing the application of the principle of proportionality. Comparative constitutional law is said to be enjoying a renaissance.[106] This is also reflected in the scholarship on proportionality, which has been one of the central objects of comparison. The two subsequent parts justify the choice of the courts and the choice of the rights in question. They explain why it makes sense to compare the application of proportionality in these four courts that are, in some respects, very different and why the comparison should take place across the three rights, which, after all, represent a small fraction of rights that exist.

4.1 Comparing Proportionality

In the first place, we need to consider what it is we are comparing, namely the reasoning of the courts in the application of proportionality. The previous parts of this chapter have elaborated why this is a problem worthy of consideration, ultimately setting up the comparison. We are interested in the way in which

[106] R Hirschl *Comparative Matters: The Renaissance of Comparative Constitutional Law* (2014).

courts construct the arguments in their application of proportionality. More specifically, we are interested in how courts defer when applying the principle of proportionality. But what does this mean to be precise?

It may help to set out different styles of comparative constitutional law. Since comparing the practice of proportionality has received increased attention lately, it may be useful to show how this work relates to them. In the first place a strand of scholarship seeks to reconstruct the practice of proportionality review. These authors seek to create a 'theory of the practice of constitutional rights law'.[107] Unlike a philosophical account that seeks to present the morally best account of rights, a reconstructive approach will pick the morally coherent account that fits the practice best.[108] For example, Robert Alexy's *A Theory of Constitutional Rights* reconstructs the practice of the German Federal Constitutional Court. In comparative terms, Kai Möller's monograph titled *The Global Model of Constitutional Law* proposes to reconstruct the practice of courts worldwide in order to capture the essential elements of global practice. This is then a variant of a popular approach to constitutional law scholarship that includes more than one system.[109]

A second type of comparative approach to proportionality focuses on explicating relevant differences and similarities in the application of the principle. There is a primitive type of this kind of research that simply contrasts the laws of different legal systems, presuming that this kind of comparison is sufficient as a justification for it. However, with the increased attention paid to comparative constitutional law and its methods, this type of scholarship is not particularly popular. Some work explores the cultural setting that informs proportionality. For example, Jacco Bomhof uncovers the 'imagination' that informs balancing in

[107] Möller at 20.
[108] *Ibid*.
[109] See this obituary of Ronald Dworkin by Cass Sunstein that explains why this approach has been particularly popular with constitutional lawyers. C.R. Sunstein 'The Most Important Legal Philosopher of Our Time' (2013) Available at https://www.bloomberg.com/view/articles/2013-02-15/the-most-important-legal-philosopher-of-our-time.

America and Germany.[110] Moshe Cohen-Elia and Iddo Porat in turn explore the culture that underpins constitutionalism to discover different 'cultures of justification'.[111] Others focus on institutional factors. Benedict Pirker identifies four models of proportionality that inform its application.[112] Most recently, Niels Petersen approaches the question of the legitimacy of proportionality based judicial review from a law and economics point of view, arguing that balancing is much less frequent than is often assumed.[113] This is a type of comparative constitutional law that picks a criterion around which it compares and contrasts the different systems.

Finally, a third type of comparative law on proportionality traces the spread of proportionality throughout the world. Proportionality is, after all, the most successful legal transplant after the Second World War and it is hardly surprising that scholars would be interested in how proportionality is transplanted, transformed, transposed and re-engineered in the process.[114]

The research proposed here falls primarily into the second category of comparative studies of proportionality in that its primary focus is to tease out the similarities and differences in the application of the principle of proportionality. There are elements of the reconstructive approach where the approaches the courts have taken are then consolidated into a general framework that coheres with the considerations about the legitimacy of judicial review discussed in the first part of this chapter. This manifests particularly at the end of the next chapter on the general approach of courts to proportionality and deference and in the conclusion where I give a broader picture of the relationship between proportionality and deference.

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[110] J Bomhoff *Balancing Constitutional Rights: The Origins and Meanings of Postwar Legal Discourse* (2013).
[111] M Cohen-Elia & I Porat *Proportionality and Constitutional Culture* (2013).
[112] B Pirker *Proportionality Analysis and Models of Judicial Review* (2013).
[113] N Petersen *Proportionality and Judicial Activism* (2017); N Petersen Verhältnismäßigkeit als Rationalitätskontrolle (2015).
[114] A Stone-Sweet & J Matthews #Proportionality balancing and global constitutionalism. *Colum. J. Transnat'l L.*, *47*, 72.

This means that we are interested in not only when courts strike down or uphold legislation but also in the general approach of the court to balancing. This has two consequences. The first is that we are interested in cases in which government participates in general and not simply those which constitute challenges to statutes enacted by Parliament. The reason for this is two-fold. In the first place, separation of powers considerations arise not only when laws are struck down but also when the court interprets potentially unconstitutional legislation in a way that offends the constitution. When a rights limitation (or potential rights limitation) is found, a court does not necessarily need to strike down the statute as unconstitutional. It may also, where possible, interpret the section in question in a manner that strikes an appropriate balance between the competing rights. This raises questions about the separation of powers for two reasons. The first is that in narrowing down the application of a statute, the court is in effect making law. In giving the law a particular interpretation beyond what might be thought to be the full scope of the law, the court is creating law. This is, of course, less dramatic than striking down the entire piece of legislation, but it does nonetheless involve law making. Thus, the court will have to balance – and consider its institutional position – even where a statute is upheld.

Secondly, while are main interest lies in how courts balance, decisions that do not include challenges to legislation may still be indicative of the court's general approach. Hence cases where the court reviews administrative action are occasionally included, when they illustrate the court's approach to a certain question or might be indicative of its future approach to a question of balancing.

4.2 Comparing the Four Courts

This thesis compares the practice of four different courts, two constitutional courts, one supreme court and one regional human rights court. These courts are in many ways vastly different. They belong to different types of legal systems, the Canadian legal system is a common law system, the South African system is a mixed system although predominantly marked by common law traits, the German court sits in a civil law system and ECtHR is an international court

straddling both common and civil law systems. Some of the systems have centralized review, others diffuse, some accept abstract review, others do not. The courts have different legal and judicial philosophies. They sit in vastly different social and economic conditions.

One can legitimately wonder whether such a comparison makes sense. The answer to this question depends not on the courts, being the objects of comparison, themselves but rather on the criterion or criteria that are used to compare the legal systems in general or practice of courts in this case.[115] Legal systems have many similarities and differences. There are then, often significant differences between those systems that seem very similar or belong to the same legal family. Conversely, systems that at first glance seem vastly different, say a domestic supreme court and an international court, will more than likely share commonalities (they are, for example, at least courts and they apply law). In general, legal systems – and the polities in which they sit – are complex entities made up of many different elements, and whether comparing these different elements produces some form of meaningful insight depends on how we choose the criteria for comparison. More specifically, the meaningfulness of the comparison does not depend on the similarity or difference of the systems being investigated, rather it depends on whether the criteria that were chosen are themselves somehow meaningful.

As such there is nothing, *prima facie*, strange about comparing the four courts that are compared here. The fact that the European Court of Human Rights is an international court does not mean that it is incomparable with the domestic courts. Likewise, the fact that the South African Constitutional Court plies its trade in a political context that is very different from that of the Canadian and German courts does not mean that comparing the three would be nonsensical.

[115] While comparative private law has been aware of this problem for a long time already, it has only recently become discussed by comparative constitutional law scholars. M van Hoecke & M Warrington. "Legal cultures, legal paradigms and legal doctrine: towards a new model for comparative law." *International & Comparative Law Quarterly* 47, no. 3 (1998): 495-536; G Samuel, "Taking Method Seriously", 2 Journal of Comparative Law (2007);W Ewald 'Comparative Jurisprudence (I): What Was It Like to Try a Rat?' *University of Pennsylvania Law Review* 143, no. 6 (1995): 1889-2149.

And further, the German Federal Constitutional Court can be compared to the South African and Canadian courts even though the former is placed in a civil law system and the latter two in common law legal systems. All of these factors – and many more – affect how the comparison should be undertaken but none make a comparison in itself futile.

Two further points merit comment. The first relates to the study of influence in the application of proportionality. One of the well-known aspects of proportionality is how it has spread as a transplant from Germany to other jurisdictions.[116] While there can be great academic and practical merit to studying the ways in which legal systems influence one another, I want to leave this aspect to one side for the purposes of this study. Rather I want to take each system as I find it and compare the systems on their own terms.

The second point relates to the position of the United States of America's. (USA) The USA legal system poses something of an exception to the practice described here. While US constitutionalism has long been held as an influential model when it comes to the structure of fundamental rights, it no longer holds that position. Thus, where this thesis draws general conclusions about the nature of fundamental rights in general or proportionality and balancing, it should be noted that in this respect the US is most likely an exceptional case.[117]

The point of this thesis is to compare how different courts apply the principle of proportionality, and all of the courts included do indeed apply that principle. The differences among them, of course, influence the comparison and the conclusions that can be drawn from it. Nevertheless, the crucial point is that all of them apply proportionality and ought to take their institutional position into account.

[116] For an exhaustive account in this style, see: A Stone Sweet & J Mathews, 'Proportionality Balancing and Global Constitutionalism', (2008–9) 47 *Columbia Journal of Transnational Law* 72, 97.
[117] About the US in general, see: K Möller *Global Model* at 17-20, V Jackson 'Being proportional about proportionality' *Constitutional Commentary* (2004): 803.

4.3 *Comparing the Three Rights*

This takes us to a second possible point of contention, namely why the three rights, expression, religion and privacy. This calls for three points of clarification, the first relating to the decision to narrow the comparison to three rights, secondly as to why these specific rights and, finally, the plausibility of studying proportionality in the context of one right.

We could also, imaginably, have compared the four systems without narrowing down the sample even further to only include specific rights. There are, however, some problems with this approach. First, the sheer number of cases that one would have to read would be unmanageable. The HUDOC database that contains the case law of the European Court of Human Rights contains close to 50,000 judgments. The Grand Chamber itself has handed down close to 3,500 judgments. The domestic courts, understandably, have a lower case load that varies between 50-100 rights cases annually. But added up over the years this would still amount to a vast number of cases. Dealing with this number of cases would simply be impossible. Thus, in order to compare different courts at all, it is necessary to narrow the scope of the research in some way.

Relatedly, without restricting the research to a number of rights, it would be impossible to compare the reasoning of the courts on more specific points of substance. Work that takes only a general perspective on the question of proportionality and deference can rarely go beyond observing that a court could adjust its standard of review in order to be more or less deferential. There is nothing wrong with this and it is a perfectly valid observation; however, the question of what lowering or raising the standard of review means requires closer investigation, which, in turn, requires closely tracking the arguments in a case. This can only be done by limiting the number of cases to what can reasonably be discussed in detail in the course of three chapters.

Secondly, it necessary to note that while the chapters carry the title of a particular right, what we are interested in in balancing cases is in fact conflicts of

rights. Proportionality and balancing are never simply applied in the context of one right. Instead, these doctrines apply when rights clash. A right would conflict with a public interest or another right. In practice, however, the same types of rights conflicts arise under the rights. Freedom of expression is often limited to protect the dignity of others, public order considerations and sometimes more specific considerations such as the quality of political debate. Similarly, the right to privacy is also often limited by a circumscribed number of considerations, usually security and public order related. The right to freedom of religion probably represents the broadest set of clashes as religion itself often presents a comprehensive system of norms that may be limited by any other legal norm. The range of behavior that may be limited is then much broader than it is for freedom of expression and privacy. Nevertheless, even here certain issues arise more than others. For example, questions relating to the permissibility of displaying religious symbols in various situations, such as the workplace or a school, come up in all three sets of rights. The question whether it is possible to compare only proportionality in relation to one right is appropriate; however, in substance the chapters do take this into account by focusing on real-life conflicts found in the case law.

Finally, questions may arise as to why these three particular rights and not others. The answer is, that it would be possible to choose another set of three rights. The rights chosen here, have, however, first the benefit of being well-established civil and political rights and are protected in all four systems being compared. In particular, freedom of expression and religion and the right to privacy also cover three of the four rights in the European Convention that contain the second paragraph permitting limitations. All three rights are also more or less controversial – although privacy and religion arguably more so than religion – and have given rise to controversial cases in which the limits of judicial power have been questioned.

5. Conclusion

This chapter set out to achieve two things. In the first place it argues that proportionality-based judicial review poses a particular, new kind of challenge to the separation of powers. The nature of the test presents judicial organs with a high level of discretion and the nature of the reasoning requires the judges to reason in an openly substantive manner while the constraints that limit judicial behavior still pose restrictions on what courts ought to do. The second aim has been to outline the comparative approach taken to research this question. Here the central argument was that despite the differences between the courts, it is illuminating to compare the application of proportionality by the different courts as they share a common, theoretically and practically significant, challenge.

The following chapters will look at these questions in more detail. The next chapter studies the question on a general level. It details how courts have developed proportionality, how they conceive their judicial role and how take the institutional position of courts into account when applying proportionality. Thereafter, three chapters look at balancing cases in three specific rights in order to capture how courts take their institutional role into account when balancing rights.

Chapter 2: Proportionality and Deference in General

1. Introduction

It is hardly surprising that when proportionality-based judicial review is instituted, the changes to the legal system are described both as a legal revolution and legal evolution.[118] Since the end of the Second World War, Germany,[119] Canada,[120] South Africa,[121] and the European Convention system[122] and a number of others[123] have all adopted proportionality-based judicial review... Wherever proportionality-based judicial review has been implemented, either as part of significant social changes as in post-World War II Germany or post-Apartheid South Africa or simply as a mere domestication of already binding international obligations, the adoption of proportionality was heralded as a revolution in the legal system. Often this was achieved through the imposition of a supreme bill of rights over a pre-existing legal order. At the center is a new form of rights adjudication based on a proportionality analysis.[124] Proportionality is the core of what has been called the new 'global model of constitutional rights',[125] the 'post-war paradigm'[126], or the 'rational human rights

[118] See, e.g.. E Mureinik 'A Bridge to Where? Introducing the interim Bill of Rights' *South African Journal of Human Rights* 10 (1994) 31; L Ackermann 'The Legal Nature of the South African Constitutional Revolution' *New Zealand Law Review* (2004) 633.
[119] Grundgesetz für die Bundesrepublik Deutschland, 1949 (German Basic Law).
[120] Charter of Fundamental Rights and Freedoms (1982).
[121] The transition from a system of Parliamentary sovereignty to a constitutional democracy was taken in two legislative steps. First, the interim Constitution, 1993, created a temporary arrangement before the entry into force of the Constitution, 1996. Both constitutions included justiciable bills of rights.
[122] The European Convention on Human Rights was adopted in 1950.
[123] For example, the United Kingdom through the Human Rights Act, 1998.
[124] There is a vast literature on proportionality, for the leading texts, see: R Alexy *Theory of Constitutional Rights* (1985, transl 2002); M Kumm 'Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice' 2 (2004) 574; M Klatt & M Meister *The Constitutional Structure of Proportionality* (2012); A Stone Sweet & J Matthews 'Proportionality, Balancing and Global Constitutionalism' *Columbia J Transnational L* (2007) 73; D Beatty *The Ultimate Rule of Law* (2004); A Barak *Proportionality* (2012); GCN Webber *The Negotiable Constitution* (2009); S Tsakyrakis 'Proportionality: An Assault on Human Rights' Vol 7 Iss 3 *ICON* (2009) 463.
[125] K Möller *The Global Model of Constitutional Rights* (2012)
[126] L Weinrib 'The Post-war Paradigm and American Exceptionalism' in S Choudhry (ed.) *The Migration of Constitutional Ideas* (2007)

paradigm'.[127] At the same time the institution of proportionality-based review also leaves much of what has existed before in place, evolving step-by-step and side-by-side with existing institutions, practices and philosophies.

It is a well-known part of the story of proportionality that although proportionality has spread throughout the world's legal systems, the way in which it is understood and applied in different jurisdictions varies.[128] So, even though proportionality may be part of 'generic constitutional law'[129], it nevertheless sits within local cultures that determine how it operates.[130] This is also true, perhaps especially true, for the question of how institutional considerations should be accommodated in the proportionality enquiry.

In each of the four jurisdictions, the way in which proportionality is constructed and applied is court-created. Proportionality has been developed by courts in order to determine the justifiability of limitations to human rights. Sometimes, this is as an interpretation of a general limitations clause such as section 1 of the Canadian Charter or section 36 of the South African Bill of Rights. Sometimes, it is developed as an approach to specific limitations clauses such as the second paragraph of articles 8-11 of the European Convention on Human Rights. Or they can be, over time, created as a generally applicable approach to all constitutional law as has happened in the German constitutional system. But alongside developing the proportionality framework, courts have also had to develop a framework for how the famously 'empty' framework is to be filled. Below I trace the general ideas – from the landmark cases the *Pharmacy Case, Oakes, Makwanyane, Handyside* and their progeny – that guide the courts in this endeavor.

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[127] M Kumm 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' Vol 4. Iss.2 *Law and Ethics of Human Rights* (2010) 141.
[128] J Bomhoff *Balancing Constitutional Rights: The Origins and Meanings of a Post-War Legal Discourse* (2013); M Cohen-Elya & I Porat *Proportionality and Constitutional Culture* (2013).
[129] DS Law'Generic Constitutional Law' 89 *Minnesota Law Review* 652 (2005); K Möller *The Global Model of Constitutional Rights* (2012); L Weinrib 'The Post-war Paradigm and American Exceptionalism' in S Choudhry (ed.) *The Migration of Constitutional Ideas* (2007); D Beatty *The Ultimate Rule of Law* (2004); AS Sweet & J Mathews. 'Proportionality balancing and global constitutionalism' *Colum. J. Transnat'l L.* 47 (2008): 72.
[130] J Bomhoff *Balancing Constitutional Rights: The Origins of a Post-War Legal Discourse* (2014);

From this comparison, a multitude of similarities and differences emerge. However, two crucial points become clearly apparent: First, despite the multitude of differences that may exist between the approaches of courts to proportionality, they all involve the justification of policies through an engagement with substantive reasons rather than through (orthodox) interpretation, as was suggested by the preceding chapter's theoretical foray. Secondly, the way deference operates is through adjusting these substantive arguments to the institutional position of the court, sometimes by explicitly acknowledging the need to do so, but more often implicitly in the way the arguments made by the courts operate.

2. Developing Proportionality, Including Deference

It is probably safe to say that when the four courts adopted proportionality as the doctrinal instrument to resolve conflicts between rights, they had not considered what the institutional implications of this would be. Over the years, courts developed various aspects of proportionality and the principles that guide the application of proportionality. This development has been haphazard and it has often been somewhat messy. Here, I will trace these developments in order to give a general picture of how the different courts conceive of proportionality and what the role of the separation of powers plays in it.

2.1 Germany

It is appropriate to begin the survey with Germany since this is where proportionality has the longest history. The inconspicuous manner in which proportionality was introduced into German constitutional law belies the monumental changes in how the Basic Law was understood and what role rights and proportionality would play in law and politics and that rendered what at its adoption looked like a Western liberal constitution into the Basic law we are

familiar with today.[131] Rooted in ideas of a material constitution, a general right to freedom and the practical concordance or harmonic interpretation of rights, this system has given rise to a particular way of applying proportionality. In particular, this has given rise to proportionality and balancing being conceived of in 'value formalist[tic]'[132] terms that 'casts the pragmatic as reasoned, policy as principle and the substantive as formal'[133]. This also defines the way in which the institutional dimension is taken into account when balancing. Rooting the balancing in objective order of values, legislative discretion is left where there are either empirical or normative uncertainties.[134]

Proportionality in Germany pre-dates the constitution, both in theory and practice. Jurists had been developing and advocating for proportionality to be set as the limitation of the powers of the police when enforcing the law.[135] Writers such as Carl Gottlieb Svarez and Günther Heinrich von Berg developed and advocated for a system that resembled proportionality already in the 18th century, with others continuing this work throughout the 19th century. Eventually, the doctrine came to be accepted as positive law through the case law of the Prussian administrative courts (*Oberverwaltungsgericht*) where it served to delineate precisely the question of the powers of the police where the actions of the police potentially limited an individual's liberty or property rights.[136] The domain of proportionality remained limited to administrative law until after the Second World War, as the rights in the constitutions of most German states were not employed as 'trumps against otherwise legal state action'.[137] And although a number of well-known constitutional theorists, among them Carl Schmitt, Rudolf Smend and the future justice of the Federal Constitutional Court Gerhard Leibholz, began to conceive of rights as the basis of

[131] My understanding of the intellectual background to the German Basic Law is largely formed by two recent monographs, Jacco Bomhoff's *Balancing Constitutional Rights* (2014) and Michaela Hailbronner's *Traditions and Transformations* (2016) who trace the ideas that inform the understanding of the Basic Law.
[132] Hailbronner at 97-99.
[133] Bomhoff at 74.
[134] R Alexy at Postscript.
[135] For an overview of this see: AS Sweet & J Mathews. 'Proportionality balancing and global constitutionalism' *Colum. J. Transnat'l L.* 47 (2008): 72 at 98 - 104.
[136] For a thorough account of the historical origins of proportionality, see A Barak *Proportionality* (2012) 175 – 181.
[137] Stone Sweet & Matthews at 103.

all state action during the period of the Weimar Republic, this development, which may have well led to the adoption of proportionality-based rights review by the Supreme Court (*Reichsgericht*), this development was cut short by the collapse of the state.[138]

2.1.1 Constructing the Constitution: Lüth, the Pharmacy Judgment and Elfes

In a relatively brief period of time shortly after the entering into force of the Basic Law in 1949 and the beginning of the functioning of the Federal Constitutional Court in 1951, the court laid down how the constitution would operate. The court's approach to fundamental rights began to be defined – *Lüth*, the *Pharmacy Judgment* and *Elfes* – in a short period between 1958 and 1961.[139] It began to be defined because the court spent very little time on explaining how or why the concepts were being used and how they would apply in the future. Their impact would be significant even when it was not always immediately appreciated and they would only be fleshed out over the coming decades. As Kai Möller notes these concepts have not only gone global, they are all also part of the current constitutional paradigm.[140]

2.1.2 Lüth and the Material Constitution

Lüth was the first of the cases to come before the court. It was also the first time the court would deal with a matter concerning the freedom of expression and the first time the question of horizontal application of rights was before the court.[141] Appropriately, the facts of the case were also not merely scandalous from a social perspective but also rooted in the country's Nazi past, which the Basic Law sought to overcome. The case arose out of a statement made by Erich Lüth, then Chairman of the Publications Office of the City of Hamburg, in which he called for a boycott of a new film by Veit Harlan. Harlan had directed an extremely anti-

[138] The most accessible account of German public law during and around the period of the Weimar Republic is M Stolleis (trans. T Dunlap) *A History of Public Law in Germany 1914-1945* (2014).
[139] Hailbronner at 53 – 65.
[140] Möller at 2 – 18.
[141] Bomhoff at 77.

Semitic film during the fascist period[142] and Lüth was concerned that Harlan's return to film-making may damage Germany's image abroad and would hinder reconciliation between Christians and Jews. After Harlan brought a civil action against Lüth, the lower court found in Harlan's favor and Lüth complained to the Federal Constitutional Court.

Even against this striking background the court's judgment was momentous, being described as *epochenmachend* – defining an era – by Ernest Böckenförde.[143] In its judgment the court introduced two ideas, balancing and the idea that the constitution formed an 'objective order of values', that would shape the understanding and application of the Basic Law until this day. The court's judgment began with affirming the nature of rights as being primarily rights against the state.[144] It was, however, also necessary to recognize that 'the Constitution, which does not want to be a value-neutral order, has, in its Part on Fundamental Rights, erected an objective value order'.[145] Continuing, the court held '[t]his value system at the, at the core of which is the dignity of the personality of the individual developing freely within the social community, has to be understood as a foundational constitutional decision for all areas of the law'.[146] The court, then, went on to find that the lower court had erred in the weight it should have given to the freedom of expression and overturned its decision.

While *Lüth* was a private law case and its importance lies there and questions of deference or separation of powers do not arise, it also gives birth to the notion of the constitution as a value order. The connection between the material constitution and balancing is crucial in that it shapes how the court understands how it is to approach the proportionality exercise and in particular its content.

[142] The film was called *Jud Süß* and featured a Jewish advisor who persuades the King of a region to take decisions to the advisor's benefit and to the great detriment of the people. The film was a box office success and required viewing for all members of the SS.
[143] Böckenförde at 87.
[144] BVerfGE 7, 198,
[145] 205.
[146] 205.

2.1.3 The Pharmacy Judgment and the Birth of Proportionality

The next judgment of fundamental importance was the *Pharmacy Case,*[147] which is often quoted as the birthplace of proportionality in the constitutional rights jurisprudence of the Federal Constitutional Court.[148] It is, indeed, here that we find the first engagement with what proportionality and balancing entails. The case concerned the right of a licensed pharmacist who had moved from the German Democratic Republic (GDR) to open a pharmacy in a part of Bavaria. The pharmacist's request for a license was denied by the relevant authority on the basis of Bavarian law on pharmacies. That law required that the establishment of a pharmacy had to be in the public interest. As the town in which the applicant wanted to open his pharmacy already had one, the authorities declined the request. The applicant complained that the authorities had decided his application on the basis of inadmissible reasons, taking into account economic considerations instead of limiting its considerations to those of health and safety. The question for the court, then, became whether the particular section of the Bavarian law could be consolidated with the freedom of trade in article 12 of the Basic Law. The court begins a lengthy analysis of what article 12 means, encountering some problems relating to the wording of that article which gives everyone the right to choose a profession but allows restrictions to the practicing of any profession on the basis of a law.[149]

The court then goes on to state the general principle that governs limitations in article 12. First, the court states that the right in article 12 may 'be restricted by

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[147] BVerfGE 13, 97.

[148] Although, this captures the most crucial elements of the development of the way in which constitutional rights work in Germany, it does leave out some important milestones from the development of proportionality in Germany that should be mentioned here for completeness sake. The first application of proportionality comes in a case regarding a piece of electoral law in the state of North-Rhine Westphalia[148] Here, the court applied the principle of proportionality to the regulation which required that a certain number of signatures were required to register a political party and found that this did not unfairly prejudice the chances of parties that could not collect the necessary signatures. The use of proportionality in this case is limited to the court referring to it in its reasons. Indeed, although, the judgment is the first appearance of proportionality in the case law of the Federal Constitutional Court this case is often omitted from the analysis or left to as an additional footnote.

[149] Paras 73 - 74. The wording of article 12(1) reads: "Alle Deutschen haben das Recht, Beruf, Arbeitsplatz und Ausbildungsstätte frei zu wählen. Die Berufsausübung kann durch Gesetz oder auf Grund eines Gesetzes geregelt werden."

reasonable regulations predicated on considerations of the common good'. However, this is only permissible for the 'sake of a compelling public interest.' The court notes that there is a burden on legislator to 'careful[y] deliberat[e], the common interest at stake and that the right may be limited 'only to the extent that the protection cannot be accomplished by a lesser restriction on freedom of choice.'[150]

Having made balancing the measure of constitutionality, the court then lays out what it called the 'graduated scale of possible restrictions'[151]. The first type of limitation relates to how a profession is exercised (*reine Ausübungsregelung*).[152] Here the court states that the legislature enjoys the greatest freedom as the limitation is aimed at how a profession is practiced without restricting entrance to it.[153] The next step consists of subjective conditions of being admitted to a profession, such as having a particular education or other formal competence.[154] These are a more weighty limitation of the right in article 12, but nevertheless they are not a particularly serious limitation as it is possible to determine beforehand whether a person can achieve them. These are often also justified in that they are necessary in order for a profession to be practiced adequately.[155] Finally, the last gradient of limitations on the right to a profession are objective restrictions over which a person has no control, such as the number of permissible businesses of a kind in an area.[156]

This general picture is followed by a detailed discussion of whether the absence of the Bavarian law 'restrict the orderly supply of drugs in such a way to endanger public health'.[157] Here the court evaluates the government's attempts at justifying the law which rested largely on the fact that if existing pharmacies were not protected against competition they could suffer economically to the extent that they would close, threatening the availability of medicine in the

[150] Translations from Kommers & Miller at 687.
[151] Kommers & Miller at 668. Original at 405 of the judgment.
[152] 405-6.
[153] 406.
[154] 407.
[155] *Ibid*.
[156] Paras 81.
[157] Kommers & Miller at 688

affected areas. The court finds that there is no reason to assume that the number of new pharmacies would reach a number that this would be of serious concern. The court does not discuss the level of certainty or evidence that would be required to prove this. It does state that it is not sufficient to approach the law in a 'general and cursory'[158] manner and that 'the evaluation of hypothetical causal chains and their greater or lower probability is a task that is also possible for the judge to perform in their own way'[159].

The *Pharmacy Judgment* is then a mixed bag. In the first place, it represents a thorough application of the principle of proportionality. However, it is also under-theorized in a number of ways. First of all, and as is always remarked when the case is discussed, the Federal Constitutional Court never explained why proportionality was the appropriate test for determining the constitutionality of rights limitations.[160] Dieter Grimm, a former chief justice of the Federal Constitutional Court, remarked that proportionality was introduced as if 'it could be taken for granted'.[161] It has, probably correctly, been observed that if the court had felt it necessary to justify the use of proportionality through the text of constitution it could have done so with relative ease.[162]

More importantly for our purposes, the court does not explain proportionality's steps or how they operate. In the *Pharmacy Judgment* the court's discussion of how proportionality operates is limited to stating that a right may only be limited for a sufficiently weighty social purpose. The court does recognize that there are different elements and it does allude to balancing the need to employ the least restrictive means and the importance of a legitimate aim from time to time but it does not engage in these considerations on a more abstract level.

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[158] 412. 'allgemein und Schlagwortartig'.
[159] 412. 'Die Beurteilung hypothetischer Kausalverläufe, die den Normierungen des Gesetzgebers zugrunde liegen, auf ihre größere oder geringere Wahrscheinlichkeit hin ist eine Aufgabe, die ihrer Art nach auch vom Richter erfüllbar ist.'
[160] B Schlink 'Der Grundsatz der Verhältnismässigkeit' in P Badura & H Dreier *Festschrift 50 Jahre Bundesverfassungsgericht* (2001).
[161] Grimm at 385.
[162] Grimm at 386-7.

Secondly, the court begins to address its institutional position in applying the principle of proportionality, albeit in a very cursory manner. The court makes one reference to this question, which is a positive statement ascertaining the judges' ability to entertain questions of empirical fact. Indeed, the court spends much more time elaborating on the graduated limitations (*Dreistufentheorie*) and the substantive arguments than on justifying how and why it should do those things.

Beyond justifying the use of proportionality – or rather the lack thereof – it is striking how little of its argument the court dedicates to discussing its functioning at all. The court states that a balance must be struck between ends and means, before moving on to state the theory of three grades of interference with the right to choose a profession and to evaluate the arguments for and against an objective ban on pharmacies in the Bavarian town. Along the way, the court said very little about its role as a court in undertaking this effort. It asserted that it was 'also' appropriate for judges to undertake this task, it stated that the purpose could not simply be asserted in a sloganeering fashion. There was also the additional statement regarding the first grade of limitations to article 12, where the court stated that it left the government the largest leeway. Nevertheless, the *Pharmacy Case* laid the groundwork for future developments, which, like the judgment itself, happened in very small steps but over time building up to a rich doctrinal framework.

2.1.5 Beyond the Pharmacy Judgment: Discretion through Uncertainty

From the *Pharmacy Case* onwards proportionality was consolidated over a number of years and has come to be applied with regularity. Initially, proportionality remained in the domain of article 12 where the court was mainly concerned with whether a lower level of restriction was possible between the three levels identified in the *Pharmacy Case* and if not, then, whether this was still a justifiable intrusion when balanced with the common good being protected

by the law.[163] From there the court went on to expand its reach to all rights, although this only happened in a case in 1963.[164]

Importantly, most cases are decided in the final, balancing stages, of the proportionality equation. The first two, legitimate aim and suitability, are usually very easily satisfied as most laws do pursue some legitimate aim and do, at least, something to achieve it.[165] As such the first two steps serve largely to narrow down the policy options that are to be tested in the necessity and balancing tests. Laws also usually pass the necessity test which the court interprets very strictly to mean a Pareto optimal situation whereby no interest is not limited less than before.[166] Thus, most cases are ultimately decided at the final stage.

Here, the court's style has remained similar to the *Pharmacy Judgment* in that it performs a thorough analysis of the arguments for and against the law. This led to proportionality being conceptualized as leaving no room for the legislator. For example, Robert Alexy's reconstruction of proportionality was heavily criticized for this reason and he only later added a post-script to his main work on proportionality, *A Theory of Fundamental Rights*, some twenty years later in which he addressed this point.

The answer to what discretion the legislator ought to be left with lies in the normative and empirical uncertainties. The leading case on this point is *Kalkar I.*[167] Here the court held that uncertainty about how untested nuclear power technology cannot create a total prohibition on legislation. Later in the *Codetermination Case* the court refined this position, stating that while

[163] BVerGE 13, 97.
[164] BVerfGE 16, 95.
[165] An exception is found in a case about regarding a law that required a gun-shooting test in order to hunt with falcons. The requirement was a general one required for any hunting license and pursued the legitimate aim of increasing safety but failed to make an exception for those forms of hunting that did not make use of firearms. BVerGE 50, 159.
[166] Again there are exceptions such as the case concerning chocolate Easter bunnies where the court accepted that a labeling requirement may protect consumers just as well as a total ban on a certain product. BVerfGE 53, 153.
[167] BVerfGE 49, 89.

uncertainty would not create a prohibition to legislate, it also did not release the government from constitutional control.[168]

The court has since then developed a framework against which it determines how strictly it will control the facts of the case based on the nature of the case,, depending on the circumstances, whether the government's claims are 'evidently incorrect', 'reasonable' (*vertretbar*) or 'intensive scrutiny'.[169] Two points on this. The first is that the question at this point seems to have become one about the criteria that a court should apply to determine which of the standards of review to apply and how it should apply them. This is to some extent what happens. However, there is a second point. Namely, that in practice, the court does not refer to these questions. It makes its findings without discussing the basis for its criteria for doing so.

2.1.6 Conclusion

In German constitutional law, deference is conceptualized as being found in the empirical and normative uncertainties that arise when balancing. The question, then, becomes one of whether the scheme devised by the court can satisfy scrutiny on a more concrete level of detailed case analysis. That is to say, the question is how exactly the scheme applies in real-life cases and whether it produces satisfactory results in the political system.

2.2 Canada

The Canadian ideal of judicial review is rooted in the idea of dialogue among the political institutions.[170] It aims at undoing the counter-majoritarian problem of judicial review by integrating a number of structural features into the Canadian Charter which redress the problem of an unelected court overruling an elected

[168] BVerGE 50, 200.
[169] Grimm at 391.
[170] W Hogg & A Buschell 'The Charter Dialogue between Courts and Legislatures, (Or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)' *Osgoode Hall LJ* 35 75 (1997).

legislator. Most importantly, this includes section 33, the notwithstanding clause, that allows for a Parliamentary override of the Supreme Court and the Charter, and section 1, the general limitations clause, which requires the court to evaluate reasons for and against a law, guiding the legislator. While there is increasing skepticism as to whether genuine dialogue is taking place,[171] section 1 has taken a center stage in the Supreme Court's Charter jurisprudence.

The Canadian Charter, adopted in 1984, grants Canadians a comprehensive array of rights, which are guaranteed and limited through a general limitations clause in section 1.[172] The story of how proportionality is applied in Canada is in large part the story of the Canadian Supreme Court's decision in *R. v. Oakes* (*Oakes*) creating what Sujit Choudhry seminally describes as the creation of a 'dominant narrative'.[173] In *Oakes*, the court adopted what it described as a 'stringent standard of scrutiny' for a limitation to be justifiable. However, soon after in *Edward's Books, RJR MacDonald* 'retreated from *Oakes*' and created a counter-narrative[174]. The court, ever since, oscillates between a stringent standard that leaves the legislator little discretion and a more relaxed standard that gives the legislator more discretion.

2.2.1 Oakes: 'A stringent Test of Justification…'

Let us begin by taking a closer look at *Oakes*.[175] The case arose as an ordinary appeal in a criminal trial not long after the Charter of Fundamental Rights and Freedoms had been adopted. The respondent had been charged with the unlawful possession of a narcotic for the purpose of trafficking contrary to section 4(2) of the Narcotic Control Act. The trial judge went on to make a finding in terms of section 8 of the same act that it was beyond reasonable doubt

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[171] R Dixon 'The Supreme Court of Canada, Charter Dialogue and Deference' *Osgoode Hall LJ* Vol 47(2) (2009); W Hogg, Peter M., Allison A. Bushell Thornton, and Wade K. Wright. "Charter Dialogue Revisited-or Much Ado about Metaphors." *Osgoode Hall LJ* 45 (2007): 1.
[172] The full text of section 1 reads: '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] [1986] 1 SCR 103.
[174] S Choudhry 'So What is the Real Legacy of Oakes? Two Decades of Proportionality Analysis under the Canadian Charter's Section 1' (2006). *Sup Ct L Rev* 34: 501.
[175] [1986] 1 SCR 103.

that Oakes was in possession of eight grams of cannabis. The appellant then challenged section 8 of the Narcotic Control Act in terms of section 11 of the Charter, arguing that it unjustifiably limited his right to a free trial. He argued that section 8 places the burden of proof on the accused to prove that he is innocent, effectively reversing the onus to prove guilt. Both the Ontario Provincial Court and the Supreme Court of Ontario considered the section unconstitutional.

On appeal, the Supreme Court of Canada found that section 8 did indeed limit the presumption of innocence in section 11 of the Charter.[176] In the Supreme Court of Canada's analysis, the Chief Justice Brian Dickson somewhat surprisingly, decides to give a far broader analysis of section 1 that could have been expected from the court's approach in previous cases. Before tackling how section 1 operates in practice the Chief Justice notes two contextual elements of section 1, namely that it both guarantees and limits the rights in the Charter[177] and that in that applying it the court must be guided by the values underpinning a 'free and democratic society'[178]. Then, turning to how section 1 works in practice, the court states that 'the rights and freedoms in the Charter are … not absolute',[179] before following it up with one of the best known and most oft-quoted phrases of the judgment, that section 1 'impose{s} a stringent standard of justification'[180] on the state to justify limitations of fundamental rights. The strictness of that formulation is further highlighted in the subsequent paragraph which makes limitations to rights 'exceptions'[181] to the 'general guarantee'[182] of the rights in the Charter and that their limitation can only be justified through 'exceptional criteria'[183]. Then for two paragraphs, the judgment, rather questionably, considers the standard of evidence that should be applied to the section 1 inquiry.[184] So far, the *Oakes* court has highlighted the stringency of the section 1

[176] Paras. 27 – 61.
[177] Para 63.
[178] Para 64.
[179] Para 65.
[180] *Ibid*.
[181] Para 66.
[182] *Ibid*.
[183] *Ibid*.
[184] Paras 67-8.

justification test and the heavy burden of justification that it places on government when it seeks to limit it.

After this, the court turns to the analytical framework for a section 1 analysis. First the court held that the interest protected by the law must be 'of sufficient importance to warrant overriding a constitutionally protected right or freedom'.[185] This, the court justified by saying that

> [t]he standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.'[186]

Here again, the court sets a high bar for what is acceptable for a limitation of a Charter right, by limiting the acceptable purposes to only those that are sufficiently important.

The court turns to what is considered reasonable and justifiable in terms of section 1. This consists of the three-part proportionality test, although the court refers to it as 'a form of proportionality test'.[187] Then, the court, interestingly, goes on to note that 'the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups'.[188] After this the court lays out the three parts of the proportionality test: First, the rational connection prong is described as follows: 'the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations.' [189] Secondly, the measure must limit the right 'as little as possible'.[190] And finally, 'here must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the

[185] Para 69, citing *Big M Drug Mart*.
[186] Para 69.
[187] Para 70.
[188] *Ibid*.
[189] *Ibid*.
[190] *Ibid*.

objective which has been identified as of "sufficient importance"'[191]. This the court explains 'operates by balancing the competing interests'.[192]

Turning to consider the impugned section, section 8 of the Narcotic Prohibition Act, and in light of aforementioned considerations, the court makes further remarks about what section 1 requires in general. The court found that the impugned section, in protecting society from the trafficking of illegal drugs, pursued an aim of sufficient importance to justify over-riding the right to a fair trial.[193] But then, in two short paragraphs the court rules that section 8 does not survive the first step of proportionality, rational connection, as it is 'over-broad'.[194] Here the court's reasoning is rather questionable and it can be asked whether overbroadness of a law is in fact best conceived of as a matter of rational connection (and not rather as a matter better considered in the two subsequent prongs of less restrictive means and proportionality in the narrow sense).

So far, three aspects of the judgment are noteworthy. The first is that the structure of proportionality is identical to the German understanding of the test. Like the German court, the Canadian court also appears to have created the test out of thin air.[195] As such, the Canadian test fits squarely within the generic model of proportionality and balancing. Secondly, the court describes the limitation of rights as exceptions to the general rule that must be justified. This, too, is in line with the generic model and in some sense unremarkable. Finally, what makes *Oakes* so important is how it seeks to apply the test. So, the final observation relates to how the court conceives of the practical application of the test. Here the court seems to imagine the test in terms of evaluating the evidence put forward by the party seeking to uphold the limitation of rights. And further, the test is a robust one – it is a 'stringent test' in the court's own words. It was

[191] *Ibid*.
[192] Para 71.
[193] Paras 73-76.
[194] Paras 77-78.
[195] For a similar observation see L Weinrib 'The Supreme Court of Canada and Section 1 of the Charter' Vol 10 [1988] 469; D Grimm (in particular with reference that the Canadian court could have used Germany as a model.)

quickly noted by commentators that the 'state will seldom satisfy section 1 justification because the supreme law states that certain rights and freedoms will be honoured in the ordinary course'.[196] The consequence is that the court does not appear to leave much room to the legislator to make decisions where there is or can be no evidence forthcoming. In this respect the *Oakes* case differs from the German model, which had developed different standards of scrutiny for different types of claims. In *Oakes* the court foresees only one standard of evidence. Ultimately, in conceiving the limitation of rights as an exceptional case, the court, without explicitly considering its institutional position, ends up creating a situation in which, by having to achieve a high standard of justification, the court leaves very little room for discretion.

2.1.2 The Retreat from Oakes: Edward's Books, Irwin Toy and Beyond

It is hardly surprising that less than ten months after *Oakes* was decided, the court handed down its judgment in *R v Edward's Books and Art Ltd.*,[197] which seemingly contradicted much of what the court had held in *Oakes*. The case dealt with the constitutionality of the Ontario provincial Sunday closing law. The Retail Business Holidays Act designated a number of Christian and secular days as holidays, including all Sundays of the year. Section 2 of the act then makes it an offence to conduct business on holidays, while sections 3 and 4 contain a diverse array of exceptions to section 2 for certain types of businesses (e.g. small 'corner' stores, pharmacies, gas stations, educational and recreational services, restaurants and others) and for certain small businesses that have closed the previous Saturday.

The court upheld the law in a judgment that seemed to reverse everything it had said previously in *Oakes* on the all important point of the standard of justification needed. The court stated that in situations 'in which there appear to be particularly urgent concerns or to constituencies that seem especially needy' and, more generally, that "[l]egislative choices regarding alternative forms of

[196] Weinrib 'Supreme Court and Section 1' at 492.
[197] [1986] 2 S.C.R. 713.

business regulation ... need not be tuned with great precision in order to withstand judicial scrutiny", because '[s]implicity and administrative convenience are legitimate concerns'.[198] Compared to the language of *Oakes* which spoke of strict burden of justification, the language in *Edward's Books* does not seem to pose a particularly heavy burden at all.

Shortly after *Edward's Books*, the court was faced with *Irwin Toy*, a case dealing with a prohibition against advertising to children under the age of thirteen years.[199] In evaluating the justification of the state for the law, the court remarked again 'that the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups'.[200] It added that 'a legislature mediating between the claims of competing groups will be forced to strike a balance without the benefit of absolute certainty concerning how that balance is best struck'.[201] The court found that the law was justified.

Many commentators picked up on the apparent discrepancy between *Oakes* on the one hand and *Edward's Books* and *Irwin Toy* on the other. Robin Elliot noted that, *Oakes* had seemed 'comprehensive in character'[202] and to 'settle … how section 1 was to be applied'[203] but that *Edward's Books* and *Irwin Toy* made it blatant that that 'the Court is far from *ad idem* on the matter of how s. 1 is to be applied'.[204] More recently, Sujit Choudhry has written that '[f]or the last two decades, the Court has struggled to come to terms with the institutional task it set itself in *Oakes*'[205], noting that '[t]he Court has yet to work out under what circumstances it will use common sense, reason or logic to bridge an absence of evidence, and to delineate when it will allow inferences to be drawn from inconclusive social science evidence'[206].

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[198] Para 130.
[199] [1989] 1 S.C.R. 927.
[200] Para 74.
[201] *Ibid*.
[202] R Elliot 'The Supreme Court of Canada and Section 1—the Erosion of the Common Front"(1987)' *Queen's LJ* 12: 277 at 340.
[203]Elliot at 339.
[204] Elliot at 339.
[205] Choudhry 'Real Legacy of *Oakes*' at 530.
[206] *Ibid*.

What the court has done is to use different standards of evidence in different cases. This does not sound very different from what the German court did as described in the previous section. The problem appears to be that, in the first place, the court used the language of an extremely stringent test in the *Oakes* judgment, having to back track from it in subsequent cases. The court has been roundly criticized for this, especially as it seems to have obfuscated the confusion itself and because its approach has been seen as opportunistic. Yet, it is also possible that there is significantly more consistency in its case law than the general statements let on when considered on a practical level and compared to courts like Germany's that openly adopt different standards of review as a principle.

2.2.3 Conclusion

The Canadian system of deference is then based on tightening and relaxing the standard or evidence that is required in order to justify a law in terms of section 1. The court has been criticized for being inconsistent in the way it does this with the court often using a the more relaxed standard of *Edward's Books* and at other times relying on *Oakes* when it feels that the government has not made its case. Of course, only a closer look at the case law would reveal whether the court is indeed as erratic as is sometimes claimed.

2.3 South Africa

South Africa is interesting for the fact alone that it represents a paradigmatic example of the shift from a formalistic and deferential legal system to one in which responsibility for the enforcement of rights is shared and courts act as the upper-guardians of rights. Prior to the enactment of the interim Constitution in 1993, the South African legal system was characterized by what Etienne Mureinik famously called the 'culture of authority', where Parliament was the

supreme law-giver and the courts merely gave effect to its will.[207] The professional legal culture of the time was then steeped in a culture of seeing a strict divide between law and politics, with the only the former being of interest to the courts.[208] The Constitution brought a profound sea-change to this, both in terms of culture and the manner in which courts reason. It represented a shift from the culture of authority to a culture of justification; a culture in which 'every exercise of power is expected to be justified; in which the leadership of government rests on the cogency of its case offered in the defense of its decision ... The new community must be one of persuasion not of fear'.[209]

The Constitutional Court embraced this invitation in *Makwanyane*.[210] The court set out the general two-stage framework of rights interpretation and justification analysis based on proportionality. Although South Africa has also adopted proportionality and balancing as the predominant method for determining the permissibility of limitations of rights in terms of the general limitations clause, section 36, there are still a number of significant differences between how the test is applied in South Africa and the other jurisdictions.[211] Chief among these is that the court, while embracing proportionality under section 36, has adopted other understandings for other parts of the constitution, in particular in relation to socio-economic rights. This, in turn, affects the way in which the court understands deference in civil and political rights cases where proportionality is applied.

[207] E Mureinik 'A Bridge to Where? Introducing the interim Bill of Rights' at 31.
[208] It should be noted that there was a strong counter-current of activist-lawyers who attacked this view in academia and practice. Many of the authors of the texts cited in the previous footnote formed part of this activist movement.
[209] Mureinik 'A Bridge to Where?' at 32.
[210] *S v Makwanyane* 1995 (3) SA 391 (CC).
[211] Proportionality and balancing have received significantly less attention in South Africa than in the other jurisdictions. See F du Bois 'Rights trumped? Balancing in constitutional adjudication' *Acta Juridica* 2004.1 (2004): 155-181 for an early exception. More recently, David Bilchitz has written on balancing in the South African context: D Bilchitz 'Does balancing adequately capture the nature of rights?' *Southern African Public Law* 25.2 (2010): 423-444.

2.3.1 Makwanyane: The Starting Point for Interpreting the Constitution

In order to understand how these sections have come to work in practice, the starting point is the decision in *S v Makwanyane and Another*.[212] *Makwanyane* was the first hearing and second decision to be handed down by the Constitutional Court in 1994.[213] The case dealt with the constitutionality of the death penalty and bears a number of unusual features. In the first place, the question of the constitutionality of the death penalty was deliberately left to the court to decide because no agreement on the matter could be found during the constitutional negotiations. It was considered a 'good first test' for the functioning of the court. Secondly, almost all parties participating in the proceedings, with the exception of the Prosecutor of the Witwatersrand, argued for the abolition of the penalty, putting the applicants - two criminals sentenced to death – and the government on the same side. Thirdly, the case was considered so important that Chief Justice Chaskalson had every justice of the court write a judgment. Consequently, the court said much more than it might have in ordinary circumstances. Finally, it must be kept in mind that this was a relatively inexperienced court dealing with highly political matter on which the government and the public disagreed strongly.

All of this led to a judgment that is widely celebrated as a crowning achievement for the court, laying the foundation for a value-based jurisprudence.[214] However, the judgment is also rather messy in its structure and the system it sets up. The first thing that stands out is how far the court goes in making value statements and laying out its interpretative approach where the court surveys a number of different rights, some comparative material, the role of public opinion before turning to the question of justification.[215] Theunis Roux has argued that for all of the judgment's argument on values and references to foreign case law, the court

[212] [1995] ZACC 3; 1995 (3) SA 391.
[213] In its first judgment, *S v Zuma* [1995] ZACC 1; 1995 (2) SA 642; 1995 (4) BCLR 401 (SA); 1995 (1) SACR 568, the court did apply section 33 but did not make significant general statements about its application.
[214] J Fowkes *Building the Constitution* (2017) at 6 – 19.
[215] Para 96.

'makes little effort to articulate an understanding of these terms'.[216] In this sense *Makwanyane* represents yet another way of approaching constitutional interpretation. While the *Pharmacy Case* was silent on almost all general aspects of interpreting the constitution and the operation of proportionality and *Oakes* said very little about the values of the Charter but laid down a comprehensive framework for applying section 1, *Makwnyane* does not shy away from making broad value statements and incorporating those into the proportionality exercise.

This also applies to the way in which the court approaches the structure and operation of the limitations clause, section 33 of the interim Constitution. Unfortunately, some of the vagueness has also carried over to this part of the judgment. First, the court affirms that the approach under the Constitution would take the form of a two-stage approach.[217] Much of what the court says in the headings 'Justification'[218] and 'Two-stage Approach'[219] makes the point that the court follows a two-stage approach and that this was different from systems such as the US.

The court, then, turns to the limitation of rights. In the interim Constitution limitations were addressed under section 33(1), the relevant part of which reads:

> (1) The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation-
> (a) shall be permissible only to the extent that it is-
> (i) reasonable; and
> (ii) justifiable in an open and democratic society based on freedom and equality; and
> (b) shall not negate the essential content of the right in question

The text of the provision does not give much by way of guidance as to what the terms of it should mean. In large part it mirrors the Canadian section 1 and

[216] T Roux *The Politics of Principle: The First South African Constitutional Court 1995-2005* (2013) at 242.
[217] Paras 97-102.
[218] Paras 97-99.
[219] 100-2.

elements of the German constitution. The judgment continues and the court states broadly what its approach to section 33 is going to be:

> 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*. This is implicit in the provisions of *section* 33(1). The fact that different rights have different implications for democracy, and in the case of our Constitution, for "an open and democratic society based on freedom and equality", *means that there is no absolute standard which can be laid down for determining reasonableness and necessity*. Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, *the relevant considerations will include 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.* In the process regard must be had to the provisions of *section* 33(1), and the underlying values of the Constitution, bearing in mind that, as a Canadian Judge has said, *"the role of the Court is not to second-guess the wisdom of policy choices made by legislators.*"[220] (emphasis added, citations omitted)

Four important points for the practice of limiting rights are contained in this paragraph. The first is that rights are limited through an assessment of the proportionality of the measures. Remember that section 33(1) did not explicitly require this and the court could well have chosen another device to satisfy section 33(1). The second point concerns what the court states about the application of proportionality, whereby establishing general principles is possible but the application is always done on a case-by-case basis. This is an interesting point that is not made by other courts, namely that in every case there will be some general principles that together with the particular facts of the case decide the case. The third point, which is closely related to the previous one, relates to the factors that to be taken into account when balancing the competing rights and interests. Here, the Chief Justice mentions the factors that are well known from Robert Alexy's weight formula and necessity. Finally, the

[220] Para 104.

court refers briefly to the institutional limitations that the court faces in applying the principle of proportionality. This brief statement about not second-guessing the legislator is important as it shows that the court is conscious of taking its institutional position into account.

This paragraph is followed by comparative remarks from Canada, Germany and the European Convention system where the court makes a number of points elaborating on some of the aspects from the paragraph quoted above.[221] In reference to Canada the court quotes the *Oakes* judgment as to the component of proportionality and notes the following observations about applying the necessity stage.

> 'Can, and should, an unelected court substitute its own opinion of what is reasonable or necessary for that of an elected legislature? Since the judgment in *R v Oakes*, the Canadian Supreme Court has shown that it is sensitive to this tension, which is particularly acute where choices have to be made in respect of matters of policy. In I*rwin Toy Ltd v Quebec (Attorney General)*, Dickson CJ cautioned that courts, "must be mindful of the legislature's representative function." In Reference re ss. 193 and 195 (1)(c) of the Criminal Code (Manitoba), it was said that "the role of the Court is not to second-guess the wisdom of policy choices made by ...legislators"; and in *R v Chaulk*, that the means must impair the right "as little as is reasonably possible". Where choices have to be made between "differing reasonable policy options", the courts will allow the government the deference due to legislators, but "[will] not give them an unrestricted licence to disregard an individual's Charter Rights. Where the government cannot show that it had a reasonable basis for concluding that it has complied with the requirement of minimal impairment in seeking to attain its objectives, the legislation will be struck down."'[222] (*citations omitted*)

With regard to Germany, the court simply restates the German position but does not draw any lessons for the South African practice.[223] The court also states the position of the ECtHR and adds the following considerations:

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[221] Paras 105-109.

[222] Para 107.

[223] It is indeed quite difficult to understand why the court chose to include the following paragraph at all: 'The German Constitution does not contain a general limitations clause but permits certain basic rights to be limited by law. According to Professor Grimm, the Federal Constitutional Court allows such limitation "only in order to make conflicting rights compatible or to protect the rights of other persons or important community interests...any restriction of

> 'The limitation of certain rights is conditioned upon the limitation being "necessary in a democratic society" for purposes defined in the relevant provisions of the Convention. The national authorities are allowed a discretion by the European Court of Human Rights in regard to what is necessary - a margin of appreciation - but not unlimited power. The "margin of appreciation" that is allowed varies depending upon the nature of the right and the nature and ambit of the restriction. A balance has to be achieved between the general interest, and the interest of the individual. Where the limitation is to a right fundamental to democratic society, a higher standard of justification is required; so too, where a law interferes with the "intimate aspects of private life." On the other hand, in areas such as morals or social policy greater scope is allowed to the national authorities. The jurisprudence of the European Court of Human Rights provides some guidance as to what may be considered necessary in a democratic society, but the margin of appreciation allowed to national authorities by the European Court must be understood as finding its place in an international agreement which has to accommodate the sovereignty of the member states. It is not necessarily a safe guide as to what would be appropriate under *section* 33 of our Constitution.'[224]

The Canadian and ECtHR comparisons, then, are used to highlight the importance of deference and the role of a court's institutional position.

Makwanyane raises a number of important points. In the first place, it incorporates proportionality into the Bill of Rights. Secondly, it makes a number of important qualifications about how the principle is to be applied. The first of these relates to the source of the arguments to be employed in the balancing exercise. Here, the court engages with what kind of arguments are to be considered in the balancing equation, in contradistinction to the German and Canadian courts. Although, the court does not reach a conclusion on this, it does reject the possibility of public opinion forming the basis of rights in the

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human rights not only needs constitutionally valid reasons but also has to be proportional to the rank and importance of the right at stake." Proportionality is central to the process followed by the Federal Constitutional Court in its adjudication upon the limitation of rights. The Court has regard to the purpose of the limiting legislation, whether the legislation is suitable for the achievement of such purpose, which brings into consideration whether it in fact achieves that purpose, is necessary therefor, and whether a proper balance has been achieved between the purpose enhanced by the limitation, and the fundamental right that has been limited. The German Constitution also has a provision similar to *section* 33(1)(b) of our Constitution, but the Court apparently avoids making use of this provision, preferring to deal with extreme limitations of rights through the proportionality test.' (*citations omitted*). Para 108.

[224] Para 109.

Constitution. The court also alludes to this when it says that some aspects of balancing will be recurring and others will be determined on a case-by-case basis. Unfortunately, the court does not elaborate further on where the arguments for balancing come from in *Makwanyane* but these two points illustrate that the court is aware of the fact that the court itself has a role to play in developing the arguments in the proportionality equation.

Makwanyane also gives birth to what is one of the defining characteristics of its jurisprudence on section 36, namely its holistic approach to balancing.[225] Unlike the structured proportionality inquiries of Germany and Canada, the South African court usually considers all the factors together. In practice this leads closely to a similar type of practice in Germany and Canada as those courts also decide cases as a balancing exercise, whether explicitly so or in practice. Finally, the court also repeatedly makes a point about its institutional position and the role that deference must play in interpreting the Constitution. Here, the court largely re-states the principles espoused by the Canadian Supreme Court and the European Court of Human Rights.

In *Makwanyane* we find a judgment that incorporates many of the lessons of the Canadian and German experience into the decision-making of the South African practice in broad terms. The court is often quite vague in what it commits itself to and avoids making strongly binding statements. Further, in its non-committal approach, the court does not elaborate its understanding of the conceptual relationship between proportionality and deference. Unlike the Canadian court, the *Makwanyane* court does not commit to a stringent test of justification, rather more like the German court, the question is left open.

2.3.2 Development of Section 36 after Makwanyane

After *Makwanyane*, the court's development of the section 36 test has been rather piecemeal. In the first few years a great number of the court's Bill of

[225] N Petersen Proportionality and the Incommensurability Challenge in the Jurisprudence of the South African Constitutional Court. 30 South African Journal on Human Rights 405-429 (2014).

Rights case law dealt with criminal process. Here the court struck down each of the sections of the Criminal Procedure Act that was challenged, many of these being reverse onus provisions. In each of these cases the court struck down the provision as unjustified.[226] In other cases where the issue might have come up it was hardly addressed, such as in *S v Williams* which concerned the constitutionality of juvenile whipping as a punishment in criminal law.[227]

The case of *Ferreira v Levin* is also interesting for our purposes, for not so much what it said about section 36 but because of the discussion of a general right to freedom and its relationship to deference.[228] After arguing for the existence of a general right to freedom in the South African Constitution in a similar fashion to Germany, Justice Ackermann noted that the level of deference would be lower in a situation in which the Constitution clearly spells out the right, as opposed to a situation in which the court relies on the residual right.[229] The court has not embraced a general right to freedom in its jurisprudence (in fact it has often been more restrictive in its interpretation of rights as may have been expected[230]) and this part of the 'global model' has not made it to South Africa.

Over the course of thirty years of existence the court has continued to make references to the discretion that the legislator is due and the level of evidence required to justify a claim in terms of section 36. In *Prince v President of the Cape Law Society* the court considered the right of a Rastafarian to manifest his religion – by consuming cannabis sativa – in a manner that was otherwise illegal.[231] The majority (per Chaskalson CJ, Ackermann and Kriegler JJ) held that the prohibition of cannabis was constitutional, while the minority (per Ngcobo J) held that it would not have been. The differences between the two judgments lie in whether there exist less restrictive means to achieve the aims of protecting

[226] *S v Zuma and Others* [1995] ZACC 1; 1995 (2) SA 642; *Coetzee v Government of the Republic of South Africa, Matiso and Others v Commanding Officer Port Elizabeth Prison and Others* [1995] ZACC 7; 1995 (4) SA 631;
[227] *S v Williams and Others* [1995] ZACC 6; 1995 (3) SA 632.
[228] *Ferreira v Levin NO* (1) 1996 SA 984 (CC).
[229] *Ferreira v Levin NO* (1) 1996 SA 984 (CC) at para 87.
[230] See K O'Regan 'Text matters: some reflections on the forging of a new constitutional jurisprudence in South Africa." *The Modern Law Review* 75.1 1-32 (2012).
[231] *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 792.

the public from the effects of cannabis. The majority argued that the exemption granted to Rastafari would 'undermine the general prohibition' on the drug.[232] The majority held that the problem of trade in cannabis was a problem and even a limited exemption was too difficult to police.[233] The minority felt that there was no evidence to support the assertion that an exemption could not be enforced adequately, and that in particular the government had failed to produce evidence on exemptions – which are quite common in the regulation of prohibited substances – in particular.[234]

An interesting statement regarding deference is found in *Pillay*. In the course of the argument the school claimed that the court should defer to the school as the expert on these issues. The court rejected this argument. In doing so, Langa CJ acknowledged the importance of giving due weight to the opinions of experts but then went on to hold that the determination of unfairness of discrimination or its justifiability was a matter for the courts. Courts were the bodies mandated to enforce the equality legislation and had the expertise to do so.[235] *Pillay* may, then, be the strongest statement that court does not believe deference is appropriate in civil and political rights cases, even when it calls for a practice that would be described as deferential elsewhere (including this thesis).

In general, these cases point to a rather ambivalent approach to deference in civil and political rights cases. On the one hand, the court at times explicitly denies deferring in these cases, yet on the other it adopts arguments that in Germany and, especially Canada, would be considered deferential. Interestingly, these cases can be read alongside with developments in cases in other areas such as socio-economic rights and judicial review of administrative action.

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[232] Para 141.
[233] The court noted that '[p]olicing of the use in such circumstances would be well-nigh impossible. There are, moreover, important concerns relating to cost, the prioritisation of social demands and practical implementation that militate against the granting of such an exemption. The granting of a limited exemption interferes materially with the ability of the state to enforce its legislation, yet, if the use of cannabis were limited to the purpose of the exemption, it would fail to meet the needs of the Rastafari religion.' (Para 142). (footnotes omitted)
[234] Paras 52-66, especially at 66: 'There is no suggestion that these problems cannot effectively be regulated.'
[235] *Ibid* paras 80-81.

2.3.3 Socio-Economic Rights and Administrative Law: Review Outside of Section 36

There are two sets of case law worth mentioning at this point: administrative law and socio-economic rights. The most comprehensive discussion of deference is to be found in *Bato Star*.[236] The case dealt with the administrative review of allocated fishing quotas. The applicant was dissatisfied with its allocated quota and launched an action in terms of the Promotion of Administrative Justice Act, 2000, which requires, inter alia, that administrative action be 'reasonable'. In considering the meaning of deference under the new constitutional dispensation, O'Regan J explicitly endorsed Mureinik's idea of the Constitution ushering in a paradigmatic change in the understanding of deference as respect.[237] This meant that a court would have to take into account the nature of the decision, the considerations of fact and policy that are involved and the identity of the decision-maker when deciding on the weight that their opinion should bear.[238] The Court then went on to lay out the different factors set out in the Fisheries Act that were required to be taken into account when allocating quotas. Thereafter, the Court went on to consider whether the respondent had in fact taken these considerations into account and struck a reasonable equilibrium between the competing interests. The Court paid special attention to the decision and its connection to the various goals set out in the act and the considerations given by the administrative agency to conclude that the decision was reasonable.[239] What sets this decision apart from many other decisions is that the court openly acknowledges the need for deference whereas in rights cases it is reluctant to explicitly acknowledge it.

A similar point emerges from the court's socio-economic rights jurisprudence. Here, the court has expressly adopted reasonableness as the standard of review rather than proportionality. The first socio-economic rights case, *Soobramoney,* dealing with the claim by a man suffering of chronic renal failure to have emergency medical health care pursuant to section 27, established the basic

[236] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC).
[237] *Ibid*. para 46.
[238] *Ibid.* para 47.
[239] *Ibid* para 52-54.

principles of deference in socio-economic rights cases.[240] The applicant had been denied renal dialysis, without which he could not survive, and he claimed that this denial breached his right to emergency health care. The Court found that the right had not been breached but it did state that it could not require government to re-allocate resources given that it was not in a position to evaluate the effect of that kind of decision as well as having to double guess the assessment of the medical practitioners involved in the treatment of the patient.[241] *Grootboom* was decided along similar lines, with resource constraints and the Court's lack of expertise to decide this kind of case.[242] The Court was required to interpret the right to housing. The applicant, Irene Grootboom, was a homeless person living in Cape Town. She and a number of persons in her situation claimed that their homelessness breached their right to 'access to housing' contained in section 26 of the Constitution.

The approaches in *Soobramoney* and *Grootboom* were confirmed in *Treatment Action Campaign, Mazibuko* and *Nokotyana.* In *Treatment Action Campaign* the Court explicitly placed these considerations into a separation of powers and deference framework, adopting reasonableness as the appropriate standard of review.*[243]* In that case, the court was faced with a claim for the provision of an anti-retroviral drug to expectant mothers infected with HIV. The government argued that it should be shown deference in the formation of its policies and, if relevant, the formulation of the remedy.[244] The Court went on to confirm its lack of expertise in these cases and also highlighted that the sections on socio-economic rights were drafted in such a manner as to make reasonableness the standard of review rather than proportionality. As a whole, what emerges from these four cases is that in socio-economic rights cases, deference is given to government through the application of the reasonableness standard of review.[245] Again the main point of contrast to cases decided in terms of section 36 consists of the court openly acknowledging the need for deference.

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[240] *Soobramoney v Minister of Health (kwaZulu-Natal)* 1998 (1) SA 765 (CC).
[241] *Ibid.* paras. 42-46.
[242] *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (1) SA 46.
[243] *Treatment Action Campaign v Minister of Health and Others (No 2)* 2002 (2) SA 721 (CC).
[244] *Ibid*. at para 22.
[245] For a similar observation see K McLean *Constitutional Deference* (2010).

2.3.4 Conclusion

This analysis of the relationship between proportionality and deference in the case law of the South African Constitutional Court has stuck somewhat closer to the cases as was the case for Germany and Canada and will be for the European Court of Human Rights. The reason for this lies in the lesser attention that the court has received from commentators, unlike Germany, Canada and the ECtHR, and there has not been extensive commentary on proportionality and deference. The picture that is presented is somewhat fractured and not always coherent.

Perhaps this is not surprising, the Constitutional Court's judges have always been relatively comfortable with being on a bench that combines different judicial philosophies.[246] As Lourens du Plessis notes that 'in the past nearly decade and a half of constitutional democracy in South Africa no discernible theories of constitutional adjudication have emerged'.[247] Justice Albie Sachs makes a similar point but more poetically with reference to the different cow hides that cover the bench along which the judges are seated. He would often tell visitors to the court that each of the hides represents how the judges of the court feel about the Constitution, the white background representing the Constitution that is the same for all and the black patterns represented the judge's personal approach to the Constitution.[248] As such, maybe it is not surprising that the court's case law on section 36 is also not entirely coherent and that one can detect a number of different voices in the judgment.

Nevertheless, two characteristics mark out the South African court's approach to section 36 and proportionality. The first is its holistic approach to balancing. Unlike the German and Canadian courts who employ a structured proportionality test, the South African court approaches proportionality all in

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[247] L du Plessis 'Interpretation' in S Woolman & M Bishop *Constitutional Law of South Africa* (2008) at 32-2.
[248] A Sachs *The Strange Alchemy of Life and Law* (2010); E Cameron *Justice – A Personal Account* (2013) and D Moseneke *My Own Liberator* (2016).

one go. The second is its ambivalent approach to deference. That said, while the court often seems to disavow deference in civil and political rights cases, in practice it does take its institutional position into account when evaluating arguments for and against a policy. In general, the court has said considerable more than the German court, which developed the principles it applies through applying them. The South African Constitutional Court has not shied away from theorizing section 36. The court has been more cautious than its Canadian counterpart and has avoided committing itself to the kind of inflexible standards the Canadian court set down in *Oakes*. Ultimately, the court's approach does fit into the same mold of the other two courts' approach in the broad, general sense. The court applies proportionality to determine whether limitations of certain rights are justified and it does take its institutional position into account when evaluating the arguments for and against the constitutionality of the policy.

2.4 European Court of Human Rights

As a regional human rights court, the European Court of Human Rights is different from the national supreme and constitutional courts considered above. Yet, in many ways in performs a very similar function in upholding a basic minimum standard of human rights throughout Europe.[249] Even, so, as a supranational tribunal, the European Court of Human Rights must surely be considered to occupy one of the most difficult ones sitting.

It may be best to begin by acknowledging three general characteristics of the reasoning of the ECtHR. The first is that it centers largely around the concept of the margin of appreciation.[250] Balancing and proportionality is often invoked, but the margin of appreciation is what the court refers to most often. The second characteristic is that the nature of the margin remains highly elusive and the court's use of it highly criticized. Finally, it has been argued that more recently

[249] E Benvenisti 'Margin of appreciation, consensus, and universal standards' *NYUJ Int'l L. & Pol.* 31 (1998): 843.
[250] The literature on the margin of appreciation is by now vast: A Legg *The Margin of Appreciation in International Human Rights Law* (2012) and H Yourow *The Margin of Appreciation Doctrine* (1996). Y Arai-Takahashi *The Margin of Appreciation and the Principle of Proportionality* (2002).

the court has become increasingly concerned with the conceptual framework that it applies to the second paragraph of articles 8-11 and that its approach is evolving in some central manner.

One of the notable features about proportionality and deference, is how much more attention is given to the margin of appreciation (the name given to deference in the Convention system) than to proportionality and balancing compared to the other courts considered here. The margin also plays a much more prominent role in the judgments of the ECtHR than comparable doctrines do in the case law of the other courts. Indeed, the court states that 'in applying the Convention the national authorities must be given granted a margin of appreciation' in almost every judgment. Judging from many of the leading commentaries one could easily believe that it is the margin of appreciation that is the guiding principle for the interpretation of the Convention, rather than proportionality in conjunction with the margin. Even where the two are discussed in concert, it seems to be the margin of appreciation that is considered more important.

This brings us to the second point, the court's approach to the margin of appreciation. The court's reasoning has been described as 'casuistic … lacking principled coherence'[251] and the margin of appreciation in particular, has famously been described as 'slippery as an eel'.[252] And despite a great number of commentary on the idea '[t]he margin of appreciation doctrine is widely commented on, but commentators have nevertheless not been able to explain it to a satisfactory level of clarity.'[253] Some go so far as to blame the court's messy reasoning on the concept: 'Rather than merely being an excuse, or a disguise, for incoherence of judgment, … the margin is its very cause of it.'[254] Finally, Christoffersen delivers a damning overall verdict as follows:

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[251] R. Harmsen, 'The European Convention on Human Rights after Enlargement' *International Journal of Human Rights* 5 (2001), 1843 at 32, 33, 35 and 38, note 53.
[252] A Lester 'Universality Versus Subsidiarity: A Reply' *European Human Rights Law Review* 73 (1998) 75.
[253] O M Arnardóttir 'Rethinking the Two Concepts of the Margin of Appreciation' *European Constitutional Law Review* (2016) 12 27-53.
[254] Lord Lester, 'The European Covnention in the new architecture of Europe', (1996) 1 *PL* 6

> The early practice of the Commission is characterized by a high degree of inductive reasoning that did not purport to outline more general practices that are now subject to the principle of proportionality. The Commission restricted itself to general references to the margin of appreciation or the considerable discretion available to domestic authorities…[255]

Is there, then, any hope for trying to understand the concept of margin of appreciation in the case law of the European Court of Human Rights? Some commentators have suggested that the court is reformulating its understanding of proportionality and the margin. Judge Robert Spano has written that 'the Court is in the process of developing a more robust and coherent concept of subsidiarity as well as attempting to reformulate the conditions for allocating deference to the Member States'.[256] Eva Brems has argued that the court is moving away from conceiving of proportionality as merely a loose balancing test but also now has begun to include a less restrictive means test to its limitations analysis.[257] Matthew Saul has argued that the court has embraced the review of Parliamentary procedure, thus expanding the court's basis on which to evaluate proportionality.

In the next section I try to disentangle the relationship between proportionality and the margin of appreciation in the case law of the ECtHR. I will first review two popular accounts of the margin and critically analyze why they do not reflect important aspects of the court's practice before finally presenting my own view of the court's reasoning.

2.4.1 Proportionality and the Margin of Appreciation

The origins of proportionality in the European Convention on Human Rights system is usually traced back to the *Belgian Linguistics Case,* according to which,

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[255] J Christofersen at 38.
[256] R Spano 'Universality or Diversity of Human Rights?†: Strasbourg in the Age of Subsidiarity' *Human Rights Law Review*14, no. 3 (2014): 487-502.
[257] E Brems & L Larysen 'Don't Use a Sledgehammer to Crack a Nut': Less Restrictive Means in the Case Law of the European Court of Human Rights'

> The Court considers that the general aim set for themselves by the Contracting Parties through the medium of the European Convention on Human Rights, was to provide effective protection of fundamental human rights, and this, without doubt not only because of the historical context in which the Convention was concluded, but also of the social and technical developments in our age which offer to States considerable possibilities for regulating the exercise of these rights. The Convention therefore implies a just balance between the protection of the general interest of the Community and the respect due to fundamental human rights while attaching particular importance to the latter.

Here, the court seems to argue that balancing between rights and the public good arise from the purpose of the Convention to protect human rights. It is difficult to see why this would be the case, rights may be protected in many ways but the quote does represent another undramatic and unexplained introduction of proportionality/balancing into a legal system.

When it comes to articles 8-11, however, the story of the margin of appreciation begins with the case of *Handyside v UK*.[258] In *Handyside* the Court was faced with a fine and seizure order in terms of a law prohibiting the publication of 'obscene material'. The applicant had published a book titled 'The Little Red Schoolbook', which addressed a range of topics, including a chapter on sexual intercourse, which is what formed the contentious part of the publication. The UK court had ordered part censorship of the work. The publisher complained to the ECtHR that this breached his right to freedom of expression. The UK government sought to justify the action, among others, by claiming that it was for the protection of public morals.

The crucial move to incorporate the margin of appreciation into the jurisprudence of the Court came, when it considered what would constitute 'necessary in a democratic society', the standard set by paragraph 2 to justify a limitation. The Court noted that what is required for the protection of public morals were subject to 'vary from time to time and from place to place', especially in 'our era which is characterized by a rapid and far-reaching

[258] Judgment of 7 December 1976, 1 EHRR 737.

evolution of opinion on the subject'.[259] Then, the Court reasoned that '[s]tate authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them'.[260] The Court clarified that this did not imply that necessity would become as flexible as other standards of review such as reasonable or desirable. Ultimately, the Court found that 'it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of "necessity" in this context.'[261]

Consequently, Article 10 para. 2 (art. 10-2) leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ("prescribed by law") and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force …'[262]

It can be pointed out that *Handyside* is almost perfectly the mirror image of the domestic landmark cases considered above. While those adopt proportionality and pay scant attention to deference, the *Handyside* court almost entirely ignores the proportionality aspect while elaborating much more on the limitations on its capacity to decide questions about the right balance of rights.

Handyside also illustrates what makes deciphering the ECtHR's approach to the margin of appreciation so difficult. The court blends the idea of proportionality, balancing, deference and consensus, superior institutional capacities and substantive arguments into one large set of arguments without considering the relationship between them or how and why they matter and how they should be operationalized. Below I turn to two well-known attempts at theorizing the margin before concluding with some arguments on whether the court is developing a more coherent approach to the margin.

[259] Para 48.
[260] *Ibid*.
[261] *Ibid*.
[262] *Ibid*..

2.4.2 George Letsas' Two Concepts of the Margin of Appreciation

One of the best known and most sophisticated theories comes from George Letsas.[263] He argued that much of the confusion surrounding the margin of appreciation came from not being able to distinguish between two concepts of the margin. The first concept of the margin is what he calls the substantive concept, this concept 'addresses the relation between fundamental freedoms and collective goals, under an ideal theory of political morality'[264]. This refers to cases where there has been an interference with the right but the interference did not amount to a violation of the right.[265] When it comes to the substantive concept of the margin of appreciation, Letsas stops short of providing an account of what the margin is. He argues, correctly and like MacDonald and Singh, that the margin is often used as a conclusory label but that this does not itself provide a theory of what the margin is.[266] Instead, 'the substantive margin of appreciation must refer to a theory that explains the role of rights within a broader scheme of political morality that includes political values such as justice, legality and democracy'[267]. This is so because '[w]ithout locating rights within such a scheme we would be unable to provide a useful and illuminating account of such notions as proportionality and deference'[268]. Letsas is, of course, correct that the reasoning of the courts must be rooted in some substantive theory of rights. This does not, however, help us understand what the margin is in applying those substantive theories of rights. Identifying the substantive margin within the substantive theories of rights requires further refinement.

Before addressing how to discern a substantive margin in the application of substantive theories of justice, it is necessary to consider Letsas' second concept

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[263] Letsas' work is the first that addressed questions about the margin of appreciation beyond describing the content of the various decisions. See, S Greer 'Book Review of A Theory of the Interpretation of the European Convention on Human Rights' *International Journal on Minority and Group Rights* 16 (2009) 503–510. Letsas' theory is firmly and explicitly rooted in a Dworkinian understanding of the nature of law. However, I do not believe that this affects his analysis of the margin of appreciation.
[264] *Letsas* 'Two Concepts' at 709.
[265] *Ibid.* at 710.
[266] *Ibid*. at 710-5
[267] *Ibid* at 715.
[268] *Ibid*.

of the margin of appreciation. This second concept, referred to as the *structural concept of the margin of appreciation*, addresses the 'limits or intensity of the review of the [ECtHR] in view of its status as an international tribunal'[269] This is where we find the familiar argument about the competence of the court being of central importance, as Letsas claims '[t]he ECtHR has argued in case law that it must *defer* to the national authorities whenever they are '*better placed*' than an international judge to decide on human rights issues raised by the applicant's complaint'[270]. According to Letsas, there are two situations in which the court considers national authorities to be better placed than the court to decide a case. The first includes cases where there is no *consensus* among Contracting states on what human rights individuals have'[271]. He states that

> [t]he approach of the European Court has been that the less consensus there is among Contracting States on whether something counts as a human rights violation, the better placed national authorities are to decide on the matter. This use of the margin of appreciation has been, by and large been used when interpreting personal sphere rights (arts. 8-11 ECHR) and in particular restrictions based on public morals. *The idea has been that in absence of a uniform conception of public moral in Europe, Member States are 'better placed' to assess local values and their application to particular cases*.[272]

The second type of case is where a matter is particularly politically sensitive, such as the case of abortion in Ireland.[273]

There are a number of conceptual and empirical criticisms that can be levelled at Letsas' argument. The first relates to whether the category of a substantive margin as understood by Letsas is not circular. His argument is that the substantive margin refers to instances where the court in terms of the second paragraph of article 8-11 finds that the limitation is justified. This question begs clarification. It does not tell us anything about when the court should find a limitation justified in terms of the second paragraph, simply that it does,

[269] G Letsas '*Theory of Interpretation*' at 91.
[270] *Ibid*.
[271] Letsas at 93
[272] Letsas at 91.
[273] Letsas at 92-95.

rendering the concept of the margin useless in explaining anything meaningful about justified limitations to articles 8-11.

The two examples of the structural margin are also problematic. Letsas argues that the court has found that there is a margin where there is a lack of a European consensus. This raises the question of what exactly is meant with a European consensus. There are for instance different types of consensus. For example, in the case of *Zaunegger v Germany*, where the Court was asked to check whether the impossibility of securing judicial review of custody of a child born out of wedlock discriminated against the father. The court found that

> although there exists no European consensus as to whether fathers of children born out of wedlock have a right to request joint custody even without the consent of the mother, the common point of departure in the majority of Member States appears to be that decisions regarding the attribution of custody are to be based on the child's best interest and that in the event of a conflict between the parents such attribution should be subject to scrutiny by the national courts.[274]

There is nothing in Letsas' account that would help us decide which of the two consensuses we should prefer.

Secondly, the idea of leaving a case undecided because the moral questions are too controversial suffers from the same mistake. There are no doubt moral questions that the ECtHR should not decide, as there are similar cases for all other courts, however, stating that there are such cases does not elucidate what those questions are or how the court should identify them.

Finally, Letsas' theory does not offer an account of what the role played by a great number of other reasons in the judgments is. The court often reasons substantively in article 8-11 cases but Letsas' account does not say anything about how these operate. Given that they are at the forefront of theorizing about limitations in the domestic courts, the account ought to ascribe some role to them. Letsas offers none. Letsas' ideas, then, do not offer a satisfactory theory of how the margin of appreciation operates.

[274] G Letsas *A Theory of the Interpretation of the European Convention on Human Rights* (2007).

2.4.3 The Margin as Attaching Different Weights Based on Institutional Reasons

Andrew Legg's recent monograph also puts forward a theory of the margin of appreciation. He has argued that the margin of appreciation should be understood as 'assign[ing] varying degrees of weight to the judgments of the elected branches, out of respect for their superior expertise, competence or democratic legitimacy'.[275] Unlike what the court itself may often state, Legg sees the margin as part of a balancing exercise. This comes quite close to conceptions of deference in domestic systems and as such seems like a suitable candidate for an understanding of the margin of appreciation.

However, as with the other similar conceptions of the margin, the proof of the value of such an understanding lies in its application: that is in how the court chooses the criteria it uses to vary the different weights. This is once again a question about the practice of the court that remains to be answered. Given the convoluted and confused state of the margin of appreciation jurisprudence, it would be quite surprising if the court could offer a coherent, general account of the kind that Legg sees in the court's case law.

2.4.4 Evolution and Unanswered Questions

Finally, we may consider whether the judicial understanding of the margin of appreciation has changed or evolved over the decades since its inception. For example, Robert Spano, a judge at the ECtHR, has written that the court is developing 'the Strasbourg Court is currently in the process of reformulating the substantive and procedural criteria that regulate the appropriate level of deference to be afforded to the Member States so as to implement a more robust and coherent concept of subsidiarity .'[276] The court's judgments at least seem to have become more developed and broader in their reasoning. In cases like *UK v Hatton*, *von Hannover v Germany* and *Animal Defenders v UK*, the court sets out at

[275] Legg at 18.
[276] Spano at 491.

much greater length the principles according to which it will rely. While the reasoning in these cases is more detailed, nevertheless, it cannot be said that the court would have devised a concept of the margin of appreciation that would overcome the problems of the two conceptualizations by Letsas and Legg.

Hatton v UK stands out as a case in the development of the court's reasoning in a number of ways.[277] In the first place it is probably best known for the expansive reading of article 8, to include freedom from excessive noise and disturbance.[278] The second reason relates to some of the statements that the court made about the nature of the margin of appreciation and especially Andres Legg's conceptualization of the margin.[279] The case concerned the increased number of night-time flights out of an airport. The case was brought by near-by residents who suffered from the noise to the extent that it significantly impacted on the quality of their sleep and consequently on the quality of their entire life. The court, then, had to balance the interests of the residents' quality of life with the economic interests of the entire state.

The court also dedicated some attention to discussing the margin of appreciation. In particular the court notes that in the case there are factors, which at once point to a narrow margin of appreciation on the one hand and to a wider margin of appreciation on the other.[280] The court considers that as the right in question can be considered 'intimate' the margin of appreciation should be narrower.[281] Conversely, the case concerns a matter of general policy, where governments enjoy greater leeway in formulating policy.[282] In the application of these competing interests the court found that the state had given sufficient consideration to the interests of the affected residents. The finding rests primarily on a study undertaken by the government.[283] A minority of judges dissented from the court's finding. They differed with the majority primarily on

[277] *Hatton v. United Kingdom* (2003) 37 EHRR 28.
[278] On this rights ,'inflation', see K Möller *Global Model* at 3 – 6, Letsas, *A Theory of Interpretation of the European Convention on Human Rights* at 126.
[279] Legg at 31.
[280] *Hatton v Uk* at para 103.
[281] Para 103.
[282] *Ibid*.
[283] Paras 116-130.

the weight of the applicants' interest in terms of article 8 and would have upheld the applicant's claim.[284]

While *Hatton v UK* may be important in bringing ot the fore important aspects as those highlighted by the Andrew Legg about the margin of appreciation representing secondary reasons, the case is also symptomatic of the pathologies that make it so difficult to capture the nature of the margin of appreciation and how it operates. As Janneke Gerards has argued *Hatton v UK* is a case in which the court 'contents itself by mentioning a number of relevant factors (sometimes even expressly noting the conflict), and … then continues to examine the case without providing any clarity as to the scope of the margin of appreciation and the applicable level of intensity'[285]. The picture of the court's understanding that emerges from these cases is that although the court may have something of a foundation for the application of the doctrine of the margin of appreciation, one that is captured, at least in part in the theories of Letsas and Legg, but in its application the doctrine is very difficult to follow.

Other cases confirm this intuition. In *von Hannover v Germany* the court set out at length the criteria which it would use to balance the right to privacy and freedom of expression.[286] The court lists a number of factors that render the rights limitation more or less intense without connecting these to considerations of the margin of appreciation. These substantive considerations stand separate from considerations of the margin of the appreciation. The same point may be made with regard to *Animal Defenders International v UK* which is probably the leading case on the review of legislative process, where the court has considered the review of the process that led to the law. In this case, the court undertook a significant review of the Parliamentary process that led to the Communications Bill, 2002 and the criteria that would guide it. Inclusion of reviewing the procedural aspects of an impugned policy should probably be best regarded as

[284] Paras 1-4. The judges also dissented on a number of other points on articles outside article 8 as did Judge Kerr on his own.
[285] J Gerrards at 115.
[286] *Von Hannover v Germany* (no 2) [2004] ECHR 294 at paras 56 – 60.

adding to the set of criteria that determine the width of the margin, albeit of a different kind than substantive criteria rather than as a replacement for them.[287]

The problem with understanding the margin of appreciation is that it the different elements stand apart. While the court can be said to have developed its argument of the margin of appreciation and the general substantive criteria for balancing competing interests these are not discussed together with one another or with the arguments in the case. Thus, while the conceptualizations of the margin of appreciation by Legg and Letsas may in may ways reflect the understanding of the margin of appreciation of the ECtHR, it is in their application that we find the problem connecting the threads.

The margin of appreciation doctrine has been different from the treatment of the case law of the national courts. While with regard to the national courts the task was to explore where the court had developed the notion of deference, with regard to the ECtHR the idea of the margin of appreciation has been in the open at all times. Nevertheless, the concept is difficult to identify. Broadly speaking it can be said to resemble similar concepts in domestic constitutional law in that it represents criteria that the court ought to take into account when balancing competing interests.

3. Taking Stock – An Institutionally Sensitive Application of Proportionality

The four accounts of the development of balancing in the four jurisdictions under review reveal a fascinating matrix of similarities and differences. While the reasoning of the courts is often different, even radically different, in style and approach, there are nevertheless important similarities between them.

[287] For example, is *Hatton* the court kept these two ideas separate: 'The Court considers that in a case such as the present one, involving State decisions affecting environmental issues, there are two aspects to the inquiry which may be carried out by the Court. First, the Court may assess the substantive merits of the government's decision, to ensure that it is compatible with Article 8. Secondly, it may scrutinise the decision-making process to ensure that due weight has been accorded to the interests of the individual.' (para 99).

3.1 Proportionality – Similarities and Differences

Here, I want to distinguish between three dimensions that are relevant to the way in which it is applied by the courts before going on to consider how the courts conceive of deference in proportionality. The first is the structure of proportionality. Germany and Canada follow the four-prong model, consisting of legitimate aim, suitability, necessity and balancing *stricto sensu,* most closely and is the most observant as to its structure. The South African Constitutional Court has adopted what has been called a holistic balancing test where the majority of the work is done in the final balancing prong of the test. The ECtHR also follows the well-known four-prong model, although it has a tendency to skip all other prongs and go to final one immediately.

The second dimension is the conceptualization and application of the prongs. Here there are some slight differences between the courts. With regard to the first two prongs there are very few differences, mainly in the language used, but all in all, they represent such low thresholds that in practice these differences become insignificant. When it comes to necessity and balancing this picture begins to change. In Germany, necessity is conceived of as Pareto optimality. This poses a very strict test, according to which the third prong can only be satisfied if everyone is better off with the alternative policy choice. In practice this test is, then, rarely satisfied. In Canada, on the contrary almost all cases are resolved at the necessity stage. The reason for this would, in general, seem to be that the Supreme Court's interpretation of necessity is connected to the balancing exercise and in reality it may be much closer to a balancing exercise rather than a necessity test when conceived of as Pareto optimality. South Africa is also in this regard different in its conceptualization of the prongs as only the last one is deemed relevant. Ultimately, then all four courts, in spite of their different conceptualizations of the prongs of the proportionality test end up very often deciding the case by balancing competing interests.

The final dimension relates to the nature of the arguments that go into the proportionality test. Proportionality is famously 'empty' in that it only forms a check-list for a judge to 'fill out' in order to determine constitutionality. Indeed, the four courts say almost nothing about how they fill the proportionality check-list. In part, this may be explained by their desire to render what are policy decisions, based on a political evaluation, appear as if they were legal interpretation. Thus, we find statements like the Canadian Supreme Court's statement in *Singh* where the court denies that it is making a policy decision. Likewise, the South African Constitutional Court in *Makwanyane* claims that it is not the public will that informs the meaning of rights but rather the interpretation of the constitution that matters. We might also speculate that the German Federal Constitutional Court is relatively comfortable with making such arguments given that it believes that the Basic Law sets out an objective normative value system. Be that as it may, what we do find is very little by way of justifying how courts should fill out the proportionality argument.

There is a further similarity in the reasoning of the courts, namely the fact that the courts engage in policy analysis when deciding on the proportionality of policy measures. Some theorists refer to this as public reasoning following John Rawls.[288] In South Africa this type of reasoning is generally referred to as substantive reasoning [289] following the distinction between formal and substantive reasons in RS Summers' and PS Atiyah's comparative law work on different reasoning in English and US American law.[290] This arguably does reflect a rather significant shift in the way in which courts adjudicate cases as it means the traditional techniques – such as the development of the common law and the canons of interpretation on which courts have rested their expertise and arguably significant degree of institutional legitimacy – has given way to a much less legal way of reasoning.[291] This shift to substantive reasoning represents

[288] Kumm 'Socratic Contestation' at 142.
[289] A Cockrell 'Rainbow jurisprudence' (1996) *SAJHR* 13; C Roederer 'Judicious engagement: Theory, attitude and community' (1999) *SAJHR* 486; S Woolman 'The amazing, vanishing bill of rights' (2007) *SALJ* 762.
[290] PS Atiyah & RS Summers *Form and Substance in Anglo-American Law* (1987).
[291] Kumm 'Socratic Contestation' at 142.

probably the most significant challenge that proportionality brings with it to the question about the institutional competence of courts.

Moving on from proportionality, we may, once again, ask what about deference. If these three characteristics define the application of proportionality, how does deference fit into the picture? In the broadest, sense the four courts seem to conceive of deference in a similar way, that is by adjusting the level of scrutiny that it applies to the arguments that are brought before and against the policy. Rhetorically, the courts differ on this point. The German court conceives of discretion as being a matter of uncertainty. The Canadian court sees it as a question of evidence, and the South African court and the ECtHR are similar although vaguer. Crucially, whether the matter is phrased as a question of uncertainty or evidence is not important. After all, it is through an evaluation of evidence, in which uncertainty is deemed to be found, to either merit deference or not. As such the notion put forward in the previous chapter that balancing can be understood as a type of reasonableness review bears out empirically for the four courts.

Such a reconstruction leaves us with many open questions. If deference is conceived of as varying the level of justification needed to justify a limitation – and in all systems this appears to be the case – then this nevertheless raises questions about how the standard ought to be measured. One plausible distinction that is often made in reference to the Canadian case law is between evidence and common sense.[292] Another is to consider the burden of proof on whether the government has to prove its statement or not.[293] However, even these conceptualizations leave questions open as to when evidence is sufficient or not. Furthermore, there are questions as to the moral or philosophical aspects of the balancing exercise. If it is correct, as it seems to be, that courts themselves can determine the scales according to which the weighing takes place, then focusing on empirical questions alone cannot give a complete picture of the reasons that courts need to give in order to decide a case.

[292] Choudhry 'The Real Legacy of *Oakes*' at 530.
[293] C Chan A Preliminary Framework for Measuring Deference in Rights Reasoning *Int J Const Law* (2016) 14 (4): 851-882.

A further point is necessary. Identifying where the court is being deferential in order to reach a finding based on its own reasons may be impossible.[294] While, a court will sometimes make reference to its institutional position and then goes on to discuss how this affects its evaluation of the arguments, this is rarely the case. Rather deference is more often than not latent. A court will give its reasons, giving weight to different arguments but leaving explicit references out. At other times, we find an intermediate position, where a court will discuss deference in some detail but not refer back to it in its substantive reasons, leaving the relationship between its attitude to deference and substantive reasons. This means that often deference is left to the guesswork of the readers and commentators.

Answering these questions takes up the rest of this thesis in the context of three different rights. It continues with the comparative perspective that was already adopted in this chapter but focuses in on the specific arguments that courts make when considering the justifiability of a limitation.

4. Conclusion

In order to understand how deference operates we must understand how proportionality works. This chapter sought to set out what actually happens in a proportionality enquiry *in practice*. This picture is fascinating both from a theoretical and practical point of view in that it reveals a number of important similarities and differences. While all the courts apply proportionality in order to determine whether a rights limitation is justified, they all conceive of proportionality in different ways. The courts all also conceive of deference in similar terms as leaving discretion to government within the proportionality analysis. There is a great degree of local character in how the tests are conceived

[294] A similar point is made in AM Arnadottir 'Rethinking the Two Margins of Appreciation' at 46-7.

and explained but on the abstract level there is a great deal of similarity among the court.

Chapter 3 - Freedom of Expression

1. Introduction

Freedom of expression is a subtly contentious right. Unlike the other two rights considered in this thesis – privacy and freedom of religion – freedom of expression rarely attracts the kind of public controversy that those rights do. Nevertheless, the case law on the right to freedom of expression has attracted controversy in all four legal systems under review. In Canada, the right has been seen in a somewhat disappointing light, with commentators decrying the fact that most cases under section 2(b) are won by the government, leaving rights claimants empty handed.[295] In the European Court of Human Rights, the right, which was once seen as a relatively clearly circumspect right, has for the past twenty years attracted increasing criticism. In Germany, many of the Federal Constitutional Courts early balancing cases concerned freedom of expression, with the seminal cases on the development of the principle of proportionality having their origins in this particular right. Nevertheless, or possibly as a result of this, the early years of the court's jurisprudence is sometimes referred to as having created a 'myth of the balancing court'.[296] In South Africa, too, while freedom of expression has been at the center of a number of public controversies – hate speech in general, questions of what is permissible in terms of political campaigning and, outside of the court rooms so far, what is permissible as a piece of art - the Constitutional Court's case law reflects a more nuanced engagement with the right.

Picking up from the last chapter, this chapter traces the arguments that courts use and how they create space for the government. Across the board, the case law on freedom of expression seems defined by two core characteristics. The first is the relatively highly theorized nature of freedom of expression in the practice of courts. Unlike many other rights, when it comes to freedom of

[295] J Cameron 'A Reflection on Section 2(b)'s Quixotic Journey' 1982-2012' (2012) *Supreme Court Law Review* 58, 163
[296] N Petersen *Verhältnismäßigkeit als Rationalitätskontrolle* (2015) at 136-154.

expression, courts generally engage with the theoretical underpinnings of the right in their jurisprudence on free expression. The second characteristic relates to the nature of expression and, more precisely, to the difficulty of legislating expression in a general fashion.

2. Theory and Doctrine of Freedom of Expression

In judicial practice freedom of expression is one of the most theorized rights. Indeed, one commentator notes that 'as a general matter, freedom of expression has proved fertile ground for cross-fertilization between the disciplines of law and political philosophy'.[297] It is also an area of law where there is considerable uniformity among the states included in this study in several important ways, such as the reasons to protect the particular right. Nonetheless, there is also great divergences as illustrated by the way in which the right is regulated in the actual practice of the court.

Freedom of expression is explicitly protected in all four systems under review in broadly the same terms with some variation as to the emphases and exceptions. Article 5 of the German Basic Law provides that every person shall have the right to disseminate her opinions in a variety of ways as well as inform herself in a variety of ways. Therefore, the provision is also sometimes, and somewhat misleadingly, referred to as the freedom of opinion (often called *Meinungsfreiheit* in German, although *Meinungsäusserungsfreiheit*, the freedom to express an opinion would be more accurate). The article also prohibits censorship, explicitly protects young people and provides that the arts, sciences, research shall be free. The South African Constitution and the Canadian Charter of Fundamental Rights provide explicitly for the protection of freedom of expression. The Canadian provision also explicitly includes the freedom of the press and other media of communication.[298] The South African Constitution, on the other hand, excludes some types of speech – propaganda for war, incitement to violence and hate

[297] A Stone 'The Comparative Constitutional Law of Freedom of Expression' *in* (ed.s) *T Ginsburg & R Dixon Research Handbook in Comparative Constitutional* Law (2011) 406 at 424.
[298] Section 2(b) of the Charter of Rights and Freedoms.

speech – from the protection of the clause.[299] The European Convention on Human Rights protects both expression and holding opinions. Further the article explicitly permits governments to require licenses for broadcasting.[300] Thus, while there are some local differences, the overall picture on the textual level is one of a high degree of similarity.

This picture of the textual similarity is coupled with a high degree of similarity concerning the reasons to protect free expression, when compared to other rights. The ECtHR deems right to free expression to be 'one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment'.[301] Similarly the German Federal Constitutional Court describes the right as 'direct expression of one's personality one of the most prestigious rights' and that 'freedom of expression is necessary for a democratic system of government in that it enables the mental confrontations and battle of opinions on which democracy depends'.[302] The South African Constitutional Court echoes these sentiments: 'Freedom of expression is integral to a democratic society for many reasons. It is constitutive of the dignity and autonomy of human beings. Moreover, without it, the ability of citizens to make responsible political decisions and to participate effectively in public life would be stifled.'[303] Finally, the Canadian Supreme Court – although with much dryer selection of words than its other counterparts – has, in the same spirit often endorsed the value brought by freedom of expression in the following way:

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[299] Section 16.
[300] Article 10 ECHR.
[301] This phrase is, too, repeated in almost cases dealing with the freedom of expression. See, e.g. *Wingrove v the United Kingdom*, Judgment of 25 November 1996 *Reports* 1996-V, pp. 1957-58, 58; *Von Hannover v Germany* para 60.
[302] Author's translation, the original text reads: 'Das Grundrecht auf freie Meinungsäußerung ist als unmittelbarster Ausdruck der menschlichen Persönlichkeit in der Gesellschaft eines der vornehmsten Menschenrechte überhaupt …Für eine freiheitlich-demokratische Staatsordnung ist es schlechthin konstituierend, denn es ermöglicht erst die ständige geistige Auseinandersetzung, den Kampf der Meinungen,der ihr Lebenselement ist.' BVerfGE 7, 195 at para 33. See, also BVerfGE 5, 85 at 205.
[303] *Khumalo and Others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401; 2002 (8) BCLR 771 at para 21. See also: *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* [2005] ZACC 7; 2006 (1) SA 144 (CC); 2005 (8) BCLR 743 (CC) at paras 45-6; S v Mamabolo (CCT 44/00) [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) at paras 37.

> (1) seeking and attaining truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in a tolerant and welcoming environment for the sake of both those who convey a meaning and those to whom meaning is conveyed.[304]

Thus, all four courts believe in an almost identical triadic understanding of the right which consists of truth seeking, the 'market place of ideas' and the benefits for society and the individual.

Each court has developed a body of case law as a result of challenges to legislation on the basis of freedom of expression. In practice, freedom of expression often clashes with some aspect of personality rights, most often dignity or privacy. This is the case for example with hate speech and defamation. Sometimes freedom of expression may also conflict with the right to safety and security and other considerations such as free and fair elections. In the rest of the chapter I will chart some of the seminal decisions handed down by the courts, in which free expression was invoked in order to see how – if at all – the court determines the space left to government in balancing expression against others public interests.

3. Canada

It may be convenient to begin the exercise with Canada for a number of reasons. The first is that the Canadian Supreme Court has heard a large number of cases on freedom of expression that range in kind. Thus, we have a good set of cases that we can analyze in the context of commercial speech, political speech, hate speech and pornography. The Canadian jurisprudence is also interesting in that it is often regarded as the court's weaker body of case law and has been frequently critiqued by commentators. Freedom of expression under the Charter

[304] *Irwin Toy v Quebec* (1989) at p 976. Again this is oft-cited, see e.g.: *R v Keegstra* [1990] 3 SCR 697.

is rarely 'heralded' 'as [one] its finest moments'.[305] The Supreme Court's jurisprudence on section 2(b) has been subjected to sustained vigorous criticism since it decided its first case. This criticism has been directed at the general manner in which the court approaches freedom of expression cases, in particular the framework it set up in *Irwin Toy* as well as individual decisions.[306]

Probably the most scathing critique of the court's section 2(b) case law has been voiced by Jamie Cameron. She criticizes the court for failing section 2(b)'s 'test of courage' and asks whether there is 'any way to understand the court's case law … that spares it from incoherence'.[307] Others have also been critical. Robin Elliot, revisiting the judgments in 2011, considers the landmark judgment of *Irwin Toy* and the framework it established and sets out a series of criticism. The court's decision, in Elliot's opinion,

> lacks a solid justificatory basis, ignores general interpretative principles, encourages pointless and wasteful litigation, fails to appreciate the symbolic value of the Charter' and that 'roadmap the Court prescribes for determining whether or not governmental action infringes on freedom of expression is inconsistent with the Court's own prior jurisprudence on this feature of Charter analysis, lacks logical coherence, misapplies a feature of American free speech jurisprudence of questionable merit, and is incomplete.[308]

What the Canadian Supreme Court has produced, then, is a body of case law where the government wins cases at a ratio of two to one, which is much to the dissatisfaction of commentators.

Against the background of this rather harsh criticism, let us now look at this case law, focusing closely on how the court sets up the inquiry and how it argues in order to leave government the discretionary space. The bulk of the case law, and the early case law in particular, deal with various forms of commercial expression. This includes early cases such as *Ford*, *Irwin Toy* and *RJR-MacDonald* and later cases such as *R v Butler*, *Three Sisters Bookstore*. Cases involving

[305] J Cameron 'A Reflection on Section 2(b)'s Quixotic Journey' 1982-2012' (2012) *Supreme Court Law Review* 58, 163 at 163.
[306] Cameron *ibid*. R Elliot 'Back to Basics: A Look at the *Irwin Toy* Framework for Freedom of Expression' *Rev. Const. Stud.* 15 (2010): 205.
[307] Cameron at 166.
[308] Elliot at 205.

political expression are far fewer but judgments like *Harper v Canada* and *Thomson Newspapers* are considered 'surprising'[309] or 'disappointing'.[310] Finally, a number of cases have been brought against the criminalization of hate speech. While this context is narrower and includes fewer cases than the other types of cases, the cases that the court has decided have split the court on more than one occasion and received critical input.[311]

The argument here will be that the court's reasoning process can be defined by two characteristics. The first relates to the way in which the court attributes normative weight to the restriction of expression. This functions on two levels. In the first place the court distinguishes between different types of expression in a broad sense, such as commercial expression and political expression, to which weight is attributed in accordance with the importance of the expression. Beyond this first layer of attributing weight, the court considers the importance of the expression in question, sometimes discounting the value of political speech when it does not contribute to freedom of expression in a meaningful way. The second defining characteristic relates to the difficulty of measuring the impact that expression has in various contexts and the difficulty of regulating it. Undesirable expression is often difficult to tell apart from desirable expression in a general manner, leaving courts with the difficult task of determining whether a particular law is excessively overbroad to survive the necessity or balancing stage.

3.1 Defining the Court's Approach to Section 2(b): Commercial Speech Cases

Let us then turn to the case law and consider how the court has dealt with section 1. We begin this analysis by focusing on cases dealing with commercial speech for a number of interrelated reasons. First, and possibly most importantly, many of the early cases dealt with commercial expression. Secondly, and more ambiguously, the debates about the level of protection given to

[309] Choudhry 'The Real Legacy of *Oakes*' at 534.
[310] Cameron ' A Reflection' at 164.
[311] *R v Zundel [1992] 2 S.C.R. 731; R v Keegstra* [1990] 3 SCR 697. L Weinrib (1990) 'Hate Promotion in a Free and Democratic Society: R. v. Keegstra' *McGill Law J*ournal *36*, 1416.

commercial speech in US American law informed some of the early debates in the court and the way in which section 1 was conceived of in free expression cases.[312]

The case law in this area includes cases regarding language regulations for signs, [313] advertising of tobacco products, [314] advertising to children, [315] advertising of medical products, [316] advertising for prostitution, [317] pornography[318] and the importation of pornography[319]. In all of these cases, the court found a limitation of the right to free expression under section 2(b). However, in terms of the outcomes, the cases represent a mixed bag with the court upholding some of the limitations while striking down others as unjustified. Beyond these differing outcomes we find a pattern in the reasoning of the court. In the first place the court evaluates the value of commercial speech as being of lesser weight, owing to the fact that it is further removed from the concerns that inform freedom of expression. The second defining characteristic relates to the empirical difficulties of assessing the impact of speech and the difficulties of assessing the impact of regulation. Together these two characteristics define how the court constructs the space which government has to make policy within.

3.1.1 *Ford v Quebec (Attorney-General)*

The first decision in which the court considered the justifiability of a limitation to section 2(b) was *Ford v Quebec (Attorney-General)*. The case concerned the validity of two provisions of the Charter of the French Language which required that '[p]ublic signs and posters and commercial advertising shall be solely in

[312] For an early overview of the case law, see Y De Montigny 'The Difficult Relationship Between Freedom of Expression and its Reasonable Limits' *Law and Contemporary Problems* 55.1 (1992) 35-52.
[313] *Ford v Quebec (Attorney-General)* [1988] 2 SCR 712.
[314] *RJR MacDonald v Canada* [1995] 3 S.C.R. 199.
[315] *Irwin Toy v Quebec (Attorney-General)* [1989] 1 S.C.R. 927.
[316] *Rocket v Royal College of Dental Surgeons* [1990] 2 SCR 232.
[317] *Reference re ss. 193 & 195.1(1)(c) of Criminal Code (Canada)*, (the Prostitution Reference) [1990] 1 S.C.R. 1123.
[318] *R v Butler* [1992] 1 S.C.R. 452.
[319] *Little Sisters Book and Art Emporium v Canada (Minister of Justice)* [2000] 2 S.C.R. 1120

French' and that 'only the French version of a firm name may be used in Québec'.[320] As is expected in situations that come soon after the enactment of significant changes to the legal system, especially changes of such a profound nature such as proportionality-based judicial review, the court first considered questions of how the provisions fit into the new constitutional scheme. In this case, the court had to consider the right to freedom of expression in section 2(b) and the override provision in section 33.[321] Having resolved that specific question, the court turned to whether section 2(b) had been limited. The court addressed this question in a two-fold manner. First, it asked whether the requirement to use French was a limitation on freedom of expression.[322] Secondly, the court asked whether commercial expression was also protected under the Charter.[323]

Answering both questions in the affirmative, the court, moved on to consider the justifiability of the prohibition to use languages other than French. The crux of the judgment is found in two long paragraphs.[324] The measure was ultimately struck down as being unnecessary and disproportionate. The court stated that 'requiring the predominant display of the French language, even its marked predominance, would be proportional to the goal of promoting and maintaining a French "*visage linguistique*" in Quebec and therefore justified under the Quebec *Charter'*[325]. The court went on to find that '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.'[326] As such, it was the absolute requirement that only French be used that rendered the impugned sections invalid.

Ford is a fragmented judgment, with its arguments presented in a rather different manner from the way in which the court has come to present them. In

[320] Sections 59 and 69 of the Charter of the French Language, R.S.Q., c. C-11.
[321] Paras 23-32.
[322] Paras 39-44.
[323] Paras 45-60.
[324] Paras 72-3.
[325] Para 73.
[326] *Ibid*.

retrospect, we can say that the specificity of its argument, including the normative arguments, relate to the weight to be attributed to the speech and its regulation. Nevertheless, the elements that we find in the later cases after *Irwin Toy* are also present in *Ford*: the engagement with the reasons for protecting different kinds of speech, the regulation of speech and the measuring of the impact on society.

3.1.2 *Irwin Toy v Quebec (Attorney-General)*

Irwin Toy has already been discussed above in relation to its general importance to section 1 and to section 2(b) where it was held to 'acknowledge and confirm' the approach laid down in *Edward's Books* and the counter-narrative to *Oakes*. Here we will discuss the case in relation to how the court dealt with the section 1 analysis in relation to the limitation of the freedom of expression.

The case concerned the constitutionality of sections 248 and 249 of the Consumer Protection Act which regulated television advertising to persons under the age of thirteen years. Section 248 prohibited advertising to persons under thirteen years of age and section 249 established certain criteria according to which it would be determined whether an advertisement fell into the prohibited category. Irwin Toy Ltd. had been found guilty of several counts of contravening section 248 and challenged its constitutionality. One of the attacks was rooted in sections 248 and 249, constituting an unjustifiable limitation to free expression.[327]

3.1.1.1 *Irwin Toy* and the Court's Approach to Freedom of Expression

However before turning to an analysis of the way in which the Supreme Court has approached section 1 in freedom of expression cases, it is necessary to make a preliminary detour into the court's judgment in *Irwin Toy*. Any account of the Supreme Court of Canada's understanding of the operation of freedom of

[327] pp 965 The other challenges were rooted in the lack of competence by the Province of Canada to pass legislation on the subject matter in question.

expression in section 2(b) must begin with this well-known and much criticized decision and the ensuing harsh academic criticism. The case laid down a controversial general framework for dealing with claims under section 2(b) and has been the focus of commentary on free expression in Canada. As I show in this section, the case is not as important in practice.

Decided in 1989, *Irwin Toy* is not the court's first case about freedom of expression[328] but it was when the court laid down a general framework for how to interpret section 2(b) and how to apply section 1 in free expression cases.

The first part court's judgment constructs the question of whether section 2(b) has been limited in the first place.[329] The court (very helpfully) sums up what is required for a limitation of section 2(b). The first two elements define expression negatively as '[a]ctivity which (1) does not convey or attempt to convey a meaning, and thus has no content of expression or (2) which conveys a meaning but through a violent form of expression, is not within the protected sphere of conduct' and excludes activity of this kind from the sphere of protection of section 2(b).[330] Thus activity, in order to qualify as for protection in terms of section 2(b) must be able or attempt to convey meaning and be non-violent. If the activity does fall within the sphere protected by section 2(b), two further questions ensue. The first is 'to determine whether the purpose or effect of the government action in issue was to restrict freedom of expression'[331]. Then, '[i]f the government has aimed to control attempts to convey a meaning either by directly restricting the content of expression or by restricting a form of expression tied to content, its purpose trenches upon the guarantee'.[332] But where the impugned law 'aims only to control the physical consequences of particular conduct',[333] then there is no infringement. In this case, the 'plaintiff can still claim that the effect of the government's action was to restrict her

[328] The case was preceded by *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712.
[329] Pp 979. On this particular aspect of the case see: R Elliot;
[330] Pp 978.
[331] *Ibid*.
[332] *Ibid*.
[333] *Ibid*.

expression'.[334] This final condition comes with the condition that 'the plaintiff must at least identify the meaning conveyed and how it relates to the pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing.'[335]

As indicated already, this formula for determining whether section 2(b) has been limited has come under harsh criticism for several reasons. It is said to misconstrue the relationship between section 2(1) and section 1 by deciding questions under section 2(b) rather than in the more contextualized exercise under section 1. However, no matter how accurate these criticisms may be, there are serious doubts that they in practice would affect the outcome of the vast majority of free expression cases under the Charter. On this point, Robin Elliot notes, '[i]n fact, it is fair to say that, precisely because of the Irwin Toy framework, and particularly the extremely broad meaning it gives to freedom of expression, most s 2(b) cases are resolved at the s 1 stage.'[336] Indeed, in the thirty years following *Irwin Toy* the commentary has shifted away from critiquing the framework of the case to criticisms of the court's practice in terms of section 1.[337]

It is then through section 1 that the case law on freedom of expression has evolved. Here, we find the aftermath of *Oakes* in judicial practice. Remember that *Oakes* claimed to have established a general framework and *Edward's Books* quietly retreated from it, all of it done under heavy academic criticism about the incoherence of the framework. So, when the court in *Irwin Toy* decided to develop a general framework for free expression claims, it had two mutually contradictory templates on which to build its judgment.

3.1.1.2 Section 1 in Irwin Toy

[334] *Ibid*.
[335] *Ibid*.
[336] Elliot at 210.
[337] *Ibid*. at 217.

Having found that the impugned sections satisfy a legitimate objective and are rationally connected to that objective[338], the court begins to address the two remaining legs of the proportionality inquiry. The court commences the minimal impairment test with some telling statements about the standard of proof required in a section 1 inquiry. In general, the tone of this part of the judgment is very cautious, highlighting the role of uncertainty in law-making and the potential for privileged groups to use the Charter to challenge legislation intended to protect vulnerable groups. The court quotes from *Oakes*. Although the court refers to the paragraph about the varying nature of proportionality, it does not address the part about a stringent standard of justification.[339] From there the court goes on to make the point that 'when striking a balance between the claims of competing groups the choice of means, like the choice of ends, will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources'[340].

The substantive part of the judgment continues this cautious tone with the words 'the strongest evidence that the ban impairs freedom of expression as little as possible comes from the FTC report'.[341] Subsequently, the judgment becomes quite difficult to read because most substantive arguments are dealt with in a page-long paragraph addressing a number of different challenges to the impugned sections. The first set of arguments relates to the classification of advertising based on the audience of a television show. The court rejects the argument that advertising could be regulated based on content, as children are 'not equipped to identify the persuasive intent of advertising'.[342] Furthermore, advertising could not be regulated based on audience composition because this was not sufficiently segmented and would thus either not capture a sufficient number of children or prohibit advertising to too many adults.[343] Thus, the court found that the impugned sections were necessary for achieving the objective as alternative means could not achieve the aim as efficiently.

[338] Pp 987-991.
[339] P 993(c).
[340] P 993(h).
[341] P 994(j).
[342] P 995(a).
[343] P 995(e-h).

Besides creating the controversial framework for determining whether section 2(b) had been limited, *Irwin Toy*, also displayed the two main characteristics that manifest in limitations analyses in freedom of expression cases, namely the theorization of speech and the difficulty of regulating it. The emphasis in *Irwin Toy* is on whether there is alternative, less restrictive means, of regulating advertising to children than a total ban.

3.1.3 Commercial Speech beyond *Irwin Toy*: *RJR MacDonald* and Beyond

After *Irwin Toy,* the court addressed a range of limitations to similar laws regulating commercial expression. Even though the outcome of the decisions has varied but often the court has ruled in favor of the government, the argumentative pattern has remained the same. It combines the characterization of commercial speech to be of a lower value and the challenge to regulate speech. It is with regard to the second characteristic that we find some variation.

In subsequent judgments, the court repeatedly designated commercial speech to be less worthy of protection than some other types of speech, thereby lowering the protection it deserves in terms of section 1. This is not to say that there is no value to it; it does serve the interests of the consumer, informing and helping her make a more informed decision. In relation to tobacco advertising, the court put this idea strongly across, stating that 'the harm engendered by tobacco and the profit motive underlying its promotion place this form of expression as far from the "core" of freedom of expression values as prostitution, hate-mongering and pornography.'[344] The court continued '[i]ts sole purpose is to promote the use of a product that is harmful and often fatal to the consumer by sophisticated advertising campaigns often specifically aimed at the young and most vulnerable'. Ultimately, this meant that 'this form of expression must then be accorded a very low degree of protection under s. 1 and an attenuated level of justification is appropriate.'[345] Similarly, as the court briefly put it in *Rocket v*

[344] *RJR MacDonald* at 281.
[345] *Ibid.*.

Royal College of College of Dental Surgeons of Ontario, a case about regulating advertising for dental services, the 'motive [of advertising] is primarily economic'.[346]

These cases are also characterized by the second characteristic of applying section 1 in free speech cases, namely the empirical difficulties in evaluating the impact of speech and regulating it. In *RJR MacDonald* the court upheld the general scheme banning tobacco advertising but struck down particular provisions banning tobacco advertising and unattributed health warning. Similarly, in *Rocket,* the court upheld the ban on advertising for dental services since the court could not find an alternative to a total ban.

Thus, while the Canadian Supreme Court recognizes that different kinds of speech deserve different levels of protection, when it comes to political and commercial speech, the real limits of the separation of powers have yet to be tested in such scenarios. They would be considered rather easy cases as the normative questions and empirical questions align quite easily. In each of the cases, the restriction served its purpose and was justified by evidence that promoted the objectives of free speech. While upholding speech restricting laws may disappoint free speech advocates and this case law does not amount to the most exciting hour of the Canadian Charter,[347] it positively reflects on the functioning of the Canadian polity and the workings of its political and legal machinery.

3.2 Speech and the Electoral Process

A somewhat more complicated case is presented in situations where the rights limitation pertains to speech that no longer belongs to the core of the freedom of expression, such as advertising, but that can be claimed to be at the very heart of the reasons for protecting freedom of expression. One such instance pertains to

[346] *Rocket Royal College of Dental Surgeons of Ontario* [1990] 2 SCR 232 at 247.
[347] J Cameron 'A Reflection on Section 2(b)'s Quixotic Journey' 1982-2012' (2012) *Supreme Court Law Review* 58, 163.

political speech during elections. The Supreme Court has decided three cases that deal with restrictions to speech during elections campaigns: *Thomson Newspapers*,[348] *Harper v Canada (Attorney-General),*[349] and *R v Bryan*[350]. The court was split on each decision. What we see in these judgments is a development of the normative evaluation of the value of speech beyond the dichotomy of commercial and political speech.

3.2.1 Thomson Newspapers

In *Thomson Newspapers*, the newspaper challenged policy that prohibited the publication of opinion polls three days before the election. The newspaper's challenge failed because the state could show that opinion polls were flawed in many ways and could serve to distort debate shortly before an election. Similarly, in *Harper* the challenge to limits on campaign donations failed because the court saw freedom of expression as being better protected by limited donations. In line with this holding, the courts held that unequal donations could make some parties' message be heard more forcefully and potentially mislead voters.

3.2.1.1 The Minority Judgment

In the case the minority judgment was the lead judgment. Unlike the majority, the minority would have dismissed the appeal and upheld the law. The minority, like the majority that ruled after it, finds that section 322.1 limits the right to freedom of expression in section 2(b),[351] that the provision serves a pressing purpose,[352] is rationally connected to that aim,[353] and then turned to the question of minimal impairment.

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[348] [1998] 1 S.C.R. 877.
[349] [2004] 1 S.C.R. 827.
[350] [2007] 1 SCR 527.
[351] Para 20
[352] Paras 22-38.
[353] Paras 39-40.

Bastarache J begins his analysis by quoting *Irwin Toy and RJR MacDonald* to the effect that the court must undertake its task 'without the benefit of absolute certainty'[354] and that 'take a restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups'[355] This is followed by an analysis of possible alternative schemes and of the evidence that proves the necessity of the impugned section. Rejecting two alternative schemes Bastarache finds that neither publishing the methodology used for the poll nor punishing those who publish false polls would be suitable alternatives as the time left to openly discuss those is too short.[356] Then comes the heart of the judgment. The central question was, whether, the provision is overbroad in that it bans the publication of accurate polls as well as inaccurate ones.[357] The first point made by the justice is that there is no 'clear demarcation' between polls that are acceptable to the scientific community and those that are not.[358] The virtue of the 72-hour ban on the publication of opinion polls is that it 'minimizes the risks of publication and dissemination of misleading poll results on or just before the crucial moment of the polling day'[359]. The Justice cites two studies to this effect, one advocating for a 72-hour period, the other one for 48 hours.[360] Bastarache concludes his analysis on minimal impairment by recapping the importance of polls and the way in which the adversarial nature of elections may lead to manipulation of them.[361] Finally, when considering proportionality *stricto sensu,* the judge acknowledges the potential disadvantage to 'strategic voters' who may benefit from a late poll but this disadvantage is small because it is of short duration and because it benefits freedom of expression by 'promot[ing] debate and truth in political discussion since it gives voters the opportunity to be informed about the existence of misleading factual information'.[362]

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[354] Para 42.
[355] *Ibid*. quoting *Irwin Toy* p 999.
[356] Paras 45-46.
[357] Para
[358] Para 48. Bastarache draws here on the amusing image of a hamburger poll which had been raised in argument as an example of an unscientific poll. The Justice does not, however, believe that such a distinction can be made.
[359] Para 50.
[360] Paras 52-56.
[361] Para 58.
[362] Para 61.

3.2.1.2 The Majority Judgment

The majority judgment is written largely as a response to the minority judgment. This has the benefit that the points of disagreement are clearly outlined. At the same time, it has the disadvantage that the judgment does not read well as a standalone argument. The judgment written by Bastarache J has two central parts that are of importance to us. In the first part, the judge sets out his views on how to apply section 1 and then provides three arguments as to why the section 322.1 is not necessary. Bastarache begins his analysis by noting that section 322.1 is a 'very crude instrument' and unnecessary for the purpose of protecting voters from incorrect polls.[363]

The judge lists three reasons as to why he approaches the case differently from the lead judgment.[364] In the first place, Canadian voters are not a particularly vulnerable group that would require special protection by the courts.[365] The Justice stated that voters were 'rational actors … who can make independent judgments about particular sources of electoral information'.[366] Secondly, the Justice found that there is no reason to believe that the interests of the voter and pollster were opposed to one another, unlike in cases where commercial interests were involved.[367] Finally, the judge felt that the standard of proof was not suitable for the nature of the case, stating that 'the reasonable apprehension of harm test has been applied where it has been suggested, though not proven, that the very nature of the expression in question undermines the position of groups or individuals as equal participants in society'.[368] Unlike, for example, pornography, which possibly led to degrading treatment of women in general – as was the case in *R v Butler* considered above – polls did not affect a particular group's standing in society.[369] The reason why pornography and hate speech

[363] Para 111.
[364] Paras 111-
[365] Para 112
[366] *Ibid*.
[367] Para 114.
[368] Para 115.
[369] Para 116.

merited a different standard of proof as opposed to polls was that they were contrary to values 'widely accepted by Canadians'.[370] The judge also cites comparative material to the effect that while some democracies have similar block-outs on electoral polls, the majority do not.[371]

The main point of disagreement between the majority and the minority is whether publishing the methodology behind the poll is a satisfactory alternative to a complete ban. Underlying the difference on this narrow point of legislative method, however, is a point about deference. Ultimately, the case was decided on the basis that the majority did not believe that the Canadian population could be misled by inaccurate polling, while the minority felt that any population would be vulnerable to misinformation.

3.2.2 Harper v Canada

Harper was a sequel to the court's earlier decision in *Libman v Quebec (Attorney General)*.[372] The case concerned the constitutionality of a number of associated provisions of the Canada Elections Act[373] related to electoral campaigns but the thrust of the case turned on section 350. Section 350 sets limits on advertising for individuals and groups in electoral campaigns.

The majority lists four factors that determine the degree of deference to be accorded to the legislator. The first is 'the nature of the harm and the inability to measure it'. Here, the court refers to its previous judgments on section 2(b) and its long-standing finding that '[w]here the court is faced with inconclusive or competing social science evidence relating the harm to the legislature's measures, the court may rely on a reasoned apprehension of that harm'.[374] Secondly the court considered the 'vulnerability of the group' and 'subjective fears and apprehension of harm'. The court concluded that third party advertising seeks to systematically manipulate the voter, the Canadian electorate

[370] Para 117.
[371] Paras 121-122.
[372] [1997] 3 S.C.R. 569.
[373] S.C. 2000.
[374] Para 77.

may be seen as more vulnerable'[375] and that the perception of fairness was of utmost importance.[376]

Finally, the court elaborated its views on the nature of the infringed activity, namely political expression. The court accepted that political expression deserved a 'high level of protection'[377]. However, the court went on to argue that there were instances where expression itself could be contrary to the purposes for protecting the right. The court quotes its judgment in *Thomson Newspapers*, where it stated that 'under certain circumstances, the nature of the interests (i.e., a single party or faction with a great preponderance of financial resources) of the speakers could make the expression itself inimical to the exercise of a free and informed choice by others'[378]. Thus, the court found that 'by limiting political expression, the spending limits bring greater balance to the political discourse and allow for more meaningful participation in the electoral process.'[379]

As is often the situation, the case turned on the minimal impairment leg of the justification analysis. Here, the majority's reason for finding the spending limits necessary rested largely on their view of elections as egalitarian.[380] The majority found that the permitted funding was sufficient to cover some 'expensive forms of media' such as television, newspapers and radio as well as some less expensive forms of media such as leaflets.[381] Further, the limit had to be set keeping in mind that a political candidate, some of whom represent smaller parties, had the opportunity and resources to respond.[382] Ultimately, the majority found that 'the limits seek to preserve a balance between the resources available to candidates and parties taking part in an election and those resources that might be available to third parties during this period'.[383]

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[375] Para 80.
[376] Paras 82-3.
[377] Para 84, citing *R v Keegstra*.
[378] Para 85.
[379] Para 86.
[380] Paras 115-118. See, also: Y Dawood 'Democracy, Power, and the Supreme Court: Campaign Finance Reform in a Comparative Perspective' *International Journal of Constitutional Law* (2006) 4 (2): 269-293.
[381] Para 115.
[382] Para 116.
[383] *Ibid*.

The minority consisting of Chief Justice McLachlin and Justice Major, would have allowed a higher spending limit. The minority of two did not mince their words in describing how they felt about the limitation and the majority's reasoning. The minority considered the dangers that the legislation seeks to prevent to be 'entirely hypothetical'[384] and that the Attorney General had 'not shown any real problem requiring rectification'[385]. As such, the spending limit was unnecessary and should have been struck down.

The crux of the case that saved section 350 of the Canada Elections Act was that the majority felt that the spending limits were sufficient for a satisfactory engagement in a variety of different types of communications on election issues. The decision seems to rest largely on the egalitarian model of elections where the equality of the participants is the paramount consideration.[386] As such, the low third party spending limits ensured that third parties could not thwart the campaign by excessive spending. We can, of course, criticize the judgment for arriving at this conclusion too lightly as Colin Feasby has done.[387] Feasby criticizes the court, both the majority and minority, for missing the bigger picture about what is at stake in third party financing elections. Third parties can have a dual nature in elections. On the one hand, they act as catalysts for debate. On the other, they serve as vehicles to circumvent political financing laws.[388] This may be cogent criticism of how the court could have arrived at a more nuanced framework for third party funding. Nonetheless, it has to be in the very least appreciated that if this serves to underpin an argument for deference, we are talking about replacing one legislative scheme with another based on entirely different concepts (and one that was not argued before the higher or lower courts).

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[384] Para 34.
[385] *Ibid*. The reason that the minority would not have struck the law down for not having a rational connection to the legitimate aim of ensuring free elections is that the connection could be presumed based on 'logic and reason'. Paras 28-31.
[386] See, also: Y Dawood 'Democracy, Power, and the Supreme Court: Campaign Finance Reform in a Comparative Perspective' Int J Constitutional Law (2006) 4 (2): 269-293.
[387] C Feasby at 262-4.
[388] Feasby at 263. See also, Jamie Cameron's criticism of *Harper v Canada*, albeit for less convincing reasons, in her 'Governance and Anarchy in Section 2(b).

Harper v Canada is, then, a case where deference seems to be primarily about the court not intervening in legislation that regulates speech in a rather indirect manner. Rather than focusing on the kind of expression that is permissible, section 350 regulates the resources that third parties are entitled to use to engage in political expression. As such, the law is removed from the actual practice that it controls, thus leaving the actors with room to maneuver. This also makes the law's impact more difficult to predict given that changes can have multiple possible outcomes. The majority seems aware of this when it considers that the spending limits allows a variety of ways for public engagement and considers that expanding the spending limits could be abused by wealthy individuals. Ultimately, in *Harper* deference is largely due to the distance between the regulation and the activity; or to put it differently the majority is deferential because of the round-about way (through spending limits) that Parliament has chosen to regulate third party spending in elections.

Perhaps, it is then best to understand the decision in *Harper* to consist of two deferential moves. The first move relates to why the court did not raise the spending limits that were considered low by the minority and lower courts. Here the court left the laws untouched because it could not determine whether a higher limit would be as efficient. The second move is that considered by Feasby where he would have preferred the court to consider a scheme based on an entirely different legislative scheme.

3.2.3 R v Bryan

Finally, in the category of election laws challenged under section 2(b) comes *R v Bryan*. The case concerned section 329 of the Canada Elections Act which prohibits the broadcasting of election results on election day until all polling stations are closed throughout Canada. The applicant had published some election results from Atlantic Canada while polling stations remained open in

other parts of the country.[389] The case produced another split judgment with Bastarache J writing for the majority, as he did in the other cases considered in this section.

Justice Bastarache reproduces the scheme familiar to *Harper* and *Thomson Newspapers* in order to argue for a deferential approach to election laws. The action is – once again – at the minimal impairment stage. The purpose of the section 329 was to guard against informational imbalances in the voting process[390]. There were certain alternatives, such as uniform voting hours throughout the country, delaying the vote count and extending the voting period to two days but Parliament had rejected these as too disruptive for voters or election workers.[391] The court also emphasized the importance of public opinion and how this was important for fairness.[392]

3.2.4 Conclusion

Two characteristics, then, define the case law on electoral speech. The first is that the court often finds the speech to be of questionable value even if it is characterized as political. This is a consequence of the court theorizing the abstract value of speech in some detail and engaging with philosophical reasons for protecting free speech in more depth. The second is that the limitations are relatively narrow – polling black-outs and spending limits – these are relatively easily controlled, as opposed to modes of speech that require more general legislation.

3.2 Hate Speech

Hate speech poses another slightly different problem as the prohibited expression is often political but of low value. The problem, then, becomes one of creating legislation that can ban undesirable speech while leaving desirable

[389] The full facts are at paras 2-8.
[390] Paras 32-7
[391] Para 45.
[392] Paras 46-7.

speech in the public sphere. The leading case is R v *Keegstra*, which split the court four to three and caused serious controversy.[393] *Keegstra* was followed by *R v Zundel* which again split the court by one vote.

Below, I discuss the case at some length so as to show how the court arrived at its conclusion as well as to tease out the role played by deference in the judgment. In this case the court struggled not only with the characterization of the speech but also the ways of regulating it. It is a lengthy judgment but worth considering in detail.

3.2.1 R v Keegstra

Keegstra is a complex case in many ways, least so from the point of view of the court's reasoning. The case concerned section 319(2) of the Criminal Code which prohibited the willful promotion of hatred against an identifiable group. James Keegstra was a high school teacher in Alberta who had taught his students some extremely anti-Semitic ideas and worldviews. Mr Keegstra appealed to the Alberta Court of Queen's Bench to quash his charges because, among other reasons, section 319(2) unjustifiably restricted his rights under section 2(b) of the Charter. The court refused his application holding that section 319(2) did not limit section 2(b) and even if it did, the section would have been saved by section 1. The application was dismissed and Mr Keegstra was tried and convicted of hate speech. Mr Keegstra then appealed to the Alberta Court of Appeal, which reversed the Queen's Bench's decision, unanimously holding that section 319(2) limited section 2(b) in an unjustifiable manner.

The Court of Appeal found that the section offended both fair trial rights and freedom of expression. The fair trial rights were unjustifiably limited as the section contained a provision that allowed truth as a defense against the hate speech charge, thereby amounting to an unjustifiable reverse onus provision. In

[393] [1990] 3 SCR 697. See, also L Weinrib (1990) 'Hate Promotion in a Free and Democratic Society: R. v. Keegstra' *McGill Law J*ournal *36*, 1416.

terms of hate speech, the appeals court held that hate speech could indeed be damaging because it amounts to an attack on the dignity of individuals and 'can result in a debilitating sense of alienation from society'. According to the appeals court, hate speech may be tolerable if it is rejected by society as a whole but becomes intolerable if it leads to actual hatred of the group. On this basis, the Court of Appeal found that the impugned section was overbroad, as it could be used to prosecute 'harmless cranks' or 'persons in the public eye who utter an unfortunate remark that gets picked up by the media'. The appeals court then rejected arguments by the government that it would be very difficult to prove actual harm. The court did not consider that the prosecutorial discretion built into section 319 and the government failed to convince the court that the section was over-inclusive.[394]

The Supreme Court overturned these findings on appeal in respect of both the fair trial and freedom of expression counts, splitting narrowly three to four. Chief Justice Dickson wrote for the majority in a judgment that has been described as 'vibrant'[395]. The court begins with the section 2(b) challenge. First, the court undertakes a lengthy analysis of the reasons for protecting freedom of expression in previous case law, highlighting in particular its decision in *Irwin Toy* and the triad of reasons for protecting speech given there.[396] All of this is rather unnecessary at this stage as the court could quite easily have concluded that section 2(b) was limited. That finding rests simply on the question of whether the applicant had attempted to 'convey meaning' and that government had attempted to restrict it.[397]

The court then moves to the section 1 limitations analysis. The first two parts of the limitations analysis consist of a, seemingly inconsequential, analysis of US American law on the question and a short part endorsing a contextual approach

[394] The facts of the appeal are set out at 713-4; 718-22.
[395] Weinrib 'R v Keegstra' at 124.
[396] Pp 725-34.
[397] As the court states: 'Because Irwin Toy stresses that the type of meaning conveyed is irrelevant to the question of whether s. 2 (b) is infringed, that the expression covered by s. 319(2) is invidious and obnoxious is beside the point. It is enough that those who publicly and wilfully promote hatred convey or attempt to convey a meaning, and it must therefore be concluded that the first step of the Irwin Toy test is satisfied.'

to applying section 1. The court then moves to the actual section 1 analysis. In the first place this consists of a lengthy analysis, covering, in the following order, the philosophical arguments against hate speech, relevant international law and the broader constitutional scheme in order to establish whether section 319(2) pursues a legitimate objective.

Finally, the court moves on to evaluate the proportionality of the impugned section. The court begins, somewhat curiously, with an analysis of the importance of speech in general and hate speech in particular, to the values that underpin freedom of expression before moving onto the three legs of the proportionality test. Rationality is easily satisfied. The argument rests mainly on the idea that criminal law protects citizens and shows disapproval of undesirable behavior.[398] The question of the existence of less restrictive means to achieve the same policy aim is centered on the argument that section 219(3) may capture speech that lies beyond Parliament's intended scope and may be, for example, used to restrict 'merely unpopular or unconventional communications'.[399] Thus, the question for the court is whether the impugned section 'fail[s] to distinguish between the low value expression that is squarely within the focus of Parliament's valid objective and that which does not invoke the need for the severe response of criminal sanction'[400].

The court divides the inquiry into three parts. The first deals with the 'terms of section 319(2)'.[401] The court notes that section 319(2) excludes from its ambit statements made in private and is only applicable to statements made in the public sphere. Secondly, the court notes that the promotion of hatred has to be willful. And in the court's view '[t]his mental element, requiring more than merely negligence or recklessness as to result, significantly restricts the reach of the provision, and thereby reduces the scope of the targeted expression'.[402] The Court of Appeal had based its decision on the fact that even with its reduced scope, the impugned

[398] P 758.
[399] P 759-61.
[400] P 762.
[401] P 772.
[402] P 772.

section could still catch speech that did not produce actual hatred.[403] The Supreme Court rejected this logic, holding that proof of actual hatred ignored the psychological harm of those targeted by the speech in question and secondly, proving the causal link between speech and actual hatred may be very difficult, to the extent that it could 'severely debilitate the effectiveness of section 319(2) in achieving Parliament's aim'.[404] Finally, the court looks at the terms 'promote' and 'hatred' used in the impugned section and finds that they both constitute sufficiently circumscribed terms. Although the court accepted that there is a danger that people may find statements they find offensive to be promoting hatred, the court argued that this risk could be minimized by proper instructions from the judge, either to the jury or to herself.[405]

The second set of considerations relates to the defenses available in section 319(2) and section 319(3).[406] That section provides four defenses; the truth, a good faith opinion on a matter of religion, statements on a matter of public interest which the speaker believes to be true and finally that the speaker intended to point out matters that may produce hatred towards a group. According to the court, the combination of these defenses had the effect that the 'line between the rough and tumble of public debate and brutal, negative and damaging attacks upon identifiable groups is hence adjusted in order to give some leeway to freedom of expression'[407]. Indeed, the defenses seem to make significant concessions to situations and activities where a speaker may be considered to be making statements for purposes other than promoting hatred, such as in the course of theological debate.

The court singles out the first defense, truth, for a longer analysis. The Chief Justice is clearly not persuaded that truth should necessarily constitute a defense to hate speech. To him it seems like a concession to freedom of expression that is not

[403] P 773773-4. See also, the summary of the Alberta Court of Appeal's judgment above.
[404] *Ibid*.
[405] P 776-77
[406] P778.
[407] Para 778-9.

required by the Charter but available to Parliament.[408] It had been argued before the court that this concession to truth was insufficient. In that it would be possible for a speaker to make statements that could not be classified as true but could at least from the point of view of the speaker be considered to add value to public debate, or could fail to distinguish between fact and opinion innocently and be convicted under section 319(2). Given the majority's view that when it involves hate speech, the defense of truth was already a concession to Parliament not required by the Charter, so the court did not accept these arguments. The majority did not seem convinced that even a true statement should be exempt from prosecution when it would otherwise be considered hate speech.

Finally, the court considered certain alternative schemes rather than the criminalization of hate speech. Here a number of policy alternatives were suggested in the form of human rights statutes and educational programs. The majority rejected them largely on the basis that there would always be several measures to achieve a policy goal and section 319(2) only formed one part of a larger picture to protect tolerance in Canadian society.[409]

Finally, moving on to balancing *stricto sensu,* which the court deals with in three paragraphs. The court reasserts its position that it does not regard the limitation made by section 319(2) to be a particularly weighty limitation on the right to free expression.[410] The court also referred to its lengthy analysis of less restrictive means, calling the section 'narrowly drawn'.[411] Then, ultimately, the court concludes, in a paragraph that captures the reasons of the court well, stating:

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[408] Paras. 780-1. 'The way in which I have defined the s. 319(2) offence, in the context of the objective sought by society and the value of the prohibited expression, gives me some doubt as to whether the Charter mandates that truthful statements communicated with an intention to promote hatred need be excepted from criminal condemnation. Truth may be used for widely disparate ends, and I find it difficult to accept that circumstances exist where factually accurate statements can be used for no other purpose than to stir up hatred against a racial or religious group. It would seem to follow that there is no reason why the individual who intentionally employs such statements to achieve harmful ends must under the Charter be protected from criminal censure.' (emphasis in the original)

[409] P 783-6.

[410] P 786-8.

[411] *Ibid*.

> It is also apposite to stress yet again *the enormous importance of the objective* fueling s. 319(2), an objective of such magnitude as to support *even the severe response of criminal prohibition*. Few concerns can be as central to the concept of a free and democratic society as the dissipation of racism, and the especially strong value which Canadian society attaches to this goal must never be forgotten in assessing the effects of an impugned legislative measure. When the purpose of s. 319(2) is thus recognized, *I have little trouble in finding that its effects, involving as they do the restriction of expression largely removed from the heart of free expression values, are not of such a deleterious nature as to outweigh any advantage gleaned from the limitation of s. 2 (b).*[412]

The Chief Justice's rationale is relatively straightforward: hate speech has very little weight in terms of the values of the Charter. Even the relatively heavy limitation of criminal punishment is not enough of a counterweight (although the court only refers to this in passing here and in the less restrictive means part).

Before turning to an analysis of the separation of powers considerations in the majority judgment, it may be instructive to look at the reasons why the three-judge minority led by Beverly McLachlin would have struck the measure down. The minority agrees with the majority that section 2(b) is limited but then disagrees with it on crucial elements of the section 1 analysis and ultimately concludes that the limitation cannot be justified under that section. In particular, the minority disagrees with the majority's characterization of the overbroadness of section 319(2) and the weight to be attached to speech that may be caught by section 319(2).

Recall that the majority gave a lengthy analysis of the ambit of section 319(2), the defenses in section 319(3) and the role of alternative schemes in protecting groups from hate speech. The minority disagrees in almost its entirety, holding that not only does the impugned section catch more speech than necessary but also criminalization is an unnecessary limitation on the freedom of expression.

[412] P 787.

The minority's first point is that section 319(2) may catch 'many expressions' which should be protected under section 2(b).[413] In the first place 'hatred' is a broad and subjective term capable of catching a range of emotions which have to be proven by inference in court.[414] As such hatred may be inferred where none existed, for example where an opinion is simply unpopular. Further, the minority did not consider the fact that the hatred had to be 'willfully promoted' to circumscribe the offense sufficiently. According to the minority, this creates a situation in which a speaker who makes statements with 'non-nefarious reasons'[415] may 'inspire an active dislike of the group'.[416] Thirdly, the minority considers the argument that the impugned section could serve to punish speech that did not result in actual hatred. This is the rationale that was fatal to the constitutionality of section 319(2) in the Court of Appeal, but did not win favor with the majority who dismissed it. The minority finds that 'this breadth' is a 'relevant factor' but not one that is 'constitutionally determinate'.[417] This is because, in the first place, there may be actual harm that flows from the 'wrenching impact'[418] that hate speech can have and secondly, because proving that listeners were moved to hatred would be difficult to prove, so much so that even attempting such exercise has a 'fictitious air' about it.[419]

Turning to the defenses to section 319(2), the minority continues its incredulity towards the government's justification of the impugned section. Here the minority only considers the defense of truth and is not persuaded that it is sufficiently narrowly-tailored to the problem for two reasons. Firstly, the onus to prove that the statement made was in fact true rests on the accused, meaning that she may well be convicted for making statements that are true. Secondly, there are many statements that 'do not lend themselves to 'proof of truth or

[413] P 854.
[414] P 854.
[415] Para 855-6.
[416] *Ibid*. This is particularly so as the Court of Appeal had interpreted 'willful promotion' to include situations 'where by proof that the accused foresaw that the promotion of hatred against an identifiable group is certain, or "morally certain", to result from the communication.' Para 856.
[417] 855.
[418] Para 857.
[419] *Ibid*.

falsity' and it would raise serious problems for a court to 'evaluate the reasonableness of diverse theories, political or otherwise'.[420]

The minority sums up this part of its evaluation with this stark warning of what the potential impact of section 319(2) may be for Canadian democracy: 'The danger', according to the minority, is 'that the legislation may have a chilling effect on legitimate activities important to our society by subjecting innocent persons to constraints born out of a fear of the criminal process.'[421] Thus those who would like to avoid getting in the way of the criminal law, would 'predictably' according to the minority, 'confin[e] their expression to non-controversial matters'[422] Consequently,

> [n]ovelists may steer clear of controversial characterizations of ethnic characteristics, such as Shakespeare's portrayal of Shylock in *The Merchant of Venice*. Scientists may well think twice before researching and publishing results of research suggesting difference between ethnic or racial groups. Given the serious consequences of criminal prosecution, it is not entirely speculative to suppose that even political debate on crucial issues such as immigration, educational language rights, foreign ownership and trade may be tempered.[423]

Ultimately, the minority then disagrees with the majority that hate speech lies at the periphery of the values protected by free expression and states that: '[t]hese matters go to the heart of the traditional justifications for protecting freedom of expression.'[424]

This part is followed by a brief consideration of human rights legislation as a possible policy alternative and refers to some evidence in this direction.[425] Finally, the minority considers the balance between means and ends. Here the minority considers the limitation to be 'a serious one'.[426] This is so because section 319(2) 'does not merely regulate the form or tone of expression -- it strikes directly at its

[420] Para 860.
[421] Para 860-1.
[422] *Ibid*.
[423] *Ibid*.
[424] *Ibid*.
[425] Paras. 863.
[426] Para 863-5.

content and at the viewpoints of individuals'.[427] Section 319(2), then, can potentially silence speakers in 'widely diverse areas, artistic, social, or political'.[428] Thus, the impugned section goes to the heart of limiting the 'vibrant and creative society through the marketplace of ideas; the value of the vigorous and open debate essential to democratic government and preservation of our rights and freedoms; and the value of a society which fosters the self-actualization and freedom of its members.'[429] On the other side of the scales, the minority does not see the impugned section doing much work to achieve its otherwise laudable goals.[430]

By way of summary, in *Keegstra* we have two judgments, seemingly diametrically at odds on almost every issue. Significantly, the majority and minority disagree on the value of speech that may under section 319(2) amount to hate speech and on the suitability of less restrictive means. In order to understand what the different separation of powers concerns are, we must first understand what these two, closely related, disagreements consist of.

In the majority's view, hate speech is speech of low value in that it contributes very little to the values protected by the Charter. Consequently it carries little weight in the balancing exercise. The minority is a little more ambiguous in how it categorizes speech. Its argument seems to rest on two legs. The first is its argument that section 319(2) is indeterminate in its application and consequently may catch speech other than hate speech. Secondly, given the broad ambit the section also catches speech that is valuable under the Charter. The minority does not, at least not explicitly, seem to endorse the view that hate speech would be of value to Canadian society. Instead, its reliance is on the possible overly broad application of the impugned section.

In order to understand this difference, we need to look at the second source of disagreement, namely the way in which the two judgments characterize section 319(2). The majority sees the provision as catching hate speech. Here the

[427] *Ibid*.
[428] *Ibid*.
[429] *Ibid*.
[430] Para 867..

ambiguity of the phrase 'willful promotion of hatred' – the operative part of the impugned section – can, according to the majority, be applied in a sufficiently confined way on proper instruction by the presiding judge. This alone seemed to create a sufficient connection between speech and the punishable offense. The minority challenged precisely this connection between prohibiting the 'willful promotion of hatred' and the speech that could be caught by section 319(2). It is the desirable expression that may be caught by section 319(2) or by the 'chill' that it causes that concerns the minority.

The problem underlying both the majority and the minority judgments seems to regard the possibility of regulating speech. In the first place it is important to note that section 319(2) does not directly address the type of speech it regulates. Unlike the law *Irwin Toy* prohibited a very particular kind of speech but section 319(2) prohibits the 'promotion of hatred'. The majority sees this kind of broad definition as necessary and it rejected the alternative definition of speech causing 'actual hatred' as this would be very impractical.

Is the majority *Keegstra* deferential? In some ways it does seem so, even though the judgment may be better reasoned by the minority as has been suggested. It not only upholds the law under review but in its reasoning the court deals with the difficulty of regulating speech that would either explicitly mention the institutional role of court or in the very least latently hint at it. The first such instance arises in relation to the defense of truth. Here the majority openly argues that the defense is not needed by the Charter but lies with the discretion of Parliament.

Probably more important is the way in which the majority charts the leeway for Parliament by accepting the definition of 'willful promotion of hatred' as the basis of limiting speech. In the first place the majority's defense under section 319(2) was based on the perception that it could be applied without being excessively broad. But there is also a strong line of argument that appreciates the difficulty of regulating speech. This comes up when the majority considers the alternatives to prohibiting hate speech on the basis of 'actual hatred' that it may

cause, because proving the causal link between the speech and the resultant hatred may be harmful to achieving the aims of the law. Similarly, when the majority considers the option of relying on human rights legislation, it notes that prohibiting propaganda can only be one of the various means to achieve the goals of multiculturalism and tolerance.

There are then two deferential moves in the majority judgment. The first relates to how the majority conceives of designing an overall framework for combating a general problem. In this case, this amounts to a general framework combatting hate speech, involving human rights law and criminal law. The second relates to how the majority sees its own capacity in evaluating legislation drafted to limit speech. Here the majority appreciates the fact that hate speech can only be prohibited indirectly. Rather than being a specific class of speech, it can only be captured in imperfect terms – like, for example, under section 319(2). As such, I agree with both the generalization of the judgment as deferential but also as being better reasoned than the minority's counter-argument.

3.2.2 R v Zundel

Keegstra was followed by *R v Zundel*,[431] a challenge to section 181 of the Criminal Code which stated that '[e]very one who wilfully publishes a statement, tale or news that he knows is false and causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment'. The challenge was brought by a Holocaust denier who had been convicted under the impugned section for handing out leaflets that questioned the scale of the Holocaust death toll.

A narrow majority found that the section breached section 2(b) and was unjustifiable under section 1. McLachlin J distinguished the case from *R v Keegstra*, which had dealt with the 'dissemination of hate', while the *Zundel* dealt with 'a much broader and vaguer category of speech' namely that of making 'false statements deemed likely to injure or cause mischief to any public

[431] [1992] 2 SCR 731.

interest'[432]. Ultimately, the majority reasoned that the law would fail because of its overbreadth. The section failed the justification condition because 'by its broad reach it criminalizes a vast penumbra of other statements merely because they might be thought to constitute a mischief to some public interest, however successive prosecutors and courts may wish to define these terms'[433]. As such the provision failed section 1. The distinction between *Zundel* and *Keegstra* is interesting and important. While *Keegstra* prohibited speech directed to promote hate, which according to the majority could be defined adequately albeit not perfectly, the expression captured by section 181 is so broad thereby leaving discretion to prosecutors and judges that it cannot be justified in terms of section 1.

A minority of three judges wrote a brief dissent, where it argued that the impugned section could be justified under section 1. The reasoning was that section 181 required the willful spreading of false information, thus, a defendant would not be 'tried on the popularity of his beliefs' but only on those false statements that have the potential to seriously injure the public interest.[434] Any uncertainty in this would merit a finding a finding for the defendant.

The contrast between *Keegstra* and *Zundel* illustrates the difficulty of legislating expression. Both cases involve limitations to expression that can be categorized to be part of the broader category of being political and as such valuable; however, at the same time, owing to its content, it is undesirable due to the potential consequences. As such the majority and minority judges in both cases agreed that it deserved to be banned. In this sense, *Keegstra* and *Zundel* are different from political expression cases, like *Harper* and *Thomson Newspapers,* where it was questionable whether the expression was valuable. In *Keegstra* and *Zundel*, the expression is not valuable but it is difficult to tell it apart from expression that is valuable. The problem is then a legislative one of differentiating between types of desirable political expression and undesirable political expression. Here, the court has disagreed strongly in where to draw the

[432] P 731.
[433] P 735-7
[434] P 738.

line. The line between the majority opinions, however, points to a plausible distinction that the type of speech that is prohibited must at least be circumscribed in some way, which it was in *Keegstra* for hate speech but not in *Zundel*, where the prohibition was on harmful speech.

3.3 Conclusion

The Canadian case law on freedom of expression, for all its controversy, offers a rich case study of balancing and deference. In particular, the Canadian freedom of expression case law illustrates two things very well. First of all, it shows how theoretical engagement with the reasons informing the right influence the way in which proportionality and balancing are applied. In each of the cases the court refers to the three reasons underpinning free expression and connects them to the mechanisms of the law. Crucially, the reasons that support free expression also provide some reasons for limiting free expression. This is apparent in cases such as *Irwin Toy* and *RJR MacDonald* where the court could easily find that the purpose of the expression contributed little to the reasons for protecting it. It is also clearly illustrated in cases where the logic of the commercial speech cases does not function such as *Thomson Newspapers* and *Harper.* One of the decisive points in these cases was that free expression served the dissemination and contestation of information. However, and this is the point on which the cases turned, the expression in question was not likely to improve the quality of the debate or the informative basis of the voters.

Secondly, the case law hinges on the difficulty of legislating expression. Here, the majority judgment in particular is very careful to weave its institutional role as a court into its arguments about the value of hate speech, the definition of hate speech, the way in which a legislation defines hate speech and whether criminal prohibitions on hate speech can be seen as complementary to other schemes combatting racial hatred.

Neither of these characteristics, of course, determines what falls within the acceptable range of policy options and what does not. The understanding of the

normative underpinnings of freedom of expression, social scientific evidence, comparative law materials, and international law obligations may change, shifting the balance one way or the other. What the preceding analysis ought to have shown, however, is where the difficult questions, or the sticking points, for freedom of expression lie.

4. Germany

In Germany, freedom of expression case law has dealt largely with private disputes.[435] Although a number of the German Federal Constitutional Court's landmark cases – such as *Lüth*, possibly one of its most famous cases ever – have addressed freedom of expression, the court does not seem to strike down statutes under article 5. This section is brief by virtue of the fact that one can only speculate on cases where a challenge may have been plausible.

Arguably, there might be some room for a constitutional challenge; for example, in cases that limit freedom of expression through criminal laws such as criminal defamation, the protection of national symbols through criminal law or hate speech. In all such instances, however, the Federal Constitutional Court has held that it is for courts to strike the right balance between speech and other protected interests. So, for example in hate speech cases such as the *Holocaust Denial Case*[436] or *the Tuchowsky* cases,[437] the criminal law has not been challenged as happened in Canada in the *Keegstra* case. Instead, the court requires that the lower courts balance freedom of expression with other competing interests in order to interpret the criminal law provision in accordance with the constitution. Similarly, in the *National Anthem Case*[438] and the *Strauß Caricature Case*,[439] the court required that the right to artistic

[435] Prominently: BVerfGE *7 198 (Lüth)*; BVerfGE 12, 113 (*Schmidt-Spiegel);* BVerGE 25, 256 (*Blinkfüer)*; BVerGE 30, 173 (*Blinkfüer*); *BVerGE* 42, 143 (*Deutschland Magazine*); BVerGE 62, 1 (*CSU-NPD / Wahlkampf Case)*.
[436] BVerGE 90, 241 *(Holocaust Denial*)
[437] BVerGE 93, 266 (*Tucholsky I / Soldiers Are Murderers Case*)
[438] BVerGE 81, 289 (*National Anthem Case*)
[439] BVerGE 75, 369 (*Strauß Karikatur*)

freedom, a specific right protected under article 5, was balanced by the lower courts so as to strike a constitutionally appropriate balance between artistic freedom and the interests protected by the criminal law in question.

There is an exception to this general trend in freedom of expression case law presented by cases on the regulation of the media. The Federal Constitutional Court has been approached a dozen times in a long running series of cases known as the *Rundfunkentscheidungen*.[440] Through the judgments the court lays out the requirements of the broadcasting system as a dual broadcasting system consisting of both public and private operators capable of expressing a plurality of opinions. The court has also struck down a number of laws in this area. In the first *Broadcast Judgment*, the court struck down a decree that sought to create a second national television channel, under the control of the federal government. The court held that the law violated the division of powers between the states and the federal government in that while the federal government was entitled to regulate the technical aspects of broadcasting nationally, the content of the broadcasts within the states fell outside the competence of the federal government.[441] A number of state laws were struck down for not providing for the regulation of private senders in some of Broadcast judgments of the 1980s.[442]

The regulation of broadcasting is, then, one of the few areas covered by article 5 in which statutes are at times struck down. However, it is important to note that the laws that have been struck down concerned the regulation of the means of expression rather than expression itself. The impugned laws were ones that concerned how expression was to be disseminated in the form of a broadcast or how a broadcasting system was intended to function rather than laws controlling expression itself. As such they can be considered to be different from the kinds of laws that regulate expression directly, such as the prohibition on hate speech.

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[440] BVerfGE 12, 205 (*Deutschland Fernsehen GMBH*), BVerfGE 31, 314 (*Umsatzsteuer),* BVerfGE 51, 205 (*FRAG*), BVerfGE 73, 113 (*Nidersachsen);* BVerfGE 74, 295 (*Baden-Württemberg*); BVerfGE 83, 238 (*WDR*); BVerfGE 87, 181 (*Hessen 3*); BVerfGE 90, 60 (*Rundfunkgebühren*); BVerfGE 92, 203 (*EG-Fernsehrechtlinie);* BVerfGE 97, 228 (*Kurzberichterstattungen*); BVerfGE 97, 298 (*Extra Radio Hof)*; BVerfGE 119, 181 (*Rundfunkgebühren II*); BVerfGE 121, 30; BVerfGE.

[441] BVerfGE 12, 205 at 228-240.

[442] BVerfGE 73, 113 (*Nidersachsen);* BVerfGE 74, 295 (*Baden-Württemberg*).

When it comes to freedom of expression cases, the Federal Constitutional Court seems to prefer to leave the balancing to courts, the lower courts in the first place and itself when necessary. The justification for this seems to be the very context-specific nature of expression and how it is to be understood. As a consequence, the legislature seems to enjoy a broad discretion in regulating speech, especially through criminal law. But while the legislature has the power to adopt broad norms, the particular decisions in individual cases lie in the hands of the courts. The comfort with which the balancing is left to the courts in Germany may be explained by the epistemological optimism of those courts. Epistemological optimism is defined as the 'human capacity to discern right from wrong and achieve moral progress'[443]. Unlike its Canadian counterpart, then, the German court does not need to entertain challenges against statutes based on article 5. Rather it corrects cases on a case-by-case basis.

Another interesting point of contrast to the Canadian case law is, then, in relation to the problem of legislating for expression. The problem was that it was often difficult to capture the nature of speech through generalized legislation. The German solution is to leave the task to the courts while leaving the legislator to draft broad statutory norms for the courts to apply. This does, however, require faith that courts reach the right decisions, something which the Canadian court has explicitly disavowed but that may fit comfortably within the German constitutional imagination.

5. South Africa

While there is a number of freedom of expression issues that are legally fascinating in South Africa – hate speech and media freedom in particular – the Constitutional Court's case law on section 16 is, save for a small number of

[443] Cohen-Eliya & Porat at 90.

exceptions, quite uncontroversial.[444] In large part this is because the court has only dealt with a handful of cases, most dealing with legislation inherited from the apartheid legal order. Nevertheless, the four cases analyzed here illustrate the structure of balancing and the way in which deference operates in freedom of expression cases.

5.1 Protests

South African National Defense Force Union v Minister of Defense[445] dealt with the constitutionality of section 126(B) of the Defence Act, which included a provision that banned members of the Defense Force from taking part in a 'strike' or 'perform an act of public protest'.[446] The court, through O'Regan J, moves relatively quickly to find that the section does limit the right to freedom of expression and then onwards to the limitations analysis.[447] Here the court was in a somewhat awkward position because the respondent Minister elected not to oppose the finding of constitutional invalidity. The court did the best it could to fill in the arguments for the purpose of the law,[448] but ultimately found that the law could not be justified in two paragraphs. The rationale that could justify a limitation of section 16 was that members of the security services dispose of their duties dispassionately and do not 'prejudice a political party interest' nor 'further any interest of a political party'.[449] The court then reasoned that '[t]he scope of the prohibition under challenge suggests that members of the Defence Force are not entitled to form, air and hear opinions on matters of public interest

[444] Of recent monographs dealing with the role of the South African constitutional court in its political and social environment, none mention freedom of expression as particularly important or politically contentious. See, S Woolman *The Selfless Constitution* (2013) and T Roux *The Politics of Principle: The South African Constitutional Court: The First South African Constitutional Court, 1995-2005* (2013). The case of *Democratic Alliance v African National Congress and Another* [2015] ZACC 1; 2015 (2) SA 232 (CC); 2015 (3) BCLR 298 (CC) would qualify as a controversial case that might have been of interest but that ultimately did not raise any concerns of deference as the only state party to the proceedings, the Independent Electoral Commission did not make any submissions.
[445] *South African National Defense Force Union v Minister of Defense* [1999] ZACC 7; 1999 (4) SA 469; 1999 (6) BCLR 615.
[446] Section 126B Defence Act, 44 of 1957.
[447] Para 9.
[448] Para 11.
[449] Section 119(7) of the Constitution, quoted at para 11.

and concern.'[450] Then, the prohibition in section 126(B) is a 'sweeping prohibition' against all acts of public protest irrespective of the circumstances, something that is not required by the duty to perform military duties dispassionately.

The fact that the responsible minister did not seek to uphold the law speaks volumes about the content of the law. But even without this fact, the case seems relatively straightforward. The ban against participating in protests covers all protests in any circumstance and is so broad that it may be unnecessary even by the strictest reading of the necessity clause; however, it is certainly also excessively broad to be disproportionate since there are many other options are available.

5.2 Pornography

The Constitutional Court has considered legislation regulating pornographic material in the case of *Case and Another v Minister of Justice and Another*.[451] The case dealt with the constitutionality of section 2(1) of the Indecent or Obscene Photographic Material Act. That section made it an offence to have in one's 'possession any indecent or obscene photographic material'. The section further defined the material in the following broad terms as any material 'depicting, displaying, exhibiting, manifesting, portraying or representing sexual intercourse, licentiousness, lust, homosexuality, Lesbianism, masturbation, sexual assault, rape, sodomy, masochism, sadism, sexual bestiality or anything of a like nature.'

While the entire court was in agreement that the law was unconstitutional, there were five separate judgments. The main disagreement between them was whether the section should be struck down for unjustifiably limiting the right to freedom of expression or the right to privacy. The main judgment, written by

[450] Para 12.
[451] *Case and Another v Minister of Safety and Security and Others, Curtis v Minister of Safety and Security and Others* [1996] ZACC 7; 1996 (3) SA 617; 1996 (5) BCLR 608.

Justice Mokgoro, begins with a lengthy analysis of whether sexually explicit material should be covered by freedom of expression, and then an analysis of section 15 of the Constitution.[452]

Finding that it does, Mokgoro J turns to the limitations analysis, the gravamen of which consists of a relatively straightforward overbreadth analysis.[453] It is common cause that some sexually explicit material may be prohibited, such as that depicting the exploitation of women and children,[454] but that some material caught by section 2(1) also falls within the protection of the Constitution, such as at least some depictions of homosexuality.[455] The court then undertakes an interpretation of the impugned section, concluding that the wording of the section 'seems calculated to invest prosecutors and courts with unlimited discretionary power over photographic and cinematic expression'.[456] Thus, Mokgoro J concludes that because of this overbreadth 'a vast array of incontestably constitutionally protected categories of expression, are entirely disproportionate to whatever constitutionally permissible objectives might underlie the statute'.[457]

The main judgment did not explicitly test whether the law was necessarily overbroad. That is while the impugned section potentially captures too much material, it is nevertheless deemed proportionate since less restrictive measures would strike an even more unfavorable balance. This is in some way forgivable given the way the impugned section is constructed as a list of discrete elements that can easily be severed. Nevertheless, the concurring judgment by Justice Sachs takes up the problem of how section 2(1) defines the offence. Here he distinguishes between definitional and strategic overbreadth. The former could be remedied by reading down the provision,[458] the latter was more difficult as it

[452] Para 35.
[453] Paras 48 – 63.
[454] Para 52.
[455] Para 53.
[456] Para 60.
[457] Para 61.
[458] Or in Sachs J's words: 'A well-trained judicial laser coupled with a benevolent reading-down gaze, might have established a core residue of legitimately focused state intervention in relation to the two protected interests' Para 109.

indicates that '[t]here is nothing to show any serious legislative attempt to achieve the difficult balance between the principles of free expression and privacy, on the one hand, and respect for equality and the dignity of all persons, on the other'.[459] Sachs J's judgment then adds to the reasons as to what is wrong with the way in which section 2(1) is drafted and elaborates on the main judgment's reasons for finding why the section is too crude for its purpose.

Ultimately, *Case* may be a very easy case, the law is so crude that it could never pass constitutional control. Nevertheless, the case does illustrate the structure of proportionality reasoning and the functioning of deference in the context of freedom of expression very clearly. The structure of balancing is clearly expressed and sets out the outer boundaries of expression and dignity in broad terms.

5.4 Contempt of court

S v Mamabolo arose from what the court, rightly, called 'a strange set of circumstances'.[460] Mr Mamabolo was the spokesman for the Department of Correctional Services who was sentenced for contempt of court for comments made regarding alleged errors made by the judge in the trial of Eugene Terre Blanche. The comments were printed in a newspaper, read by the trial judge who then ordered Mr Mamabolo and another to appear before him to justify their claims of the judge's error. Mr Mamabolo was ultimately sentenced for the offence of scandalizing the court.[461]

The court begins with an analysis of the constitutionality of the offence, with a title headed 'The nature and purpose of the offence of scandalizing the court', having seemingly skipped over an evaluation of whether the offence limits freedom of expression.[462] The offence of which Mr Mamabolo was convicted – scandalizing the court – falls within a 'broad variety of offences that have little in

[459] Para 110.
[460] *S v Mamabolo* [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) para 4.
[461] Para 12.
[462] Para 13.

common with one another save that they all relate, in one way or another, to the administration of justice'.[463] Kriegler J then moves on to questioning whether the offence of scandalizing the court has any place in a contemporary legal system and whether it would not be regarded as a 'relic of a bygone era when judges were a power unto themselves',[464] something that is quite antithetical to a conception of the judiciary in a constitutional democracy. Ultimately, the majority does find a purpose for the existence of the offence given the role and position of the judiciary considered weaker than other arms of government, as well as the inability of judges to speak outside of court and the importance of public trust in the courts.[465] Then, judges have some recourse to the law if speech undermines courts and their role in the administration of justice is generally desirable.[466] The fact that most common law countries – with the exception of the United States – also had a similar offense lent further support to this.[467]

Then, the court turns to what it terms the 'justification' where the court finds that the manner in which the law operated – as a summary procedure – to be unjustifiable.[468] Instead it would have been desirable for the judge to engage the Director of Public Prosecutions and let that office decide how to handle the matter.[469] Ultimately, the law was excessively overbroad in the way in which it could be applied and failed to strike a balance between the protected interests.

Before turning to a deeper analysis of this judgment, it might be useful to look at the judgment by Sachs J, who concurred with the outcome but dissented on the reasons for it. Sachs J's judgment would have struck the offence down and required that in order to pass constitutional muster, namely a requirement that the statement must 'provoke real prejudice'.[470] This, according to Sachs J, would

[463] *Ibid*.
[464] Para 15.
[465] Paras 18-20
[466] Para 20.
[467] Para 21. The reason the US legal system did not have a similar offence was because of the unique way in which freedom of expression is conceived of in that system.
[468] Paras 48-61.
[469] Para 53.
[470] Para 75.

separate those cases of legitimate robust criticism from cases that in reality undermine the administration of justice. In this instance, it could be imaginable that such statements would be related to a 'wider campaign to promote defiance of the law or to undermine the legitimacy of the constitutional state.'[471] More specifically, the statements could be part of a campaign by 'druglords or warlords to gain *de facto* immunity' or '[i] the speech targets a particular judicial officer, it should be of such an unwarranted and substantial a character as seriously and unjustifiably to impede that judicial officer in being able to carry on with his or her judicial functions with appropriate dignity and respect.'[472]

Mamabolo, then, represents another scenario where a law was considered extremely overbroad and unduly restrictive of freedom of expression. While the court and Justice Sachs in his dissenting concurrence, or concurring dissent, appeared to disagree on at least some points, fundamentally both judgments grapple with the same problem of how to regulate speech. For the majority, it was sufficient to do away with the summary procedure and rely on the good sense of the prosecutorial authorities and judges to balance the rights appropriately, while Sachs J would have tightened the ambit of the offence itself. Both Kriegler and Sachs JJ stake out the boundaries of when expression may be so damaging as to harm the legitimate aim of administering justice. Kriegler J's judgment may have been more minimalist in that it only focused on the narrowest possible aspect of the law to find it unconstitutional. Sachs J on the other hand, would tighten the substance of the offence to extreme cases. This is also not a huge inroad, and probably not even one that the majority would greatly disagree with were it the case before them, into the legislative domain.

Mamabolo may be another easy – for lack of a better word – freedom of expression case for the Constitutional Court. But it illustrates, in the, first place the structure of the proportionality inquiry and the way in which a court first builds an abstract top-down scheme of the weights of the different interests. It does not implicate the separation of powers in any particularly important sense

[471] *Ibid*.
[472] *Ibid*.

– the state did not even seem to defend the law in court – but it is a useful reminder of how courts can construct the proportionality inquiry in a freedom of expression case.

5.5 Broadcasting

Islamic Unity Convention v Independent Broadcasting Authority and Others[473] dealt with the constitutionality of clause 2(a) of the Code of Conduct for Broadcasting Services (contained in Schedule 1 of the Independent Broadcasting Act), which prohibited the 'broadcasting of any material which is indecent or obscene or offensive to public morals or offensive to the religious convictions or feelings of any section of a population or likely to prejudice the safety of the State or the public order or relations between sections of the population'. The applicant was a community radio station operating with a license issued by the Independent Broadcasting Authority (the 'IBA'). One of the respondents, the South African Jewish Board of Deputies lodged a complaint with the IBA following a broadcast on the applicant's station where certain statements had been made regarding the establishment of the state of Israel and the Holocaust. After some, somewhat strange, proceedings before the IBA and the High Court, the applicant applied and was granted leave to appeal the constitutionality of clause 2(A) to the Constitutional Court.

The main judgment is written by Langa DCJ, who begins his analysis with whether section 16 has been limited. As is often the case, the court lays out the major part of the reasons for protecting the right in question. Langa begins his judgment with three quotes from two judgments considered above, *SANDU* and *S v Mamabolo* emphasizing the importance and interconnectedness of freedom of expression to a number of other rights and its importance for democracy.[474] To this, the judge adds a further consideration: the historical denial of freedom of expression during apartheid. He then quotes the European Court of Human Rights' *Handyside* judgment in support of the proposition that freedom of

[473] *Islamic Unity Convention v Independent Broadcasting Authority and Others* [2002] ZACC 3; 2002 (4) SA 294; 2002 (5) BCLR 433.
[474] Para 24.

expression is central to pluralism in society.[475] Turning to the other side of the equation, the Langa DCJ notes that '[t]he pluralism and broadmindedness that is central to an open and democratic society can, however, be undermined by speech which seriously threatens democratic pluralism itself" and that there are many instances and examples of when democratic societies limit either particular types of expression, such as hate speech, for a variety of purposes, such as to ensure fair trials and elections.[476] After setting out the broad boundaries of freedom of expression in this type of situation, the judge sets out the structure of section 16, the meaning of the exceptions in section 16(2) and the role of section 36 before turning to the justification.

In terms of justification, the judgment begins with the question of whether the phrase 'material likely to be prejudice relations between sections of the community' can be given a narrow interpretation in order to keep it constitutionally compliant.[477] The IBA had suggested that the impugned section can be read as having the meaning that

> the broadcast must promote prejudice and stereotyping or the demonizing of a target victim group by violating their dignity in such a way that other defined groups within society [...] will be sufficiently moved by the stereotyping or demonizing to regard the target victim group with contempt or hatred or to inflict harm on that target victim group; [and that] the offensive content of the broadcast is viewed by the target victim group as being the collective responsibility of a different section of society and not the work or responsibility merely of individuals, and is sufficiently offensive to a sufficient number of members of the target victim group that it moves them as a group, as opposed to individuals drawn from that group, to regard the perpetrator group with contempt or hatred or to want to inflict harm on that perpetrator group.[478]

The judge dismisses this option rather glibly by saying little more than that reading the section in this way would have been 'unduly strained'.[479]

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[475] Para 25.
[476] Para 26.
[477] Para 37.
[478] Para 39.
[479] Para 41.

Next, the court turns to considering whether the provision could be justified in any event. The IBA advanced three reasons for why the section was salvageable. The first was the ambit of the broadcasting code which only applied to broadcasting licensees and not the public in general.[480] The court rejected this argument because it ignored the fact that receiving information was a significant part of the justification for freedom of expression. If a broadcaster with a significant audience was restricted from broadcasting, a large section of the population 'would be deprived of information, that it would receive but for the prohibition'.[481] The second reason was the no criminal sanction goes with the probation.[482] This reason was also rejected as there were other sanctions, including having the broadcasting license suspended and as 'broadcasters are in the business of broadcasting' this is a significant limitation of their right to broadcast.[483] And finally, the IBA argued that the code was voluntary and that no broadcaster was subjected to it against their will. This the court also rejected. The decision then represents another case of a clearly overbroad provision.

5.6 Conclusion

The South African case law on the freedom of expression has dealt largely with rather draconian, very broad, laws inherited from the previous legal order, which have hardly tested the respective competences of the legislature and Constitutional Court. In other words, the laws that have been tested so far fall outside the bounds of the respective rights, which means that there is very little work for the court to do in striking them down. In all four cases, the reasoning was more or less the same: the law was excessively overbroad that it covered expression that was not necessary to protect.

[480] Para 45.
[481] *Ibid*.
[482] Para 46.
[483] *Ibid*.

Overbreadth alone is, however, not sufficient for a law to be deemed unconstitutional. After all, a law may be necessary and proportionate in spite of catching activity that is not undesirable – *Keegstra* discussed at length above may be an example of this in the context of freedom of expression. Indeed, often even a very broad section may be constitutionally compliant or might certainly require heavy justification in order to be struck down.

If we look at the laws in question, we find particular kinds of overbreadth. The first kind is found in *Case*. In *Case,* the prohibition was against a broad array of very specific items of material, including material that clearly fell outside the justifiable limitations. It is then, not only the fact that the section was excessively broad in that it also included a lot of material that was not deserving of protection. The calculus for the court was relatively straightforward. Having established that although some expression does not deserve protection under section 16, because the impugned section gave such a specific list, it was relatively easy to determine that the section fell outside of the protection of section 16. We might call this overbreadth through specificity. While I agree with Justice Sachs that there is also some 'strategic overbreadth' in play, as opposed to mere 'definitional overbreadth', it is important to note there is also definitional overbreadth at work in this case and that it is caused by the section specifying elements that fall outside of the protected sphere of freedom of expression.

The other three cases present a different kind of overbreadth. Here we find the offending overbreadth through the use of an umbrella term that catches a lot of or too much expression. In *Islamic Unity Convention* the prohibition was directed at expression capable of 'disturbing the relations between sections of the community'. *Mamabolo* contained probably the broadest prohibition of all the cases, prohibiting any and all expression that may scandalize courts. *SANDU*, which concerned the prohibition of only one type of expression, namely protesting, banned it in all its forms and in all circumstances.

There is a risk in striking down these kinds of provisions that is not present when striking down specific overbroad provisions, which is that sometimes it is

not possible to capture what is justifiable and what is not by more narrowly drafted provisions. Thus unlike the Canadian Supreme Court's decision in *Keegstra,* where it found that the broad terms of the hate speech law were justified because of great difficulty of protecting the interests protected by the hate speech prohibition in more circumscribed terms, the cases before the South African court all strike down these kinds of provisions without an in-depth analysis of whether the desired outcome can be achieved through alternative formulations. In the court's defense it may be that in these cases the laws never came close to what might be considered the legislator's legitimate area of discretion.

Then, at first glance, the freedom of expression case law of the South African Constitutional Court is superficially quite uncontroversial. However, it once again demonstrates a point about the difficulty of legislating expression. While in each of the cases the law was struck down, and each time it seems relatively clear that this ought to happen (the decisions had no dissents), the court did explain why these overbroad laws were particularly overbroad, to the point where in *Case* Justice Sachs added a dissent to explain why the law was particularly overbroad.

6. European Court of Human Rights

Section 10, the free speech clause of the Convention, is the birth place of the margin of appreciation in rights cases.[484] This has since changed after it was recognized that article 8 protects reputation as a personality right, around which the vast majority of the recent freedom of expression case law is based.[485] The court's case law can be divided into three categories: political expression, artistic expression and commercial expression. In the first category, the margin that has

[484] *Handyside v UK* 1 EHRR 737 (1976). S Tsakyrakis 'Proportionality: An assault on human rights?' *International Journal of Constitutional Law* (2009) 468; M Khosla 'Proportionality: An assault on human rights?: A reply.' *International journal of constitutional law* 8(2) (2010); M Klatt & M Meister 'Proportionality — a benefit to human rights? Remarks on the I·CON controversy.' *International journal of constitutional law* 10(3) (2012): 687.
[485] S Smet 'Freedom of Expression and the Right to Reputation: Human Rights in Conflict'

been left to states in expression cases has traditionally been relatively narrow.[486] In the latter two categories - artistic and commercial expression - the margin has been broader.

6.1 Political Expression

Political expression enjoys a high level of protection. The starting point is *Lingens v Austria*.[487] The case arose out of an article that appeared in a magazine of which the applicant was the editor. The magazine had published two articles that were highly critical of the Austrian Chancellor's support for a politician, who had served as a member of the SS in the Second World War. He was found guilty of criminal defamation and fined, and copies of the article were confiscated.

In its decision, the court emphasized the importance of freedom of expression as an 'one of the essential foundations of democracy'[488] and 'for each individual's self-fulfillment'[489]. The court also held that 'freedom of the press furthermore affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders.'[490] Therefore, the court went on to find that 'the limits of acceptable criticism are accordingly wider than as regards a politician as such than as regards a private individual'.[491] The criticism was of a politician in his political capacity and was a reaction against strong language by the politician himself.[492] As such the court found that the limitation of Mr Lingens' article 10 right was not justifiable in a free and democratic society.

As such political commentary is almost always protected under article 10. In *Oberschlick v Austria* another magazine editor who was convicted in terms of the same article as Lingens, appealed his sentence and had the conviction

[486] G Millar 'Whither the Spirit of *Lingens*' 3 *EHRLR* (2009) 277..
[487] *Lingens v Austria* Application No. 9815/82, judgment of 9 July 1986.
[488] Para 41.
[489] *Ibid*.
[490] Para 42.
[491] *Ibid*.
[492] Para 43.

overturned.[493] In *Oberschlick v Austria (No 2)* the court found that a criminal conviction for an article in which Jörg Haider was referred to as an 'idiot' deserved protection.[494] The limits to article 10's protection of political expression are found when expression leaves the realm of political commentary. In *Tammer v Estonia* the court unanimously rejected a claim filed by a journalist who had been convicted after writing articles about the lover of a former prime minister, who had been described in pejorative terms.

There is a fine line between what qualifies as political commentary and what falls outside of it. This can be illustrated by *Jersild v Denmark* where a journalist appealed his conviction after being found guilty for a documentary in which a number of members of a self-confessed racist group had made some extremely offensive remarks about black Africans.[495] The court split three ways about whether the conviction was appropriate. The majority held that 'the applicant's conduct during the interviews clearly dissociated him from the persons interviewed'.[496] A minority of four judges felt that a 'clear statement of disapproval'[497] would have been 'absolutely necessary'.[498] And finally, a minority of three judges felt that the conviction was justified as the journalist made no attempt to distance himself from the views of interviewees or attempted to counterbalance their views. This case, and its varying judgments, shows the level of detail which freedom of expression cases are dealt with by the ECtHR and how highly context-sensitive they are.

6.2 Artistic Expression

Artistic expression occupies a middle ground between political and commercial expression.[499] The landmark case is *Müller v Switzerland* in which the court had to consider the seizure of a number of paintings and a conviction for displaying them at a public event. The court upheld the conviction but in doing so it

[493] *Oberschlick v Austria* Application No. 11662/85, Judgment of 23 May 1991.
[494] *Oberschlick v Austria (No 2)* Application No. 20834/92, Judgment of 1 July 1991.
[495] *Jersild v Denmark* (1994) 19 *EHRR* 1.
[496] Para 34.
[497] Para 3.
[498] Para 3.
[499] Mowbray at 667.

acknowledged the need for artistic expression to enjoy a special sphere.[500] It underscored the significance of those 'who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society'.[501]

A number of particularly controversial cases have arisen where the artistic expression in case was considered to offend the religious sentiment of the population or to fall foul of blasphemy laws. For instance, the case of *Otto-Preminger-Institut v Austria*[502] became known as the *ICON* controversy, named after the journal on the pages of which it took place[503]. Although, the points made in the debate were of a more general nature, pertaining to proportionality and balancing in general, the use of the case nevertheless demonstrates the controversial nature of the case law in this area.

Let us look at some of them more closely. *Otto-Preminger-Institut* and *Wingrove v UK* concerned films that depicted various central figures of Christianity in obscene sexual acts and relations. In both cases the state authorities had limited the ability of the director to display the film. In *Otto-Preminger-Institut* the Innsbruck regional court found that the film breached the criminal law on blasphemy, meaning that it could not be shown and later seized copies of the film from the production company. In *Wingrove* the director submitted a film to the British Board of Film Classification, which then refused to classify the film, a decision upheld by the Video Appeals Committee. As a consequence, the video could not be made available for distribution. Both decisions of the national courts were upheld. In both cases the reasoning was closely related to the fact that the films seemed to be little more than abusive attacks on the religious feelings of some members of the public.[504]

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[500] Müller at para 33-4.
[501] *Müller* at para 34.
[502] *Otto-Preminger-Institut v Austria*, *Application no.13470/87,* Judgment of 20 September 1994.
[503] S Tsakyrakis 'Proportionality: An assault on human rights?' *International Journal of Constitutional Law* (2009) 468; M Khosla 'Proportionality: An assault on human rights?: A reply.' *International journal of constitutional law* 8(2) (2010); M Klatt & M Meister 'Proportionality — a benefit to human rights? Remarks on the I·CON controversy.' *International journal of constitutional law* 10(3) (2012): 687.
[504] *Wingrove* at para 61; *Otto-Preminger-Institut* at paras 55, 22.

Where the artistic expression, however, appears to be genuine and political in nature, the court has held national authorities in contravention of article 10. In two cases brought against Turkey, *Karatas v Turkey*[505] and *Alinak v Turkey*[506], the ECtHR found two decisions of Turkish courts to be in contravention of article 10 of the Convention. *Karatas* regarded a conviction for terrorism offences on account of a poem the applicant had written. First of all, the court found that it was because of the political nature of the expression that a limitation would be difficult to justify[507]. Secondly, the court held that the poem needed to be understood according its artistic content. With regard to the second point the court stated that: 'even though some of the passages from the poems seem very aggressive in tone and to call for the use of violence, the Court considers that the fact that they were artistic in nature and of limited impact made them less a call to an uprising than an expression of deep distress in the face of a difficult political situation'[508]. Similarly, in *Alinak v Turkey*, the court found that the seizure of a novel written by the applicant amounted to a limitation of article 10. Again, relying on the nature of the novel as being both political and artistic in nature, the court found that there had been a violation of article 10.[509]

The permissibility on the limitations of artistic expression, then, are to be determined with reference to the content of the expression. Where it is political in nature and contributes to the public dialogue, limitations are difficult to justify. Where it is, however, gratuitously offensive, the state enjoys a wide margin of appreciation. It should be noted, that the cases of *Wingrove* and *Otto-Preminger-Institut*, are extreme examples of where a form of artistic expression does not contribute to debate. Conversely, *Karatas* and *Alinak* are extreme examples of where genuine art that makes points that deal with difficult political debates. The middle ground, where the institutional capacity of the court really come under test as such is hardly tested by these cases.

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[505] *Karatas v Turkey*, Application no. 23168/94, Judgment of 8 July 1999.
[506] *Alinak v* Turkey, Application *no. 40287/98,* Judgment of 29 March 2003.
[507] *Karatas v Turkey* at para 50.
[508] *Ibid*. at para 52.
[509] *Alinak v Turkey* at paras 39-47.

6.3 Commercial Expression

Finally, commercial expression enjoys the lowest level of protection by virtue of the nature of the expression. Like Canada, it is most likely an imported idea from the United States case law.[510] While the court has held that commercial expression falls within the protection of article 10, the 'margin of appreciation given to States' regulation of advertising was particularly essential'.[511] So, a Barcelona lawyer who advertised his services in a local real estate newspaper and was fined for this by the Barcelona bar, failed in his article 10 claim even though his advert merely stated his professional competence. There are nevertheless measures that go too far in limiting article 10. For example, in *Krone Verlag GMBH (No 3) v Austria*, the court found that an injunction prohibiting the printing of advertisements that compared the price of two newspapers without mentioning the different quality and breadth of the coverage was an unjustifiable limitation. The court found that the degree of limitation of the injunction bore too heavily on the applicant newspaper in that it would have to determine its future level of coverage very early on before it advertised.[512] In general, however, it takes a heavy limitation of commercial expression to override the protection of article 10.

6.4 Conclusion

The case law of the ECtHR is structured around a similar categorical approach as the Canadian case law, with different types of speech deserving different levels of protection. Similar to other jurisdictions, these are not decisive but they offer a rough guide into how far the court is willing to go in protecting speech. In some ways this is a cruder form of reasoning than is found in the domestic courts. The court is more focused on the categories of speech rather than the reasons behind

[510] CR Munro 'The Value of Commercial Speech' 62(1) *Cambridge Law Journal* 134 (2003) at 134.
[511] *Casado Coca v Spain* Application no. 15450/89, Judgment of 24 February 1994 at para 55.
[512] *Krone Verlag GMBH & Co v Austria* (No 3) Application No. 39069/97 Judgment of 11 December 2003 at para 33.

them in each individual case. On the other hand, the cases before the ECtHR have dealt with more serious limitations than the cases before the domestic courts.

7. Conclusion

Two sets of observations can be made on the basis of the above survey about balancing in free expression cases in Germany, South Africa, Canada and the European Convention system. The first relates to how the reasons for freedom of expression justify certain limitations to the right itself. The best examples are many of the Canadian speech cases, especially those involving political speech such as *Thomson Newspapers* and *Harper*. The reason why speech was justifiably limited in those cases was that the limitation itself furthered, at least some, of the purposes of freedom of expression. The reasons for freedom of expression are so well-known and accepted that courts can relatively easily rely on them in order to test whether a law unjustifiably limits them or not.

The second observation relates to the difficulty of regulating speech. The meaning and effect of expression is often contested and may vary vastly from place to place. This makes regulating it a particular challenge to which courts have responded in different ways in each specific context.

The German Federal Constitutional Court seems to have a preference for leaving broadly framed statutory provisions standing and relying on judicial balancing in order to achieve an institutional balance between the role of the legislature and the courts. As such the court does not in general review acts of parliament that restrict freedom of expression but leaves it to courts to interpret the standards in line with the constitution. Then, while the literature on German law of freedom of expression often highlights the importance of dignity to the development of the content of courts' case law[513] as well as the dichotomy between true and false statements being the central criterion determining how

[513] M Rosenfeld 'Hate speech in constitutional jurisprudence: a comparative analysis' *Cardozo Law. Review* (2002) 24 1523.

much protection a statement deserves[514] the constitutionality of the limitation seems to be premised on the broadly framed limitations on free speech, usually in the form of a crime, and the belief that courts can strike the right balance in applying the law.[515] Thus, even if somebody would want to challenge the constitutionality of a law limiting the freedom of expression in article 5, as long as the standard in that law is open to an interpretation, as most laws limiting free expression seem to be, the Federal Constitutional Court seems unlikely to strike it down.

Also, in Canada we find a similar issue regarding the regulation of hate speech in *Keegstra*. The second problem relates to the regulation of hate speech – here the court must struggle with framing a law that can adequately capture prohibited speech while at the same time not posing a threat to freedom of expression. In this situation, the majority – echoing the sentiments of the German Federal Constitutional Court – relies mostly on the criminal justice system to produce acceptable outcomes even as it acknowledges that the prohibition may capture too much.

The European Court has also struggled with how to characterize and regulate expression. While the court accepts the same reasons for protecting freedom of expression, a consideration of these rarely features in its reasoning. Instead the court seems very preoccupied with the details of cases creating a somewhat arbitrary matrix of cases where it defers to government and where it does not. Nevertheless, we do see the importance of the reasons behind the right to freedom of expression. The South African court is yet to properly face the problem of regulating undesirable speech since the cases that went before the court have been relatively straightforward as the impugned laws have been extremely clearly restrictive of freedom of expression.

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[514] D Grimm 'The Holocaust Denial Case of the German Federal Constitutional Court' in I Hare & J Weinstein *Extreme Speech and Democracy* (2009).

[515] This may seem obvious but often arguments about the 'chilling' effect of a possible prosecution are used in South Africa and Canada (as was the case in *Keegstra*) to question the constitutionality of laws.

Briefly then, it can be summarized that it is the level of theorization of the purpose of speech and the difficulty of regulating it that delineate the limits to which courts have been the defining features of how the proportionality principle is applied and which acts fall outside of government's discretionary area of policy making.

Chapter 4: The Right to Privacy

1. Introduction

The story of the right to privacy is often said to begin with an article by Samuel Warren and Louis Brandeis.[516] In an uncanny description of changes in technology and society in 1890, the two future Supreme Court Justices argued that '[r]ecent inventions and business practices'[517] such as 'instantaneous photographs and newspaper enterprise'[518] as well as 'numerous technical devices'[519] called for the protection of 'the right to be left alone'[520]. Today privacy is back on the agenda. Technological advances, terrorism and the revelations of wide-spread unlawful surveillance by Edward Snowden and others mean that privacy is again at the forefront of rights debates. From a philosophical and legal perspective, privacy is a fascinating right. Moral philosophers continue to argue about the very existence of the right and its protection in legal documents varies, with some documents protecting it explicitly while others do not. The courts, however, have all found the existence of the right and its application has its own distinct features.

The jurisprudence around privacy works to a great extent on the juxtaposition of private and public spheres. While the right is often under-theorized in judgments when it comes to the philosophical underpinnings, courts have created rather sophisticated schemes to determine the extent of the limitation to privacy and the corresponding gain to the general good. Much of the legitimacy of the courts' intervention in this area depends on the courts' ability to determine the relevant distinctions between those matters that are private and those that are public.

[516] SD Warren & LD Brandeis 'The right to privacy' *Harvard law review* (1890) 193.
[517] Warren & Brandeis at 195.
[518] *Ibid*. at 196.
[519] *Ibid.*
[520] *Ibid*. Quoting Thomas M Cooley.

2. Theory and Doctrine of Privacy

Privacy is often described as a 'curious right' and perspectives on it vary from denying the existence of the right[521] to arguing that it is one of the most important rights of the time. Compared to other rights, especially freedom of expression, however, it is clear that the reasons for protecting the right to privacy are much more controversial. This is also reflected in the law. Unlike the other two rights considered in this thesis - freedom of expression and freedom of religion - the right to privacy is protected in a rather fragmented fashion in most rights instruments.

Indeed, in a 1975 article Judith Thomson argued that the right to privacy did not exist at all. Instead, all those interests that we conceive of us belonging within the scope of privacy, are simply manifestations of other rights. It is difficult to summarize Thomson's arguments. She goes through a number of situations – such as a person overhearing a fight through an open window as opposed to taking more intrusive measures or being shown a painting as opposed to breaking into a vault in order to see it – demonstrating that those instances that we might consider violations of the right to privacy in fact constitute some other form of rights violation, such as trespass. Thomson's arguments have been critiqued more recently by philosophers, such as Andrei Marmor, basing the right to privacy on a person's right to determine what picture of themselves they wish to portray and the limited benefits of knowledge about others.[522] There is then little agreement about the reasons, if any, to protect a right to privacy.

This fragmentation is reflected in the way in which the right is protected legally. Unlike freedom of expression and religion, there is very little by way of similarity in the rights instruments under review. Section 14 of the South African Constitution defines the right in the most straightforward terms: 'Everyone has the right to privacy, which includes the right not to have the person or their home searched; their property searched; their possessions seized; or the privacy

[521] J.J Thomson 'The Right to Privacy' *Philosophy and Public Affairs* 4(4) (1975) at 295.
[522] A Marmor 'What is the Right to Privacy?' *Philosophy and Public Affairs* 43(1) (2015) 3-26.

of their communications infringed'. The ECHR protects a broader conception by guaranteeing everyone a right to 'private and family life', a notion that arguably covers more than what is often traditionally understood as falling under privacy. The German Basic Law protects elements of what is usually considered privacy in articles 10 and 13, the former protecting the secrecy of correspondence and the latter the home. However, because of the breadth of privacy considerations, claims that involve privacy rights are more frequently brought in terms of the general right to develop one's personality freely in article 2(1).[523] The Canadian Charter also does not recognize privacy as an explicit right. It does, however, recognize a right to be 'free from unreasonable search and seizure' in section 8 of the Charter and a right to 'life, liberty and security of the person' in section 7 of the Charter, both of which protect some privacy interests.

The picture becomes even more complicated when we take a look at what is protected. The ECtHR's jurisprudence in relation to article 8 is a case in point. It has become a 'catch all' section which covers a wide variety of interests that may not immediately be apparent to be covered by 'family and private life'. In *Odievre v France*, for example, the court extended article 8 to cover the right of an adoptive child to know the identity of her biological mother.[524] Similarly, in Germany where privacy is not explicitly protected but where all interests enjoy protection under a general right to freedom, a number of interests that would elsewhere be considered privacy rights are covered under the broad rubric of personality rights. In South Africa section 14 grants a general right to privacy and protects against specific types of intrusions in the form of search and seizure and privacy of communications.[525] In Canada the right is most circumscribed, relating solely to search and seizure.

[523] H-D Horn ' Schutz der Privatsphäre' in J Isensee & P Kirchhof *Handbuch des Staatsrechts: Band VII: Freiheitsrechte* (2009) at 159-160.
[524] *Odievre v France* (Application no. 42326/98), Judgment of 13 February 2003.
[525] J Neethling 'The concept of privacy in South African law.' *S. African LJ* 122 (2005) 18.

2. Germany

As privacy as such is not protected by the German Basic Law, many cases that would fall under the right to privacy in other jurisdictions are dealt with in terms of article 2(1) read with article 1, which collectively are referred to as personality rights (*Persöhnlichkeitsrechte*). That right protects a variety of interests, including what is referred to as informational self-determination. Additionally, article 13 protects the inviolability of the home.

Here, the Federal Constitutional Court, has established a system of different factors that determine the weight of the protected interest. The most intimate details of one's life, such as a diary, are protected heavily and require significant reasons for their disclosure.[526] Other factors include how the information can be used or combined with other information.[527] Factors relating to how the information was gathered and whether information is given voluntarily or forcibly also play a role.[528]

In practice, in most cases the impugned law itself passes the proportionality test but often the court will place requirements on how the manner in which the information is gathered and treated. We can demonstrate this by looking at two decisions of the Federal Constitutional Court: The *Census Act* case and the *Telecommunications Surveillance* case.

2.1 The Census Act Decision

The *Census Act* case illustrates how this system works in practice. The case dealt with the constitutionality of the 1983 Census Act, which permitted the collection

[526] BVerGE 54, 148 (*Diary, Tagebuch*). Although the *Diary*-judgment seems to have advocated that the most intimate sphere would be untouchable as the core of the right to privacy, in light of latter judgments, in particular *Tonband* and *Volkszählung*, seem to limit this finding. See, M-E Geis 'Der Kärnbereich des Persölichkeitsrechts – Ein Plädoyer für die Sphärentheorie' *Juristenzeitung* 46(3) (1991)
[527] BVerGE 65, 1. Paras 152-159. A partial English translation can be found at https://freiheitsfoo.de/census-act/.
[528] *Ibid*.

and storing of personal data from citizens. The court, in evaluating the constitutionality of the act, begins with an analysis of whether article 2(1) has been limited. Following its established case law, the court states that article 2(1) requires that a person be able to decide for herself which details of her life are revealed and under what circumstances.[529] The court goes on to consider the impact of technological advancements for the right to informational self-determination, which make it more difficult for the citizen to know and control when, how and in what circumstances her data is being stored and used.[530] Moving onto the proportionality analysis the court makes a few remarks about the factors that influence how severely the right to informational self-determination is limited. In the first place the court notes that it is not only the manner in which the data is collected but also what it is used for and the ways in which it can be used and connected with other data.[531] Further, the court states that it is necessary to distinguish between personal information that is collected anonymously or in situations where the identity of the giver is known.[532]

In terms of the proportionality inquiry itself, the court goes on to acknowledge the importance of a census for the purposes of policy-making (least these be left to fate, as the court notes).[533] The law also satisfies the principle of proportionality to a large extent,[534] with a number of exceptions regarding the methods of data collection. The first regarded the sharing of non-anonymized information, which the court held that it could be shared with other public officials for the purposes of processing but it would be unconstitutional to share the non-anonymized data with other parties.[535] Secondly, the court held that it was unconstitutional to cross-reference the census data with the population

[529] Para 152. ('Die bisherigen Konkretisierungen durch die Rechtsprechung umschreiben den Inhalt des Persönlichkeitsrechts nicht abschließend. Es umfaßt ... angedeutet worden ist - auch die aus dem Gedanken der Selbstbestimmung folgende Befugnis des Einzelnen, grundsätzlich selbst zu entscheiden, wann und innerhalb welcher Grenzen persönliche Lebenssachverhalte offenbart warden.')
[530] Paras 153-4.
[531] Para 159.
[532] *Ibid*.
[533] Para 165.
[534] Para 181.
[535] Para 202.

register.[536] This was premised on the fact that if compared to the population register, the information could end up being used for administrative purposes rather than giving a more accurate picture of the population.[537] The court also struck down a number of additional provisions since these allowed the transmission of data for either no purpose that was rationally connected to the census and could be used for the enforcement of administrative orders or anonymization was required before the data could be transferred to different authorities.[538]

The *Census Case* is emblematic of the Federal Constitutional Court's reasoning in privacy cases. The court allows limitation of the right, provided that the limitation is done in a manner that respects privacy rights. The constitutionality of the *Census Act* then hinges on the way in which data could be manipulated to reveal less about the subjects of the census and as such privacy was limited less.

2.2 The Telecommunications Surveillance Case

The *Telecommunication Surveillance* case illustrates the same basic way of reasoning privacy interests as displayed in the *Census Act* decision considered above. The case concerned a challenge to the so-called G 10 Act[539], in reference to article 10 of the Basic Law which it explicitly purported to limit.[540] The act expanded the power of the Federal Intelligence Service (*Bundesnachrichtendienst*) to conduct surveillance of telecommunications. A professor, who researched international drug trafficking, alleged that a particular part of the act related to strategic surveillance. The impugned section, §3, permitted the monitoring of individuals if they were suspected of planning or had committed a serious criminal offense that posed a threat to national security. The previous article was aimed at protecting the state against an armed attack

[536] Para 203.
[537] Para 208-9.
[538] Para.s 210-215.
[539] The full title of the Act is: 'Gesetz zur Beschränkung des Brief-, Post- und Fernmeldegeheimnisses (Gesetz zu Artikel 10 Grundgesetz)'.
[540] BVerfGE 100, 313 (*Telekommunikationsüberwachung I*) I have used the translation of the title provided by Kommers and Miller at 413-4.

and was directed against regions from which such a danger might emanate. The amended Act made several legislative inroads: it expanded the scope of the reasons for surveillance as well as the scope of technology that may be surveilled from landline telephones to include international wireless traffic, it removed the prohibition to share the information gathered between government agencies and it made it possible to use the information in ordinary criminal prosecutions. It was impossible to use the previous §3 against individual persons as this was not technologically possible but where a person could be identified from the context, it was prohibited to use this information against that person with some exceptions for certain types of crimes.[541] Thus, the right to informational self-determination protects against the unlimited collection and disclosure of personal information.[542]

The court upheld §3 with the relatively narrow exception of striking down the permission of surveillance that covers surveillance for money laundering abroad. Having found that the impugned section serves a legitimate interest and that it is rationally-connected and necessary,[543] the court turns to an evaluation of proportionality in the narrow sense. Here the court begins with enumerating the criteria for evaluating the competing rights. On the side of privacy, the court considers the important factors to be: whether the persons remain anonymous, what conversations are captured and what the content of those conversations is and what disadvantages may follow for the rights-holder or that she may reasonably fear. On the side of public interest, the gains depend how great the danger is and how likely it is to occur.[544]

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[541] Para 153-4.

[542] Para 155. ('Freie Entfaltung der Persönlichkeit setzt unter den modernen Bedingungen der Datenverarbeitung den Schutz des Einzelnen gegen unbegrenzte Erhebung, Speicherung, Verwendung und Weitergabe seiner persönlichen Daten voraus. … Das Grundrecht gewährleistet insoweit die Befugnis des Einzelnen, grundsätzlich selbst über die Preisgabe und Verwendung seiner persönlichen Daten zu bestimmen.')

[543] Paras, 210, 211-216, 217, respectively.

[544] Para 219 (The original: 'Der Gesetzgeber muß aber zwischen Allgemein- und Individualinteressen einen angemessenen Ausgleich herbeiführen. Dabei spielt auf grundrechtlicher Seite eine Rolle, unter welchen Voraussetzungen welche und wieviele Grundrechtsträger wie intensiven Beeinträchtigungen ausgesetzt sind. Kriterien sind also die Gestaltung der Einschreitschwellen, die Zahl der Betroffenen und die Intensität der Beeinträchtigungen. Diese hängt wiederum davon ab, ob die Gesprächsteilnehmer als Personen anonym bleiben, welche Gespräche und welche Inhalte erfaßt werden können … und welche Nachteile den Grundrechtsträgern aufgrund der Überwachungsmaßnahmen drohen oder von

In its balancing, the court disagreed with the applicant that the surveillance was so extensive as to violate the core of the right in article 10 of the Basic Law. The court's reasoning is based on the fact that the surveillance is circumscribed in a number of ways. In the first place, what is surveilled is only international, non-wire-line communication.[545] Thus domestic communication was excluded from the ambit of surveillance as was wire-line communication (with the exception of surveillance for the purposes of preventing an armed attack). Further, whether a communication goes through a telephone wire or a satellite is determined automatically depending on the capacity of each of the systems at the time. Neither the persons communicating nor the Intelligence Agency could determine whether a particular call would be recorded. Thus it is always possible that a recording will be made, but in actual fact that possibility is quite low.[546] There is a further technical restriction on the surveillance arising from the fact that only one of the signals (the downlink) can be captured, while it would take considerable effort to record the uplink and thus is not done.[547] There are further limitations that arise from the assessment of dangers to the state that are considered to be actual dangers and rule out the possibility of excluding those from surveillance, a state of affairs that had in fact happened with regard to terrorism and drug smuggling.[548]

On the other hand, the court considered that unlike the act before its amendment, which only permitted surveillance of communications to the area of the Warsaw Pact, the impugned section vastly expanded the scope of the limitation of the right.[549] Similarly, the anonymity of the communicators could no longer be guaranteed in the same way, since technological advancement meant

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ihnen nicht ohne Grund befürchtet werden. Auf seiten der Gemeinwohlinteressen ist das Gewicht der Ziele und Belange maßgeblich, denen die Fernmeldeüberwachung dient. Es hängt unter anderem davon ab, wie groß die Gefahren sind, die mit Hilfe der Fernmeldeüberwachung erkannt werden sollen, und wie wahrscheinlich ihr Eintritt ist.')

[545] Para 222.
[546] Para 223.
[547] Para 224.
[548] Para 225.
[549] Paras 226-228.

that the contact details could now also be saved.[550] The court also took into account that a person could not, through her own behavior, influence whether she was subject to surveillance or not.[551] Finally, the court took into account that the existence of the law alone could cause harm by *a prior* limiting the discussion of certain topics of conversation, even if no actual surveillance was taking place.[552]

Against this the court contrasted the 'increased danger' caused by 'international organized crime, especially in the areas of dealing in arms and drugs and money laundering'.[553] The court acknowledged that while these dangers were not as serious as that of an armed attack, they nevertheless constitute serious threats to the state.[554] The court then went on to hold that the safeguards, without which the act would be unconstitutional, were sufficient. The court held that these did not have to be identical to those found in the policing and criminal justice context because of the international dimension of the surveillance.[555] Ultimately, the court found that the safeguards in the act are sufficient to ensure the constitutionality of the act. These safeguards include the prohibition against surveying particular connections and the use of keywords to identify monitored discussions.[556] Thus, with the exception of money laundering which the court did not find to be a sufficiently serious threat,[557] the court upheld the amended §3 of the G10 Act.

The jurisprudence of the German Federal Constitutional Court on informational self-determination shows that balancing in privacy cases hinges primarily on distinguishing between private and public elements of information. The court draws a distinction between different types of factors that influence how private data is collected; some of it being more private, such as very intimate data like a diary or a private conversation, some of it being less private, like anonymized

[550] Para 229.
[551] Para 231.
[552] Para 324.
[553] Para 237.
[554] *Ibid*.
[555] Para 241.
[556] Paras 242-243.
[557] Para 245.

data used for a census, or even data that is collected rather haphazardly like telephone conversations that have been randomly selected.

4. European Court of Human Rights

The recognition that a right to reputation in article 8 could counterbalance limitations of section 10 rights to free expression came relatively surprisingly but now occupies a central position in the case law on both of these rights.

The court has developed a relatively elaborate set of criteria against which it performs the balancing exercise. The fault-line between articles 8 and 10 runs along a number of criteria that the court summarized in *von Hannover v Germany (No2)*. The court takes into account the 'contribution to a debate of general interest' made by the publication as evaluated through a number of additional criteria, including: 'how well known the person is and the subject of the report,[558] 'content, form and consequence of the publication,[559] 'conduct of the person concerned,'[560] 'circumstances in which the photo [or other material] was obtained'. [561] Each of these categories, then, has further sub-criteria and distinctions that the court uses to evaluate each of the criteria in the preceding list.

Here, the court uses a range of categories to determine the weight to be attached to each competing right. For example, publications about politics and crime fall within the category of 'debate of general interest',[562] and so too are questions of the administration of sports,[563] but questions that are of a purely personal nature, such as one's love life or financial difficulties, are excluded from the

[558] *Von Hannover* para 110.
[559] Para 113.
[560] Para 111.
[561] Para 113.
[562] *Egeland & Hanseid v Norway Application nos. 34438/04, Judgment of 16 April 2009*.
[563] *Nikowitz and Verlagsgruppe News GmbH v. Austria*, no. 5266/03 at para 25, judgment of 22 February 2007; *Colaço Mestre and SIC – Sociedade Independente de Comunicação, S.A. v. Portugal*, nos 1182/03 and 11319/03 26 April 2007 at paras 28,; and *Sapan v. Turkey*, no. 44102/04 judgment of 8 June 2010 at para 34.

ambit of debates of public importance.[564] Similarly, with regard to the content of the report and its subjects, the court has held that

> the role or function of the person concerned and the nature of the activities that are the subject of the report and/or photo constitute another important criterion, related to the preceding one. In that connection a distinction has to be made between private individuals and persons acting in a public context, as political figures or public figures.[565]

And further that '[a] fundamental distinction needs to be made between reporting facts capable of contributing to a debate in a democratic society, relating to politicians in the exercise of their official functions for example, and reporting details of the private life of an individual who does not exercise such functions'.[566]

The way the framework is, then, applied in order to balance the competing interests determines the width of the margin of appreciation. Here, the court undertakes its own assessment of the factors. Even where a case is arguably difficult, such as might be the case with *von Hannover v Germany*, the court performs its own evaluation. In the case law on conflicts between articles 8 and 10, the court leaves the states' parties very little room for assessments of the different criteria. Even in the case of an ambiguous phenomenon like 'infotainment' in *von Hannover*, the court applies its own evaluative standard even against the judgments of the highest national courts. In particular, those factors on the privacy side of the equation – 'content, form and consequence of the publication', 'conduct of the person concerned,' 'circumstances in which the photo [or other material] was obtained' – are applied to the court's own criteria. Consequently, there is relatively little by way of a margin of appreciation in the balancing of privacy and expression rights.

The conflict between private life and expression is relatively unique within our survey of privacy, which similar to domestic systems the conflict is one that takes place between private parties and usually does not implicate deference.

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[564] *Standard Verlags GmbH, v Austria* No. 34702/07 Judgment of 10 January 2012 at para 52; *Hachette Filipacchi Associés (*ICI PARIS) *v France* 12268/03 Judgment of 23 July 2009..
[565] *von Hannover* at para 110.
[566] *Ibid*.

The balancing of the privacy interest works much in the same way as it does in other conflicts of privacy. The criterion of 'content form and consequence of publication' is, however, unique to the conflict between privacy and expression, while the others are also found in other areas of the right to privacy. Just how far the publication spread is relatively easy to determine broadly speaking based on the distribution figures of a paper. So this unique criterion also fits rather neatly into the overall picture of the right to privacy as being made up of normatively and empirically discrete elements.

5. South Africa

A similar picture emerges in the South African case law. The court's case law draws heavily on foreign law in establishing the framework for the evaluation of privacy claims. As such, it is hardly surprising that the fundamentals would be very similar to those found in the other jurisdictions.

5.1 Bernstein v Bester

Bernstein and Others v Bester NO and Others[567] is the leading case in relation to the South African right to privacy and 'remains [the] richest and most comprehensive interpretation of the right.' [568] The case concerned the constitutionality of sections 417 and 418 of the Companies Act[569] which regulated the process through which persons were summoned and examined in bankruptcy proceedings.[570] Although, the challenge itself was always a far stretch, Justice Ackermann makes significant remarks regarding the nature of privacy in general.

[567] [1996] ZACC 2.
[568] I Currie & J de Waal *Bill of Rights Handbook* (1998) at 297.
[569] 61 of 1973.
[570] The full schemes of the impugned sections, which are quite detailed, are laid out in paragraph 3 of the judgment.

Justice Ackermann's method is comparative in nature[571] and the judgment is rooted in an overview of US American, Canadian and German law. He concluded that 'it seems to be a sensible approach to to say that the scope of a person's privacy extends *a fortiori* only to those aspects in regard to which a legitimate expectation of privacy can be harboured'.[572] The right to privacy, then, is rooted in citizens' expectations rather than reasons like those found in the case law regarding other rights. The second guiding principle – the continuum of privacy interests – was also introduced in *Berstein v Bester*. There the court held that '[p]rivacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks away'.[573]

Ultimately, the argument regarding privacy turned on the scope of the inquiry permitted by the impugned sections.[574] The reason why this did not limit the right to privacy lies in the nature of that knowledge. As Justice Ackermann held,

> [i]t is difficult to see how any information which an individual possesses which is relevant to the purpose of the enquiry can truly be said to be private. One is after all concerned here with the affairs of an artificial person with no mind or other senses of its own; it depends entirely on the knowledge, senses and mental powers of humans for all its activities.[575]

He put it even more strongly some paragraphs later, underscoring:

> The establishment of a company as a vehicle for conducting business on the basis of limited liability is not a private matter. It draws on a legal framework endorsed by the community and operates through the mobilization of funds belonging to members of that community. Any person engaging in these activities should expect that the benefits inherent in this creature of statute, will have concomitant responsibilities. These include, amongst others, the statutory obligations of proper disclosure and accountability to shareholders. It is clear that any information pertaining to participation in such a public sphere, cannot rightly be held to be inhering in the person, and it cannot consequently be said that in relation to such information a reasonable expectation of

[571] In general, on Justice Ackermann's habit of resorting to comparative law, see T Roux 'The dignity of comparative constitutional law' *Acta Juridica* 2008(1) (2008) 185-203.
[572] *Berstein v Bester No* 1996 (2) SA 751 (CC) at para 71.
[573] Para 75.
[574] Para 82.
[575] Para 83.

> privacy exists. Nor would such an expectation be recognised by society as objectively reasonable.[576]

It is possible to identify a number of closely related reasons in these excerpts as to why the law did not unjustifiably limit privacy. The first relates to the character of the evidence in section 247 proceedings. Here the court argues that this is public in nature as it relates to the running of a company and as such does not 'inhere to the person' or more private affairs.

5.2 Mistry

This idea of a continuum of privacy interests has provided 'relatively easy answers' in a number subsequent of cases.[577] In *Mistry v Interim National Medical and Dental Council of South Africa* the court struck down a part of the Medicines Act that was phrased so broadly as to permit inspectors to 'inspect not only medicine cabinets or bedside drawers, but also files which might contains a person's last will and testament, private letters, and business papers.'[578] This intrusion into the 'inner sanctum' of privacy created an unjustifiable limitation of the right to privacy.[579] Similarly, in *Directorate: Serious Economic Offences v Hyundai Motor Manufacturers*, a case concerning the constitutionality of the search and seizure powers in the National Prosecuting Authority Act, the court found that the Act posed an unjustifiable limitation on the right to privacy in that it allowed the search of private homes as well as business premises.[580] *National Coalition for Gay and Lesbian Equality* may also be counted as one of the 'easy' cases. There the court, when considering the constitutionality of the prohibition of gay sex, stated that the law intruded into 'the sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community'.[581]

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[576] Para 85.
[577] I Currie & J De Waal *The Bill of Rights Handbook (5th ed.)* (2005) at 320.
[578] *Mistry v Interim National Medical and Dental Council* 1998 (4) SA 1127 at para 21.
[579] Para 23.
[580] *Directorate: Serious Economic Offences v Hyundai Motor Manufacturers* 2001 (SA) 545 (CC).
[581] *National Coalition for Gay and Lesbian Equality v Minister of Justice and Others* 1999 (1) SA 6 (CC) at para 32.

S v Jordan, although heavily criticized for its outcome and reasoning in other aspects, probably also falls within the category of 'easy' cases, albeit with slight more difficulty due to the ambiguity in how to characterize prostitution from the point of view of the right to privacy.[582] The case concerned the constitutionality of sections 2 3(b) and 3(c) of the Sexual Offences Act, which was challenged on a number of different grounds, including human dignity, freedom of person, privacy and economic activity.[583] Ultimately the outcome of the case would not have changed on the basis of the privacy analysis, with both the majority and minority rejecting that privacy considerations would render the law unconstitutional. Nevertheless of interest for the purposes of our discussion are the differences in the analysis of the privacy arguments between the majority and the minority.

The majority begins by distinguishing the present case from *National Coalition* and then goes on to give some reasons as to why privacy is either not implicated at all or only peripherally; ranging from the claim that crimes do not necessarily deserve the protection of the right to privacy,[584] to the fact that the prostitute invites the public to come and engage in the illegal conduct.[585] The majority further argued that even if privacy were implicated, it would be so only in a peripheral manner as the activity protected is primarily of a commercial nature.[586] The minority fleshed out these reasons in a little more detail, whilst agreeing largely in substance. '[C]entral to the character of prostitution', the minority held, 'is that it is indiscriminate and loveless'.[587] The minority highlighted two further characteristics of prostitution that meant that prostitution did not belong to the inner sanctum of privacy, namely that it was done for commercial reasons: 'By making her sexual services available for hire to strangers in the marketplace, the sex worker empties the sex act of much of its

[582] [2002] ZACC 22; 2002 (6) SA 642 (CC). See, E Bonthuys 'Women's Sexuality in the South African Constitutional Court' *Feminist Legal Studies* 14.3 (2006): 391-406.
[583] Para 1.
[584] Para 28
[585] *Ibid*.
[586] Para 29.
[587] Para 83.

private and intimate character.'[588] And further that the sex worker was not engaging in sex in order to further human relationships: 'She is not nurturing relationships or taking life-affirming decisions about birth, marriage or family; she is making money.'[589] Thus, according to the majority and the minority the limitation of privacy would have been minor in any event and justifiable through the interest of proscribing prostitution and brothel keeping.[590]

Thus, much like the case law of other courts, the South African court weighs privacy interests by considering certain places, like the home, or activities, like sexual intercourse, to be private. While not necessarily entirely excluded from the ambit of privacy, commercial activities and public places are on the outskirts of the right. The court has not yet faced what might be considered difficult privacy cases and thus it is impossible to predict how it would deal with the arguments in a case requiring a tighter balance. But even on the basis of the cases analyzed above, we can note some close similarities to the German and European case laws in how the courts construct the normative architecture of privacy and the discretionary area that is left to Parliament.

6. Canada

Although Canadian law protects privacy through a variety of legal instruments, the Charter only contains one provision, section 8, that protects against unreasonable search and seizure. Here, the Supreme Court has created a system very similar to South Africa where a 'legitimate expectation of privacy' and categories of places, activities and information that require special protection, such as the home, sexual intercourse and medical data.

[588] *Ibid*.
[589] *Ibid*.
[590] Paras 29; 84.

Much of the case law is naturally concerned with official searches of premises, as is often the case in privacy cases in general but specifically so given the limited nature of the protection of the right in the Canadian Charter. There are two aspects to this area of law that affect the relevance of the separation of powers. The first is that much of the law in the area is (judge-created) common law, meaning that the question of deference to Parliament (or another non-judicial institution) does not arise. Secondly, statutory provisions in the area are often phrased in broad terms and while constitutional challenges occur, often a case will be dealt with through the development of the common law. Ultimately, it is left to the courts to strike the balance between the competing interests in the application of the law. So for example, in *R v Feeney* where the court had to assess the constitutionality of a warrantless search of a person's home, the decision came down to whether the statutory scheme and the accompanying common law had been applied in accordance with the Charter.[591]

Where challenges to statutes do occur (as well as in those cases where statutes are merely applied in accordance with the Charter or the common law is adapted) the structure of the right to privacy is very similar to that found in the other legal systems. The owner of a vehicle has a reasonable expectation of privacy.[592] The owner of a house has a higher expectation of privacy than a visitor.[593] A hotel room is also considered to enjoy some level of privacy protection but this is reduced, if the occupant invites members of the public to enter.[594] Certain types of information that 'tend to reveal intimate details of a lifestyle and personal choices of the individual' also deserve more protection than information that does not, such as utilities bills.[595]

The Supreme Court, then, balances section 8 cases in much the same way as the other courts we looked at. The foundation is the 'reasonable expectation of privacy' also established in German and South African law and then proceeds on

[591] *R v Feeney* [1997] 2 SCR 13, paras 42-51.
[592] *R v Harris*on [2009] 2 SCR.
[593] *R v Edwards* [1996] 1 SCR 128.
[594] *R v Wong* [1990] 3 SCR 36.
[595] *R v Plant* [1996] 3 SCR 281.

the basis of categorizing places, activities and information and how such categorization relates to the reasonable expectation.

7. Conclusion

The way in which the separation of powers works in right to privacy cases seems to be a function of three factors. The first is that the considerations that need to be taken into account when balancing privacy claims, are of the kind where reality maps quite easily onto abstract categories. The activities where the right to privacy becomes relevant often involve such relatively clearly discernable objects, such as the home or specific identifiable data. Unlike speech, which involves drawing the line between is harmful, privacy considerations, usually in relation to entities, can be isolated for the purposes of legislation. Empirically speaking then, what makes up the various categories that underlie the normative architecture of privacy is relatively straightforward to determine.

The second closely related factor is what might be called a strong normative gradation between the different categories of spaces, activities and information that constitute the normative architecture of privacy. Most people would agree that there is a significant difference in terms of the protection of privacy between a private space, like the home, or a public space, like a park or a street. Similarly, most people would agree that there is a rather evident normative difference between some information, such as medical records, and others, such as utilities bills.

The final factor is that limitations to the right to privacy are usually caused by individual, discrete, acts that involves the state, such as searching a particular space or intercepting particular data. As a consequence, it is relatively easy to build mechanisms that protect the individual's right – through judicial oversight or other mechanisms – before the limitation of the right takes place. We find some resemblance with cases in the domain of criminal procedure here, where

courts routinely rely on their ability to evaluate police procedures and their functioning.[596]

[596] Of course, many of the cases that fall within the sphere of privacy are in fact cases of criminal procedure but this observation also applies more broadly.

Chapter 5. Freedom of Religion

1. Introduction

The final substantive chapter of this thesis concerns the freedom of religion. Having disappeared almost entirely from the public agenda, religion has become one of the most controversial topics in the public, judicial and philosophical spheres over the past two decades. In particular, the wearing and public display of religious symbols has become a hotly contested topic in courts in almost all liberal democracies throughout the world. In addition to the case law, an increasing number of philosophical arguments is being advanced.[597]

As such it is hardly surprising that religious rights have also seen a great number of highly controversial decisions by courts. The cases relating to crucifixes and headscarves before the German Federal Constitutional Court and the decisions in *Lautsi v Italy* and *SAS v France* were, in fact, already mentioned in the introduction as examples of cases where courts were said to either have overstepped the mark or stepped where they should not have. Conversely these cases are seen as instances where the court failed to protect rights by acting too deferentially.

My argument here will be that the cases turn on the understanding of the relationship between the state and church – or the understanding of state neutrality – that is employed. Here, the courts have not adequately theorized the normative arguments and empirical questions involved. The cases are consequently less well-reasoned and more difficult to defend from a principled perspective.

[597] The number of works addressing theoretical dimensions of protecting freedom of religion see, e.g. B Leiter *Why Should We Tolerate Religion* (2014); L Zucca *A Secular Europe* (2012); J Weiler *Ein Christliches Europa: Erkundungsgedenke* (2004); FB Cross *Constitutions and Religious Freedom* (2015).

2. Theory and Doctrine of Freedom of Religion

Religious rights are somewhat different from many other rights in two important respects. The first is that more often than not the state already has some relationship with religion in a way that it does not have with other rights. This, of course, makes sense as the organization of the state has often been linked to prevailing religious ideas and the role religion has traditionally played in public affairs. Thus most, probably all, societies already have some conception of the public role of religion (even if it is in the form of separating state and church entirely[598]).

The second important difference is that throughout the world, and the three state systems, there are vastly different ways of organizing religion in a state. Models of church state relations range from animosity towards religion, which denies any role to religion in the public sphere, to theocracies, which involves a 'substantive fusion' of the state with religion, to a point where the law of the state is equal to religious dogma.[599] In between these models are various models that endorse some relationship between state and church, such as models based on an established or endorsed religion, consisting of formal unity of the state with significant substantive division, separation models, that combine different degrees of separation between state and church such as the French model of *laïcité*, and finally models based on accommodation and cooperation.[600]

Religious rights are protected throughout the four systems in relatively similar terms. In practice, no state has a fully laid out system detailing what role religion plays in all of its affairs and debates about the nature of relationship between state and religion take place continually.[601] As such the right to religious freedom

[598] The regulation of religion in the US is probably one of the shortest in the world. The first amendment simply states that: 'Congress shall make no law respecting an establishment of religion or prohibiting the practice thereof.'
[599] D Bilchitz & A Williams 'Religion and the public sphere: towards a model that positively recognises diversity# *South African Journal on Human Rights* 28, no. 2 (2012): 146-175.
[600] *Ibid* at 148-158
[601] For Canada see: I Benson 'The Freedom of Conscience and Religion in Canada: Challenges and Opportunities' *Emory Journal of International Law* (2007) 21 111. See also G Bouchard & C Taylor

can be seen as a general provision sitting in some broader, not always precisely defined framework between church and state. This is generally recognized to be the case for Germany, where article 4 is seen as a result of the constitutional framers' inability to agree on the relationship between state and church.[602] As such it represents the 'centerpiece' of a myriad of provisions in the Basic Law that govern the status of the church in Germany. The same would appear true for South Africa and Canada where the right to freedom of religion is protected among other laws regulating religion within the broader constitutional framework. The European Convention is, of course, different in that it does not lay down a system for state–church relations but, nevertheless it can be seen as protecting freedom of religion in general when states protect it in their own particular circumstances.

In terms of the text of the religious freedom clause, the texts are relatively similar. The German Basic Law guarantees that the 'freedom of faith and of conscience, and the freedom to profess a religious or philosophical creed shall be inviolable' as well as a number of more specific rights.[603] Section 2(a) of the Canadian Charter guarantees everyone the fundamental 'freedom of conscience and religion'. The South African Bill of Rights grants everyone the 'right to freedom of conscience, religion, thought, belief and opinion'.[604] The European Convention guarantees that '[e]veryone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance'[605].

Building the Future: A Time for Reconciliation (2008). The report addressed the specific situation of Quebec. See also LB Tremblay 'The Bouchard-Taylor Report on Cultural and Religious Accommodation: Multiculturalism by Any Other Name' *European University Institute* Working Papers *2009/18.* For South Africa, see 'Religion and the public sphere: towards a model that positively recognises diversity# *South African Journal on Human Rights* 28, no. 2 (2012): 146-175.

[602] See, Kommers & Miller at 538. This is also mentioned by the Federal Constitutional Court in the *Church Construction Tax Case* BVerGE 19, 206 at 218.

[603] Article 4.

[604] Section 15.

[605] Article 9.

We can then expect religious rights reasoning to be quite unique in the ways in which courts construct the normative architecture they use for balancing, with a variety of existing theories to fall back on. Especially, the European Court of Human Rights' position would be interesting as Europe has a broad variety of different systems when it comes to regulating the role of religion in society.

3. Canada

Section 2(b) was not expected to be one of the more controversial rights when the Charter was enacted, given that religion in Canada, like in many other places, was peripheral to public affairs.[606] Nevertheless, that section quickly became invoked in a number of early and important cases, both from the perspective of the right to freedom of religion and from the interpretation of section 1, with cases such as *Big M Drug Mart* and *Edward's Books* laying the foundations of the right in the jurisprudence of the Supreme Court as well as important general principles of applying section 1. But after its initial importance the section was invoked less in litigation until recently when it has again been 'restored … to a state of stature in the [court's] jurisprudence'[607], with a high number of recent cases such as *Amselem*, *Hutterian Bretheren*, *R v NS* and *Multani* centering around section 2(b).

In practice, section 2(b) has given rise to litigation in a number of contexts: religious speech,[608] Sabbath and holiday observance,[609] religious dress,[610] marital practice,[611] refusal of treatment,[612] and a variety of issues in the educational context relating to the school curriculum.[613] In addition to challenges to Sunday opening laws,[614] the court has considered the right to

[606] R Moon *Freedom of Conscience and Religion* (2015).
[607] J Cameron Law, Politics, and Legacy Building at the McLachlin Court in 2014 Constitutional Cases 2014, 71 S.C.L.R. (2d) 1- 24, 2015.
[608] *R v. Big M Drug Mart* [1985] 1 SCR 295.
[609] *Big M Drug Mart; Edward's Books*.
[610] *Multani v. Commission scolaire Marguerite-Bourgeoys* 2006 SCC 6.
[611] *Halpern et al. v. Canada (AG)*
[612] *B. (R.) v. Children's Aid Society of Met. Toronto*, [1997] 1 S.C.R. 315.
[613] *Loyola High School v Quebec (AG)* [2015] 1 S.C.R. 613.
[614] *Big M Drug Mart*; *Edward's Books* [1986] 2 SCR 713.

freedom of religion in a number of contexts such as the rights of parents to educate their children on religious matters,[615] the right to refuse medical care for children,[616] and the education of children.[617] Only a few of these cases, *Hutterian Bretheren R v NS*, were challenges to statutes and the others fell into what would be considered cases for reasonable accommodation, some, such as *Multani*, *R v NS,* being brought against public bodies but many others arising out of private disputes, such as *Amselem*, dealt with conflicts between private parties.

3.1 Sunday Closing Laws: R. v. Big M Drug Mart; Edward's Books

The leading case on freedom of religion in Canada is *R v Big M Drug Mart* in which the Supreme Court struck down the entirety of the Lord's Day Act, a statute prohibiting commercial activity on a Sunday.[618]

The Chief Justice writing for the court laid out the fundamental principles of the freedom of religion in Canada as: '[a] truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct.'[619] Thereafter, the court went on to state that '[t]he essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination'.[620]

The section 1 analysis itself in the case is very brief. Two reasons had been advanced in justification of the Lord's Day Act. First, that the Christian day of rest was the most convenient one in general.[621] This was dismissed by the court as 'fundamentally repugnant' because it sought to uphold the law on the very basis

[615] *Young v Young* [1993] 4 SCR 3.
[616] *B. (R.) v Children's Aid Society* [1995] 1 SCR 315; *AC v Manitoba* [2009]
[617] *R v Jones* [1986] 2 SCR 284; *Adler v Ontario* [1996] 3 SCR 609.
[618] *R v Big M Drug Mart* [1985] 1 SCR 295. More generally, see P Hogg *Constitutional Law of Canada* (2011) 42-1 – 42.19.
[619] Para 94.
[620] *Ibid*.
[621] Para 140.

on which it was being challenged.[622] The second reason that had been advanced to justify the act was that a common day of rest was necessary.[623] This, too, the court rejected as a common day of rest had clearly not been Parliament's intention when enacting the Lord's Day Act, which explicitly made Sunday a day of Christian worship.[624]

3.2 Amselem and Others v Syndicat Northcrest

Amselem arose out of a private dispute between condominium owners and a condominium corporation. While the case does not involve a state party, the arguments in the judgment are nevertheless instructive as to how the court analyzes religious rights cases at times. The appellants were Orthodox Jews who wanted to set up succahs on their balconies, which are used in the observance of the nine day Jewish religious celebration of Succot. The respondents requested the removal of the succahs, relying on the by-laws in the co-ownership agreement. Although the case is best-known for its discussion on establishing an interference with the right to freedom of religion,[625] the substantive arguments in the case are also of interest for our purposes of analyzing the relationship between proportionality and deference.

The majority's justification analysis is brief and conclusory and comes in at nine paragraphs. The condominium owners claimed that the limitation of the appellants' religious right was justified by the co-owners' economic, aesthetic

[622] *Ibid*.
[623] Para 141.
[624] *Ibid*.
[625] The court split on this question. The majority held that the right to religion was limited if two conditions were satisfied: '(1) he or she has a practice or belief, having a nexus with religion, which calls for a particular line of conduct, either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual's spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials; and (2) he or she is sincere in his or her belief.' (Para 56). The minority would have preferred a test for limitation of the right that would require three elements: 'a claimant relying on conscientious objection must demonstrate (1) the existence of a religious precept, (2) a sincere belief that the practice dependent on the precept is mandatory, and (3) the existence of a conflict between the practice and the rule'. (Para 144). The majority's test (often referred to as the *Amselem* test or 'sincere belief test' is what has since this case been considered the test for a limitation of the right to freedom of religion.

and security interests in the property.[626] The court found that these limitations were at most very light and the respondents had not adduced sufficient evidence to make the claims of economic disadvantage.[627] The court also rejected the respondents' claim that the succahs constituted an aesthetic impediment. The court's argument on this is exactly two-sentences long and the more substantive one reads: 'Although residing in a building with a year-long uniform and harmonious external appearance might be the co-owners' preference, the potential annoyance caused by a few succahs being set up for a period of nine days each year would undoubtedly be quite trivial.'[628]

Notably, the court does not say anything about the severity of the limitation of the right to freedom of religion. There is a passing reference to its importance when the court deals with the aesthetics arguments, where it states that that 'nominal, minimally intruded-upon aesthetic interests'[629] should not 'outweigh the exercise of the appellants' religious freedom is unacceptable'[630]. The court follows this with the statement that '[i]ndeed, mutual tolerance is one of the cornerstones of all democratic societies'[631] and that '[l]iving in a community that attempts to maximize human rights invariably requires openness to and recognition of the rights of others'[632]. The balancing exercise in *Amselem* is then somewhat incomplete. While it covers the most important parts and on a charitable reading can be considered to be well-reasoned, it nevertheless leaves out the major questions of how to evaluate the severity of the limitation of the right to freedom of religion.

3.3 Hutterian Bretheren

Driver's licenses in the Alberta province are ordinarily issued with a photograph. Until 2003 drivers in the Wilson County Hutterian Bretheren could on religious

[626] Paras 82 and 83.
[627] Para 85.
[628] Para 86.
[629] Para 87.
[630] *Ibid*.
[631] *Ibid*.
[632] *Ibid*.

grounds be issued a driver's license without a photograph. The Wilson County Hutterian Bretheren maintain a rural lifestyle and aim to be self-sufficient but occasionally some of its members must make use of cars for business and other activities. The legal scheme governing driver's licenses in Alberta gave the registrar the power to make exceptions on religious grounds, a power which was removed in 2003 through a regulation.[633] The purpose of the legislation was to prevent identity theft, which had become a serious problem in Alberta.[634] The applicants challenged the regulation on the basis that they could be issued with driver's licenses that were not for identification purposes.[635]

There were four judgments in the matter, a majority judgment written by McLachlin CJC and two partial dissents by Abella J, LeBel J and Fish J. One part of the disagreement centered around the question of whether the issues at hand would be better resolved in terms of the minimum impairment or in terms of proportionality *stricto sensu*. The Chief Justice opted for the latter, somewhat unusually (albeit justifiably). The analysis of the harm perpetrated by the Alberta driver's license regulation turns on the seriousness of the limitation and the weight of the gain. The majority recognizes three benefits of mandatory pictures on driver's licenses. First they enhance the security of the driver's licensing scheme; secondly, they assist in roadside safety and identification; and, thirdly, they may lead to eventually harmonizing Alberta's licensing scheme with those in other jurisdictions.[636] The majority's analysis of the severity of the limitation of the right to freedom of religion was carried out by distinguishing cases of forced compliance and incidental limitations of the right.[637] Incidental effects of a law may also limit the practice of religion but sometimes these limits may be less serious than forced compliance.[638] Returning to the case at hand, MacLachlin CJ considers the limitation of the applicants rights to be light. This is so because, although the Wilson Colony needs to make use of transport from time to time,

[633] The legal scheme, which is somewhat complex and not interesting in its detail to us, is set out at paragraph 6 of the judgment.
[634] Paras. 9-12.
[635] Para 13.
[636] Para 79.
[637] Paras. 91-4.
[638] Para 95.

they could hire a driver or make use of another similar service.[639] The majority acknowledges that while this will more than likely create costs for the Colony, it finds that there is no reason to believe that these costs would be prohibitive.[640]

Justices Abella,[641] LeBel[642] and Fish[643] dissented. Justice Abella gave substantive reasons while Justice LeBel commented generally on the application of section 1 and briefly on freedom of religion, largely aligning himself with the substantive reasons put forward by Justice Abella. Justice Fish dissented, agreeing with Abella and LeBel JJ. In her dissent, Justice Abella takes issue with how the majority arrived at establishing the respective weights of the advantage and disadvantage. Abella J disagrees with the majority that government had successfully proved the benefits of photographic driver's licenses would carry the benefits the government claimed, calling its reasoning nothing more than 'a web of speculation'.[644] Justice Abella had several reasons for questioning the credibility of the government's evaluation of the potential benefits of the new driver's license regulation, including the fact that there was no evidence of harm done to the licensing scheme by the exemption,[645] that many Albertans do not have a driver's license[646] and that a variety of other documents, some without a photograph, can be used for identification.[647] Then, the benefits of removing the exemption for religious reasons seem 'slight and hypothetical'[648] and 'the addition of the unphotographed Hutterite licence holders to the system seems only marginally useful to the prevention of identity theft'[649]. The disagreement between the majority and minority on this point, then, appears to be empirical, with the majority accepting the benefits of the scheme while the minority is more skeptical as to the policy's benefits.

[639] Para 97.
[640] *Ibid*.
[641] Paras. 110 - 177
[642] Para 178 – 202.
[643] Para 203.
[644] Para 154.
[645] Para 156-7.
[646] Para 158.
[647] Para 159.
[648] Para 162.
[649] *Ibid*.

Turning to the question of the severity of the limitation of the applicants' religious rights, the minority also disagreed with the manner in which the majority approached the question. The minority characterizes the majority's approach to be a question of 'the Wilson Colony members' freedom of religion as being a choice between having their picture taken or not having a driver's licence which may have collateral effects on their way of life'[650]. According to the minority 'this … is not a meaningful choice for the Hutterites'[651]. The judgment then goes on to quote the lower courts' judgments, prior jurisprudence and academic historians to highlight the importance – indeed the absolutely crucial importance – of self-sufficiency to the Hutterite Colony.[652] Consequently, then, the minority disagrees with the majority that arranging for third party transport only presents a light limitation of the Colony's right to freedom of religion. Rather, if the importance of self-sufficiency for the Colony is taken into account, the sacrifice becomes significant and, according to the minority 'the choice to practise one's religion is no longer uncoerced'[653].

3.4 Multani

The case of *Multani* is emblematic of the freedom of religion case law of the Canadian Supreme Court.[654] Although it does not concern a challenge to a statute, it does display some of the characteristics of balancing religious rights discussed in this section. The case concerned the right of a twelve-year old orthodox Sikh youth to wear a kirpan – a dagger worn by Sikh men as a symbol of their maturity – at school. The boy dropped the kirpan in school, which in turn prompted the school board, the Commission scolaire Marguerite-Bourgeoys (CSMB), to request that the student take certain precautions to ensure that the kirpan remains on the inside of his clothes. The student and the parents agreed to these conditions. However, the school's governing body refused to ratify the agreement as it believed it to be in violation of article 5 of the school's *Code de*

[650] Para 163.
[651] *Ibid*.
[652] Paras 164-6.
[653] Para 167.
[654] *Multani v Commission scolaire Marguerite-Bourgeoys* 2006 SCC 6.

vie. The CSMB's council of commissioners upheld that decision. The applicant then approached the Superior Court which upheld the right of Gubaraj Singh to wear the kirpan provided he followed the conditions initially set out by the CSMB. The Quebec Court of Appeal overturned this decision on appeal.[655] The Supreme Court then in turn overturned the Court of Appeal's decision basing its decision on the fact that the kirpan could be reasonably accommodated.

The reason for banning the kirpan – and the objective of the relevant article of the *Code de Vie* – was to promote safety in the school. The Court accepted that this was an important objective [656] and that the measure was rationally connected to that objective.[657] Subsequently, the Court turned to an analysis of whether the measure 'minimally impaired' the applicant's rights.[658] Having rejected the argument that the kirpan posed an actual threat of violence,[659] the Court turned to the CSMB's arguments that the kirpan had an adverse impact on the school environment.[660] The CSMB had argued that the kirpan undermined safety in schools for broadly speaking two reasons: firstly, the kirpan is a symbol of violence that sends out the message that resorting to violence is an acceptable way of resolving conflicts. Secondly, the kirpan undermines the perception of safety and compromises the spirit of fairness in schools.

The Court rejected the first argument, that the kirpan is a symbol of violence, on two grounds. First, it held that there was evidence that this is not the meaning of the kirpan.[661] The Court seems to have been persuaded by the testimony of a Sikh chaplain who asserted that the kirpan was not a symbol of violence but primarily a religious symbol.[662] Thus the court could not only rely on the physical characteristics of the symbol but also had to consider its meaning as a

[655] The facts are laid out at paras 3-7 of the Supreme Court's judgment.
[656] *Ibid* paras 44-48.
[657] *Ibid* para 49.
[658] Minimal impairment does not require that the solution is the least intrusive one possible but leaves a discretion to the legislator. *Ibid* paras 52-55.
[659] Here the court noted that there had been no incidents of violence that involved kirpans and that the youth in question had no history of ill-discipline. *Ibid* para 59.
[660] *Ibid* paras 56-67.
[661] *Ibid* para 71.
[662] *Ibid* para 37.

religious symbol. Second, this interpretation of the kirpan did not take into account "Canadian values based on multiculturalism".[663]

The Court then dealt with the issue of the perception of safety and unfairness. This point had been raised based on an affidavit by an expert. The expert had made the claims that schools were perceived to be unsafe in the first place and that the wearing of a kirpan would add to this perception and that some students may find it unfair if one student is permitted to wear a kirpan and others are not. The Court rejected both claims. The claim regarding the kirpan undermining the safety was rejected because the expert evidence did not actually support the claim. It was not something that the expert had studied and was merely giving his own opinion.

The claim regarding unfairness was also rejected because it presented a simplistic view of the freedom of religion. The court makes a similar argument as made by the South African Constitutional Court in *Pillay* stating that:

> Religious tolerance is a very important value of Canadian society. If some students consider it unfair that Gurbaraj Singh may wear his kirpan while they are not allowed to have knives in their possession, it is incumbent on the schools to discharge their obligation to instill in their students this value that is, as I will explain in the next section, at the very foundation of our democracy.[664]

The Court then goes on to explain that an absolute prohibition on wearing the kirpan could have more negative than positive effects. Firstly, an absolute prohibition would "stifle the promotion of values such as multiculturalism, diversity, and the development of an educational culture respectful of the rights of others".[665] A total prohibition of the kirpan would "send students the message that some religious practices do not merit the same protection as others".[666]

[663] *Id*.
[664] *Ibid* para 76.
[665] *Ibid* para 78.
[666] *Ibid* para 79.

Conversely, accommodating Gurbaraj Singh would send the message that Canadian society respects the freedom of religion and its minorities.[667]

The deciding characteristic of *Multani* is the way court approaches the question of harm emanating from the symbol. Put somewhat simplistically, one could say the court thought that the perception of others was simply misguided. Had they appreciated the values of the Canadian Charter of Rights properly, they would have understood that their negative reaction to the kirpan was based on erroneous beliefs about its nature.

3.5 Conclusion

The cases considered here come in two varieties; those that turn primarily on considerations other than related to religion and those that turn on religion. *Edward's Books* is an example of the former, the court's main reasons focused on the non-religious interest involved. In these cases, the right to religion and its analysis was subordinated to the analysis of the public good that could be gained. But equally many other cases were decided where the analysis of the religious practice determined both the seriousness of the limitation of the religion as well the harm that was being avoided. *Multani* is an example of this kind of case. Here it was the kirpan and the meaning attached to it by the student as well as the others that made the case interesting. The court chose to decide in a manner in which it would itself decide on the meaning of the symbol going so far as imposing a view of it on other students. As we shall see in our analysis of the subsequent case law of other courts, this is not an unproblematic move.

4. South Africa

Like in many other places, the South African state has had a long-running, complex and often problematic relationship with religion. During Apartheid the state found support in a particular form of Christianity, which influenced many aspects of state policy, such as the type of education, sexual conduct and forms of

[667] *Ibid*.

entertainment that were acceptable.[668] Meanwhile, other religious groups strongly opposed racial segregation and to this day religious belief continues to play a significant part in the public and private lives of many South African, with the Preamble of the Constitution itself making a plea for protection from God for the people of Africa.[669] Theorists and commentators have been slower to take up the challenge of elucidating the relationship between state and religion and although, it is clear that the relationship is a friendly one, its limits are not known yet.[670] The South African Constitutional Court has considered cases pertaining to section 15 on a number of occasions.

4.1 S v Lawrence

S v Lawrence concerned the constitutionality of a ban on the sale of alcoholic beverages on Sundays.[671] There were three judgments in the matter, a main judgment written by Chaskalson P with whom six other justices agreed, a dissent by O'Regan J who was joined by two justice. Additionally, Sachs J wrote a concurring judgment, which supported the order of the main judgment albeit for different reasons. The case offers two interesting perspectives: the first relates to the interpretation of section 15 and what is understood by religious freedom and the second to the level of evidence required to displace the burden of justification in case of a breach of section 15.

The main judgment, written by Chaskalson P, dismissed the challenge as not limiting the right to religion in the first place. Following the Canadian Supreme Court's decision in *Big M Drug Mart*, Chaskalson P found that the 'essence of the concept of freedom of religion is the right to entertain such religious beliefs as a

[668] Some of the cases considered below arise directly out of this history, such as the challenge to the prohibition of the sale of liquor on Sundays.
[669] For an overview of the relationship between state and religion in general, see P Farlam 'Freedom of Religion' in S Woolman & M Bishop *Constitutional Law of South Africa* (2nd ed. 2008).
[670] A conference and subsequent special edition of the South African Journal of Human Rights makes the same point. See, D Bilchitz & S de Freitas 'Introduction: the right to freedom of religion in South Africa and related challenges' *South African Journal on Human Rights* 28(2) (2012): 141.
[671] *S v Lawrence, S v Negal, S v Solberg* [1997] ZACC 11; 1997 (4) SA 1176.

person chooses' and to manifest this in a number of ways.[672] The President of the court went on to state that:

> It is difficult to discern any coercion or constraint imposed by section 90 of the Liquor Act on the religious beliefs of holders of grocers' wine licences or any other person, or any religious purpose served by such prohibition. The section does not compel licencees or any other persons, directly or indirectly, to observe the Christian sabbath. It does not in any way constrain their right to entertain such religious beliefs as they might choose, or to declare their religious beliefs openly, or to manifest their religious beliefs.[673]

For the majority freedom of religion, then, does not include a right to religious equality, rather it amounts to a freedom to be free from religious coercion.[674]

A number of judges dissented from this particular reading of section 15, arguing that by giving preference to Christian days of rest, the law limited the religious freedom of those who were not Christian, although they then disagreed on whether the limitation was justifiable. Writing for the five who dissented on Chaskalson P's reading of section 15, O'Regan J held that '[it] requires in addition that the legislature refrain from favouring one religion over others. Fairness and even-handedness in relation to diverse religions is a necessary component of freedom of religion'[675]. The understanding of religion by O'Regan J is broader than that put forward by Chaskalson P.

The case can be seen as something of a missed opportunity for the court to hand down a landmark judgment on the freedom of religion.[676] Much of the commentary was focused on the argument about whether the reading of section 15 not being an establishment clause comparable to the first amendment of the US Constitution.[677] While this is a valuable line of inquiry, from our perspective

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[672] *Ibid*. at para 92.
[673] *Ibid*. at para 97.
[674] L du Plessis 'Religious Freedom And Equality As Celebration Of Difference: A Significant Development In Recent South African Constitutional Case-Law' PER/PELJ 2009 12 (4).
[675] *S v Lawrence* at para 128.
[676] L du Plessis 'Freedom of Religion, Belief and Opinion' in (ed.s) S Woolman & M Bishop *Constitutional Law of South Africa* (2nd ed. 2008). 41.
[677] J van der Vyver 'Constitutional perspective of church-state relations in South Africa' *BYU Law Review* 2 (1999) 635; L du Plessis 'Freedom of or Freedom from Religion: An Overview of Issues

the crucial points lie elsewhere. Namely, the disagreement between the main judgment, the dissenters (and dissenting concurrances) on this point can be understood as a general point about the relationship between the state and religion and the role that section 15 plays in shaping that relationship. The position of Chaskalson P, taken to its logical conclusion, as long as the state does not compel religious observation, the relationship between state and church is outside the scope of section 15. O'Regan J and Sachs J on the contrary find the relationship between religion and the state is one that is relevant to the religious rights of citizens and one that can be challenged on the basis of section 15.

The disagreement between O'Regan J and Sachs J is also worth mentioning. For O'Regan J the limitation was not justifiable in terms of section 33 as it was difficult to see whether it advanced a legitimate purpose and whether that purpose was achieved.[678] Sachs J agreed with O'Regan J in that there was a limitation of the right to religious freedom but that this limitation was justifiable in terms of section 33 and did not amount to an unconstitutional limitation of the applicants' rights. The reasons for Sachs J were that it was beneficial for a society to choose to limit the sale of liquor on certain days and that there were some reasons why the Christian holidays and days of rest were acceptable for this

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Pertinent to the Constitutional Protection of Religious Rights and Freedom in the New South Africa' *BYU aw. Review* (2001) 439.

[678] 'It is not clear to me precisely what the purpose of the challenged provision is, but I am willing to accept that at least one of its purposes is to restrict the availability of liquor on closed days in order to restrict consumption. Such a purpose or effect is sufficient to ensure that there is no breach of section 26 of the interim Constitution, but it is far less persuasive in relation to the breach of section 14. This is so because even if one of its purposes is the restriction of supply to restrict consumption, it is hard to conclude that this is the primary purpose of the definition of closed day in section 90(1). First, because the Liquor Act does not prohibit the sale of all liquor on closed days, only certain types of sale. In addition, it does not prohibit sale on non-religious public holidays, such as the Day of Goodwill (26 December), New Year's Day or Family Day (the day after Easter Sunday), when the roads are particularly full and the restriction of consumption would appear to be particularly desirable. To the extent, therefore*, that this is a purpose of the legislation I cannot consider it to weigh heavily for the purposes of proportionality in the context of a breach of section 14. Nor am I satisfied that this purpose of the legislation is effectively achieved*. To the extent that the Liquor Act permits the consumption of liquor in a variety of circumstances on closed days, it is not clear at all how effective it is in achieving a restriction of consumption by prohibiting sales from grocery stores and liquor stores. On the other hand, in identifying as closed days, days of Christian significance, the legislature displays an endorsement of Christianity in conflict with the Constitution. It is true that the scope of the infringement of section 14 is not severe or egregious, but in my view, *the purpose and the effect* of the legislation is not sufficient to meet the test of justification required by section 33.' (Para 132) (emphasis added)

(secular) purpose.[679] This point is a more general one about the level of evidence required to justify a limitation, reminiscent of points made in similar contexts in *Edward's Books*, *Irwin Toy* and other cases where broad social dynamics are involved. While this second point is interesting in a broader sense, for the purposes of this chapter the crucial point is about the difficulty of defining the scope of religion.

4.2 Christian Education

The same questions come up *Christian Education South Africa v Minister for Education*[680] concerning the prohibition on corporal punishment in schools. The applicant was an umbrella body representing about 200 schools with a Christian ethos. These schools felt that corporal punishment is an integral part of that ethos. The unanimous judgment written by Sachs J makes two interesting points. The first relates to whether the right to religion has been limited at all. Strikingly, Sachs J assumed without deciding, that the right to freedom of religion had been limited.[681] The reason for doing so was to avoid the debate about the content of the right to freedom of religion.[682] Having done, so the judgment finds that the

[679] E.g. here: 'My conclusion, then, is as follows: on the one hand, the scope and intensity of the invasion of section 14 rights is relatively slight. On the other hand, the dangers of excessive drinking, particularly on weekends, at the beginning of the Easter weekend and at Christmas-time, are grave. Pay packets are reduced, domestic violence is intensified and exceptionally high slaughter on the roads resulting from drunken driving becomes a matter of national concern. There are accordingly strong reasons for adopting suitably focused measures which are designed to and hopefully will restrict the consumption of alcohol on these particular days and not on others. I accordingly feel that in the particular circumstances of this case the legislative restrictions in question are both reasonable and necessary.' (Para 177)

[680] [2000] ZACC 11; 2000 (4) SA 757.

[681] Para *26-7*.

[682] 'This is clearly an area where interpretation should be prudently undertaken so that appropriate constitutional analysis can be developed over time in the light of the multitude of different situations that will arise. If it is possible to decide the present matter without attempting to give definitive answers on a complex range of questions in a new field, many of which were not fully canvassed in argument, then such a course should be followed. In the present matter I think that it is possible to do so. For the purposes of this judgment, I shall adopt the approach most favourable to the appellant and assume without deciding that appellant's religious rights under sections 15 and 31(1) are both in issue. I shall also assume, again without deciding, that corporal punishment as practised by the appellant's members is not "inconsistent with any provision of the Bill of Rights" as contemplated by section 31(2). I assume therefore that section 10 of the Schools Act limits the parents' religious rights both under section 31 and section 15. I shall consider, on these assumptions, whether section 10 of the Schools Act constitutes a reasonable and justifiable limitation of the parents' practice rights under section 15 and section 31.'Para 27).

blanket prohibition is justified because of the general goal of eliminating violence from the public sphere.[683] In terms of the extent of the limitation of the freedom of religion, Sachs J does not say very much. His remarks are in essence limited to the argument that religious association must subject themselves to secular rules in other areas of life, too.[684] *Christian Education*, then, illustrates another situation where the court is struggling to elaborate a content for the freedom of religion.

4.3 Pillay v MEC for Education

Pillay is the landmark, and indeed, sole judgment of the South African Constitutional Court that deals with religious dress. The facts are very similar to those of *Multani* considered above. The case concerned the granting of an exemption for a nose stud to be made from a school dress code.[685] The respondent[686] was the mother of a student who faced disciplinary measures by her high school for wearing a nose stud as part of her Hindu religion and culture.[687] The respondent's daughter had inserted a golden stud into her nose as a sign of maturity, a gesture which the Court accepted as being motivated by her religion and culture.[688] The respondent lost in the Equality Court,[689] but won in

[683] Para 50 'The whole symbolic, moral and pedagogical purpose of the measure would be disturbed, and the state's compliance with its duty to protect people from violence would be undermined.'
[684] Para 51. 'Just as it is not unduly burdensome to oblige them to accommodate themselves as schools to secular norms regarding health and safety, payment of rates and taxes, planning permissions and fair labour practices, and just as they are obliged to respect national examination standards, so is it not unreasonable to expect them to make suitable adaptations to non-discriminatory laws that impact on their codes of discipline.'
[685] *Pillay* (note 1 above).
[686] The respondent before the Constitutional Court was the mother of the learner, Sunali, who was facing disciplinary action.
[687] The facts appear at paras 4-24.
[688] The somewhat lengthy discussion of this appears at paras 48-60. See also O'Regan J who dissented on some of the points raised by Langa CJ, paras 141-158. Langa CJ treated religion and culture as equivalent in the determination of unfair discrimination. O'Regan J felt that it was necessary to distinguish the two in order to give each the appropriate weight in the determination of unfair discrimination. She disagreed with the majority on three main points. First, in her view cultures ought to be regarded as associative rather than focused on the individual. Thus the individualized, "sincerity approach" to equality claims is unsuitable (para 154). Second, the subjective approach of the majority does not pay sufficient attention to the need for solidarity between the individual groups (para 155). Third, such an approach based on the toleration of subjective, sincerely held beliefs does not pay sufficient regard to the value of dignity as it undermines dialogue and discourse and consequently solidarity (paras 156-157).

the High Court.[690] The Constitutional Court agreed that this is a matter that falls within the purview of equality and thus within the Promotion of Equality and Prohibition of Unfair Discrimination Act (PEPUDA).[691] The inquiry into whether there was unfair discrimination is similar to that under the religious freedom clause in the Constitution with the added element of determining unfairness.[692] The determination of unfairness is an exercise in proportionality which depends on, *inter alia*, whether it is possible to "reasonably accommodate" the religious practice in question.[693] The Court found that Sunali had been discriminated against and that this discrimination was unfair.

In its attempt to justify the discrimination, the applicant school argued that allowing Sunali to wear the nose stud would have an adverse impact on the discipline at the school and consequently on the quality of education that it can provide. The school argued that were the school to permit Sunali to wear the nose stud, it would undermine the uniform dress code which in turn would encourage the breaking of rules and undermine the boundaries that are necessary for school children that are necessary in an education environment. A school, the applicants argued, ought to be a place which moderated modern life in order to create an environment that is more conducive to learning. A school environment should provide boundaries and seek to eliminate the pressures of fashion on teenagers.[694]

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[689] The Equality Court's reasons were summed up as follows by the Constitutional Court: Although there was discrimination, the discrimination was not unfair because the school code promoted "uniformity and acceptable" behaviour among the learners, Ms Pillay had agreed to the code, the code had been devised after consultation, Ms Pillay had failed to consult the school before sending her daughter there with the nose stud in place and that there had been no impairement of Sunali's dignity (para 14).

[690] The High Court emphasized the fact that the enforcement of the code would only perpetuate the discrimination against Hindus and Indians that had occurred historically. The Court also held that the nose stud would not undermine discipline in school as its meaning to Sunali could be explained to other learners (see paras 15-18 and *Pillay v MEC for Education, KwaZulu-Natal, and Others* 2006 (6) SA 363 (EqC); 2006 (10) BCLR 1237 (N)).

[691] The Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000, was enacted in order to give content to the equality clause of the Constitution.

[692] *Pillay* para 46.

[693] Paras 73-76.

[694] Paras 96-99.

The Court rejected these arguments. The school had adduced evidence to the effect that uniforms were beneficial for discipline. However, the court distinguished the claim that uniforms are necessary from the present situation which concerned an exemption to school uniforms. The court found that the school had not shown any evidence that an exemption would undermine discipline. In fact, Sunali had been wearing the nose stud for almost two years without any significant impact on school discipline. Thus there was no solid factual basis for claiming that school discipline would be undermined by the granting of the exception.

In its consideration of the issue, the Constitutional Court stated that the "only discernable effect of the nose stud was the perception of unfairness by other students". The court accepted that some other students had found it unfair that Sunali was permitted to wear a nose stud. However, the court rejected the notion that this would have a negative impact on the learning environment. The court reasoned that granting exemptions – and presumably also wearing religious symbols – will serve to introduce learners to a multicultural society in which many different religions and cultures live side-by-side.[695] The granting of exemptions will also demonstrate to students that in a constitutional democracy people are not to be treated identically but with "equal respect and equal concern".[696] This will teach the learners the values of equality and diversity that form part of the Constitutional framework and should form part of education in any event.[697] Ultimately, the Court felt that "the more learners feel free to express their religions and cultures in school, the closer we will come to the society envisaged in the Constitution."[698]

In her dissenting judgment O'Regan J did not make mention of similar values. This is likely to be the case because her preferred approach was largely procedural in nature and focused on the necessity for an exemptions procedure

[695] Para 102.
[696] Para 103.
[697] Para 104.
[698] Para 107.

to be included in a school code.[699] However, she did make the remark that a school is an ideal environment in which to foster dialogue about cultures: 'Schools are excellent institutions for creating the dialogue about culture that will best foster cultural rights in the overall framework of our Constitution. Schools that have diverse learner populations need to create spaces within the curriculum for diversity to be discussed and understood.' [700] Then, even O'Regan's dissent can be read as supporting the inclusive secularist model in broad terms.

Underpinning the reasoning of the Constitutional Court – and of the Canadian Supreme Court for that matter – is a particular view of religious diversity. The court seemingly gives great weight to individual autonomy and autonomous expressions of religion as essential elements of the right to religious freedom. Accordingly, religious symbols are a positive feature of society that should be celebrated and thus the court affords them a high level of protection. This is evident in two ways. First, the court undertakes rigorous analysis of the evidence of alleged harm, where the court refuses to accept the evidence of the benefits of school uniforms as evidence of the detriments of exemptions to uniforms. Second, with regard to the perception of unfairness, the court refuses to accept a reason that it considers is based on a mistaken perception of religious freedom and equality. Instead, it establishes a duty on the school to explain the rationale for religious exemptions, an endeavor that, in the court's view, would further enhance democracy.

5. Germany

The role of religion in and its impact on German public life has varied throughout history from being left to the *Länder* in accordance with the principle *cuius region euius religio*, to Otto von Bismarck's *Kulturkampf* against Catholics. Irrespective of religion's varied role and impact, the links between religion and

[699] See in particular, paras 175, 184.
[700] Para 173.

state have been strong.[701] The 1949 Constitution makes a 'clear break'[702] with this past, however.

Like elsewhere, freedom of religion, article 4 of the Basic Law, turned out to be something of an Easter egg, having been included in the Constitution to little fanfare and subsequently having surprising consequences. In the first place, it is textually striking in that the provision does not contain a limitations clause, like most other fundamental rights in the Basic Law. Secondly, the *Crucifix* case, banning the display of crucifixes in Bavarian public school classrooms, is probably one of the very first truly controversial decisions of the Federal Constitutional Court.

5.1 Legal Landscape and the Constitutional Court's Approach

As has been mentioned throughout this chapter, religion is a somewhat different matter to regulate constitutionally in comparison to other rights. In addition to article 4, which guarantees the freedom of religion, article 140 incorporates a number of sections from the Weimar Constitution regarding the role of religion in the German State into the Basic Law.

Article 4 guarantees a number of different rights. The first paragraph protects 'freedom of faith and conscience and freedom to profess a religious or philosophical creed'[703]. The first paragraph protects primarily the *forum internum* of the freedom of religion, that is the freedom to think in a particular way.[704] Paragraph 2 of article 4 protects the 'undisturbed practice of religion'.[705] This article is concerned with the actual manifestation and practice of religion. Here, the FCC has embraced a broad definition of what religious practice

[701] See, e.g. Kommers & Miller at 539-40;
[702] *Ibid*.
[703] The original article 4(1) reads: Die Freiheit des Glaubens, des Gewissens und die Freiheit des religiösen und weltanschaulichen Bekenntnisses sind unverletzlich. Translated: Gerhard Robbers in G Robbers *Religion and Law in Germany* at 50.
[704] R Herzog 'Art' 4' in T Maunz & G Dürig *Grundgesetzkommentar* (2016) at 8 and 42.
[705] German original: 'Die ungestörte Religionsausübung wird gewährleistet.' Translated: Gerhard Robbers in G Robbers *Religion and Law in Germany* at 50.

involves, extending it to activities that do not solely include worship.[706] Articles 4(1) and 4(2) do not contain a limitations clause that would allow limitation of the right through legislation. Therefore, a limitation is only permissible in terms of another provision of the Basic Law itself.[707] Finally, paragraph 3 of the article 4 guarantees the right to conscious objection to armed military service.[708]

Altogether, these provisions protect the religious rights of individuals, groups and various associations of a religious nature are also protected.[709] The analysis here will be restricted to cases in terms of article 4.

4. 2 The Tobacco Atheist, Blood Transfusion, Courtroom Crucifix Cases

The German Federal Constitutional Court has considered a great number of claims under article 4. Many have been wholly uncontroversial but others have attracted considerable public upset, among these possibly one of the most notorious cases of the Constitutional Court the *Classroom Crucifix* case. After setting out a general picture of the court's reasoning in its case law, the chapter will turn to three particularly controversial cases: the aforementioned *Classroom Crucifix* case, the *Headscarf* cases.

The *Tobacco Atheist* case ('Glaubensabwerber') is one of the earliest cases regarding article 4 relates to the denial of parole of an inmate who had used tobacco to bribe his fellow inmates to leave the church.[710] While the FCC accepted that persuading others of the correctness of one's worldview was protected by article 4, it found the use of tobacco to persuade others to do so was not protected by the constitution. The court argues that determining the limits or religious freedom is difficult 'as the neutral state may not evaluate the content of

[706] See, e.g. BVerfGE 24, 236 ('*Rag Collection Case*') where the charitable collection and sale of used clothes and other items was held to fall within the purview of 2(4).
[707] See, e.g. BVerfGE 30, 173 para 193; BVerfGE 32, 98 at 108.
[708] 'Niemand darf gegen sein Gewissen zum Kriegsdienst mit der Waffe gezwungen werden. Das Nähere regelt ein Bundesgesetz.' Article 4(3) can only be limited through another constitutional right (like the other provisions of article 4). A justifiable limitation cannot be based on military defense, as this is specifically excluded through 4(3). See, Jarass at 181. Article 4(3) has seen a number of highly controversial cases relating to the
[709] R Herzog 'Art' 4' in T Maunz & G Dürig *Grundgesetzkommentar* (2016).
[710] BVerfGE 12, 1.

the beliefs of citizens'.[711] Nevertheless, the right can be limited where it infringes on the dignity of another.[712] This is the case, as was in this case, when a person attempts to influence the religious beliefs of another through 'unfair or morally reprehensible' means.[713] These brief reasons do not elaborate much of a theory of religious liberty or its limitations and are, in fact, stated as truisms. There is, therefore, very little by way of theorizing or reasoning in the judgment apart from the court stating its position.

This style is continued in subsequent cases where the court reasons in a relatively cursory manner. The *Blood Transfusion* case (called *Gesundbeter* in the German literature) is emblematic of the court's approach.[714] The case concerned the constitutionality of the criminal conviction of the appellant. The appellant's wife had died in child birth but could have been saved with a blood transfusion. The appellant was convicted to eight months in jail for failing to attempt to save his wife's life. The FCC set the sentence aside finding that the lower court ought to have taken article 4 into account in determining the applicant's guilt. As was the case in the *Tobacco Atheist* case the reasoning of the court in *Blood Transfusion* is brief and cursory. The court finds that the through article 4 protected interests do not limit those purposes pursued by the criminal law (punishment, prevention and/or rehabilitation) and are not in any way limited in this case.[715] Again the theorization of the competing interest is almost non-existent, as justifiable as that may be because the purpose of the criminal law was not limited. Nevertheless, the case fits into the series of cases where the court does not engage with the values underpinning the freedom of religion.

4.3 Crucific in the Classroom Case

[711] BVerfGE 12, 1 (4). 'Kann und darf der weltanschaulich neutrale Staat den Inhalt dieser Freiheit nicht näher bestimmen, weil er den Glauben oder Unglauben seiner Bürger nicht bewerten darf, so soll jedenfalls der Mißbrauch dieser Freiheit verhindert werden.'
[712] *Ibid*.
[713] *Ibid*. 'Die an sich erlaubte Glaubenswerbung und Glaubensabwerbung wird dann Mißbrauch des Grundrechts, wenn jemand unmittelbar oder mittelbar den Versuch macht, mit Hilfe unlauterer Methoden oder sittlich verwerflicher Mittel, andere ihrem Glauben abspenstig zu machen oder zum Austritt aus der Kirche zu bewegen.'
[714] BVerfGE 32, 98.
[715] *Ibid* at 109-110.

The *Crucifix* case is probably the most controversial case of the FCC.[716] Until that decision the court's decisions had been met with little public resistance but when the court held that a Bavarian high school was constitutionally barred from affixing crucifixes to classroom walls, the court attracted severe popular and academic criticism. Bernhard Schlinck commented on the case, stating that it amounted to a 'farewell to doctrine'[717] and Ottfried Höffe asked 'how much politics is the Constitutional Court allowed?'[718]. More recently, Niels Petersen has begun his monograph on proportionality and judicial activism by using the case to introduce the very dilemma at the heart of courts employing proportionality to resolve fundamental rights cases.[719]

The case concerned a challenge to the lawfulness of a crucifix attached to a classroom wall in a public school brought by adherents to a non-religious philosophy of life. In an academically and socially controversial decision the court found that the Bavarian state law requiring the affixation of a crucifix (or, alternatively, of a cross) to a classroom wall breached the negative aspect of the right to freedom of religion. The idea of a right to be free from religion has its roots in the FCC's religious rights case law pre-dating the *Crucifix* judgment. Here the court has consistently found that the right to freedom of religion 'protects a domain that is free from the interference of the state, in which everyone is free to choose a way of life that accords with his or her religious faith or world view'.[720] This negative side of the freedom of religion is derived from an understanding of the right to freedom of religion as protecting the right to practice one's religion

[716] M Stolleis 'Überkreuz Anmerkungen zum Kruzifix-Beschluß (BVerfGE 93, 1-37) und seiner Rezeption' *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft (KritV)* Vol. 83, No. 3/4 (2000), pp. 376-387.
[717] B Schlink 'Abschied von der Dogmatik. Verfassungsrechtsprechung und Verfassungsrechtswissenschaft im Wandel' *JuristenZeitung* 62. Jahrg., Nr. 4 (16. Februar 2007), pp. 157-162.
[718] O Höffe 'Wieviel Politik Ist Dem Verfassungsgericht Erlaubt?' *Der Staat* Vol. 38, No. 2 (1999), pp. 171-193.
[719] N Petersen *Proportionality and Judicial Review* (2017) at 1. He makes the same point in *Verhältnismäßigkeit als Rationalitätskontrolle* (2015) which is an expanded version of the book, albeit the point about the Bavarian crucifix does not occupy quite as prominent a space.
[720] 'Die Religionsfreiheit gewährleistet. einen von staatlicher Einflussnahme freien Rechtsraum, in dem jeder sich eine Lebensform geben kann, die seiner religiösen und weltanschauhlichen Überzeugungen entspricht.' BVerGE 30, 415.

in an unhindered manner, including being forced or compelled to observe a religion that is not shared.[721]

In the *Crucifix* judgment the court summed up the basis of the negative right to freedom of religion by stating that '[t]he State may neither prescribe nor forbid a faith or religion.'[722] Then, after stating that this right included the right to live in accordance with the precepts of one's religion, it also implied that 'conversely, the freedom to stay away from acts of worship of a faith not shared'. That is to say that while there is a right to manifest one's religion, there is also a right for others not to be subjected to those manifestations. In this case it meant that 'Art. 4(1) Basic Law leaves it to the individual to decide what religious symbols to acknowledge and venerate and what to reject'.[723] This conclusion was reinforced by article 6(2) which guarantees parents the right to bring up their children which 'implies the right to keep the children away from religious convictions that seem to the parents wrong or harmful'.

The right to be free from religion was unjustifiably limited by the Bavarian law as it meant that 'with no possibility of escape, confronted with this symbol and compelled to learn "under the cross".' Universal compulsory education then meant that school children were forced to be in the presence of a cross during school hours. The court distinguishes this from those situations in which one runs into religious symbols in every day life. These are different, the court argues as being exposed to religious symbols in every day life is not state sanctioned and tend to be of a more 'fleeting' nature. As the crucifix is a particular symbol of Christianity and given the young age and impressionability of learners (based on a previous decision regarding school prayer[724]), the court found that the Bavarian law limited the right in article 4.

[721] On this point see, D Merten 'Der Kruzifix-Beschluss des Bundesverfassungsgerichts' in J Burmeister (ed.) *Verfassungsstaatlichkeit* (2006) at 990-1.
[722] *Crucifix Case* at 117.
[723] BVerfGE 93,1 (translation by Basil Markesinisis, available at https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=615).
[724] BVerfGE 52, 223.

The decision could not be justified in terms of the state's educational mandate under article 7 of the Basic Law nor in terms of the positive right to religion of the parents of learners under article 4. The article 7 argument was laid out at some length. The court began by acknowledging that there exists an 'unavoidable tension between negative and positive religious freedom' and that this 'is a matter for the Land legislature'. The court has previously found that 'the Land legislature is not utterly barred from introducing Christian references in designing the public elementary schools, even if those with parental power who cannot avoid these schools in their children's education may not desire any religious upbringing'. However, '[t]here is a requirement […] that this be associated with only the indispensable minimum of elements of compulsion.'[725] This may not go so far as taking a side in the debate about religious truth, rather '[t]he affirmation of Christianity accordingly relates to acknowledgement of a decisive cultural and educational factor, not to particular truths of faith'.[726] Placing a crucifix on the wall of a classroom goes beyond this threshold. As the court found '[a]s already established, the cross cannot be divested of its specific reference to the beliefs of Christianity and reduced to a general token of the Western cultural tradition'. In brief, '[the crucifix] symbolizes the essential core of the conviction of the Christian faith'.

A minority of three judges dissented. They took the perspective of the learners and asked how these might perceive the cross. The minority found that '[t]he mere presence of a cross in the classroom does not compel the pupils to particular modes of conduct nor make the school into a missionary organization'. Further the minority held that, 'the cross [does not] change the nature of the Christian nondenominational school; instead it is, as a symbol common to the Christian confessions, particularly suitable for acting as a symbol for the constitutionally admissible educational content of that form of school'. Ultimately, then, '[t]he affixation of a cross in a classroom does not exclude consideration for other philosophical and religious contents and values in

[725] The citations are to the translation by Markesinisis which does not carry page or paragraph number.

education'. Consequently, there is no limitation of the right in article 4 or if there was, it is very minor.

The difference between the majority and the minority lies in their perception of the meaning of the crucifix and its implications for the nature of the role of religion in education. The arguments on both sides are not entirely unproblematic. The majority has no evidence that children are influenced by the crucifix, nor does the minority have evidence that they are not. As Michael Stolleis notes – and as is often said in reference to similar cases in the ECtHR as discussed below – there is no fixed meaning of the crucifix, simply the different meanings that different persons attribute to it.[727] The broader, more theoretical, problem for the court is, thus, the meaning of neutrality and the limits it sets on the

4.4 The Headscarf Cases

The court has decided two cases related to the right of teachers to wear headscarves in school. A 2003 decision that held that if headscarves were to be prohibited, this would have to be done through an act of the *Land* parliament and a more recent decision finding that prohibitions on headscarves were unconstitutional.

The 2003 case was brought by Fereshta Ludin a teacher in Baden-Württenberg who had been prohibited from wearing a headscarf while teaching. The FCC tackled the question in much the same way as it did the crucifix decision. The court stated the abstract principles in the following terms:

> [T]here is a connection between the freedom, asserted by the complainant, to testify to her religious convictions by wearing a hijab and the "negative" freedom of belief of the schoolchildren. Art. 4(1) and (2) protects equally the freedom to believe and the freedom not to believe: its guarantee of the right to abstain from participation in the rites of a religion one does not share extends to pratices and symbols which express a particular belief or religion. Under Art. 4 it is for the individual

[727] Stolleis at 381.

> to decide which religious symbols to recognize and respect and which to ignore. In a society which affords room for different faiths he certainly has no right to be spared the sight or sound of statements of belief, cultic practices and symbols of religions he does not share, but when as a result of state action a person is placed in a situation in which he has no means of escaping the influence of a particular belief expressed in acts and symbols, it may be different.[728]

These are familiar principles from the *Crucifix* case. The court continues by recognizing the 'inevitable tension' that exists between the teacher's positive right to freedom of religion and the students' negative one.[729] Ultimately the court resolves the case by holding that it is necessary for there to be a sufficient statutory basis on which the prohibition rests.[730] However, after finding this, the court added, quite ambivalently, that

> Some religious emblems are instituted by the school authorities and others arise from the decision of an individual teacher who can invoke the freedom of Art. 4(1) and (2). A distinction must be drawn. To allow teachers to choose to wear clothes betokening religious affiliation is one thing: for the state to ordain the use of religious symbols in schools is quite another. Acceptance of an individual teacher's right to express her religion by wearing a hijab is not at all an expression of the state's own opinion and should not be taken as such. It is true that if a teacher wearing a hijab stands all day in front of the class, that may have an effect on the children who cannot avoid the sight, but the effect can always be weakened if the teacher explains its religious significance.[731]

Here, the court is fully aware of its own ignorance of the impact of the headscarf on the students; it may be that there is one, it may be that there is not.

After the decision was handed down a number of states went on to pass laws that prohibited the headscarf. These were challenged in turn with a decision in 2015 overturning them, finding that a blanket prohibition on headscarves for teachers was constitutionally unjustifiable. The question was, again, whether the positive right to religion of the teacher would be outweighed by the negative

[728] The English language translation is from https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=613.
[729] Para 53
[730] *Ibid*.
[731] Para 54.

right to religion of the students. The court found that this was not the case as 'the headscarf was not worn with the intention to limit the negative right to freedom of religion of the students'. Rather, the students were merely confronted with the teacher exercising her positive right to manifest her religion, without attempting to influence her students.[732]

The two headscarf cases, then, represent variations on the *Crucifix* case in that they deal with a similar question but with some of the facts being slightly different. The crucial aspects relate to the empirical aspects of the cases. The court, not implausibly, finds that the student's negative right to freedom of religion is not limited by the teacher wearing a headscarf because they are simply faced with her manifesting her religion rather than influencing anyone. One can ask to what extent this can be maintained, a teacher is after all a figure of authority and part of the school. It may be that, in actual fact, a teacher wearing a headscarf may influence some students more than a mere crucifix on the wall. Again the debate returns to how religious symbols can reasonably be presumed to be perceived by their audience.

4.5 Conclusion

The German court's case law turns on the idea of what it means for the state to be neutral in the face of religious belief. The reasoning in general is a struggle with the idea that neutrality can include some form of positive identification with the church, like a religious symbol, but that this must not amount to infringing the rights of those who do not identify with the religion. Furthermore,

[732] BVerfGE 138, 293. The entire quote reads: 'Doch ist das Tragen eines islamischen Kopftuchs, einer vergleichbaren Kopf- und Halsbedeckung oder sonst religiös konnotierten Bekleidung nicht von vornherein dazu angetan, die negative Glaubens- und Bekenntnisfreiheit der Schülerinnen und Schüler zu beeinträchtigen. Solange die Lehrkräfte, die nur ein solches äußeres Erscheinungsbild an den Tag legen, nicht verbal für ihre Position oder für ihren Glauben werben und die Schülerinnen und Schüler über ihr Auftreten hinausgehend zu beeinflussen versuchen, wird deren negative Glaubensfreiheit grundsätzlich nicht beeinträchtigt. Die Schülerinnen und Schüler werden lediglich mit der ausgeübten positiven Glaubensfreiheit der Lehrkräfte in Form einer glaubensgemäßen Bekleidung konfrontiert, was im Übrigen durch das Auftreten anderer Lehrkräfte mit anderem Glauben oder anderer Weltanschauung in aller Regel relativiert und ausgeglichen wird. Insofern spiegelt sich in der bekenntnisoffenen Gemeinschaftsschule die religiös-pluralistische Gesellschaft wider.' (at 337).

the reasoning demonstrates a struggle with the very difficult empirics of the effects of religious symbols. In the *Crucifix* and the *Headscarf* cases, the court makes assumptions about the effect that a symbol will have on learners, without citing any empirical authority for it, rather relying on assumptions about how the symbols ought to be perceived or might reasonably be perceived.

6. European Court of Human Rights

The European Court's case law on religious symbols has attracted a great deal of criticism for a number of reasons, primarily that the empirical findings of the court are unjustifiable.[733] Here I want to make a two-fold observation about the court's case law. In the first place, the court has failed to establish a normative basis against which to evaluate the weight of a limitation caused by a religious practice. Secondly, the court employs different empirical considerations about the empirical impact of religious symbols seemingly arbitrarily when determining the impact wearing religious symbols has. The court's case law, beginning with *Dahlab v Switzerland,* continuing with the Grand Chamber decision in *Sahin v Turkey* and a number of other similar cases such as *Dogru v France*, seemed open to criticism. But it is the more recent cases of *Lautsi v Italy*, *Eweida v UK* and *SAS v France* where the court has not only reasoned unpersuasively but also seems to have gone contrary to its own reasoning in the past.

The early cases, all dealing with headscarves, were characterized by a conclusion in which the court simply declared that it could not be proven that the headscarf did not have some adverse effect. For instance, the first judgment of its kind *Dahlab* concerned a Swiss primary school teacher, who after a period of soul-searching converted to Islam and as part of her conversion began wearing a headscarf. The court had to consider the headscarf's impact on Ms. Dahlab's

[733] See: C Evans 'The "Islamic Scarf" in the European Court of Human Rights' (2006) 7 *Melbourne Journal of International Law* 52; CD Beledieu 'The Headscarf as a Symbolic Enemy of the European Court of Human Rights' Democratic Jurisprudence: Viewing Islam Through a European Legal Prism in Light of the *Sahin* Judgment' (2006) 12 *Columbia Journal of European Law* 573

student.[734] The court accepted that Ms Dahlab's right to religious freedom had been limited. The state of Switzerland had argued that the measure was enacted in order to protect the denominational neutrality of schools and religious harmony. The state further argued that when accepting the position of a teacher, Ms Dahlab had freely submitted herself to the Swiss rules that required the neutrality of schools and that 'her conduct should not suggest that the state associated itself with one religion rather than another'.[735] The crux of the court's reasoning came in a rather brief statement, where the court justified the justifiability of the limitation:

> [I]t is very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children. The applicant's pupils were aged between four and eight, an age at which children wonder about many things and are also more easily influenced than older pupils. In those circumstances, it cannot be denied outright that the wearing of a headscarf might have some kind of proselytizing effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the federal Court noted, is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.[736]

Similarly, in *Sahin v Turkey*, a case dealing with a medical student who wished to wear a headscarf during her university, the court had found a limitation of article 8. The court's reasons for justifying the limitation closely resemble those given in *Dahlab*. The court's justification analysis is rather weak . It is seven paragraphs long, says very little more than repeats some platitudes about the margin of appreciation and European supervision and finishes with the following quote:

> In *Dahlab*, which concerned the teacher of a class of small children, the Court stressed among other matters the "powerful external symbol" which her wearing a headscarf represented and questioned whether it might have some kind of proselytising effect, seeing that it appeared to be imposed on women by a religious precept that was hard to reconcile with the principle of gender equality. It also noted that wearing the Islamic headscarf could not easily be reconciled with the message of tolerance,

[734] The facts appear from p 1-5.
[735] *Dahlab* p 7.
[736] *Ibid* p 9-10.

> respect for others and, above all, equality and non-discrimination that all teachers in a democratic society should convey to their pupils.[737]

Dahlab and *Sahin* elicited strong criticism for their reasoning both for the manner in which they arrived at the conclusion as well as the substance of the argument.[738] Even though at least they seemed coherent, the court required next to no evidence that a religious symbol could have a particular effect, be it a proselytizing one on children or one of undermining the secular nature of the state. And while perhaps not strong arguments, given that both are states of affairs which require difficult social analysis, perhaps it was justifiable for the ECtHR to act deferentially even when this took arguably absurd dimensions such as in *Dogru v France*.[739]

Be that as it may, the subsequent case law destroyed any consistent basis that may have been identified. Since *Sahin* the court has decided three major cases that deal with religious symbols. Each one of them has contradicted the others in some way in the normative and empirical statements the court makes. The first one, *Lautsi v Italy* dealt with the lawfulness of crucifixes in Italian class rooms.[740] The applicant challenged the lawfulness of these on the basis that they breached the state's duty to neutrality. Having lost at all levels in the Italian legal system, she appealed to the ECtHR challenging the lawfulness of the crucifixes under article 2 of Protocol 1, guaranteeing "the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions".[741] The Chamber concluded that the display of crucifixes violated

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[737] *Sahin* at para 111.

[738] The criticism was primarily aimed at two aspects of the reasoning: The first was that the link the court drew between the religious symbol and its consequence was not substantiated in any real way. The second concerned the courts understanding of gender equality and the headscarf necessarily being forced on women. C Evans 'The "Islamic Scarf" in the European Court of Human Rights' (2006) 7 *Melbourne Journal of International Law* 52; CD Beledieu 'The Headscarf as a Symbolic Enemy of the European Court of Human Rights' Democratic Jurisprudence: Viewing Islam Through a European Legal Prism in Light of the *Sahin* Judgment' (2006) 12 *Columbia Journal of European Law* 573; T Lewis 'What Not to Wear: Religious Rights, the European Court, and the Margin of Appreciation' (2007) 56 *International and Comparative Law Quarterly* 395.

[739] App. No. 31645/04. The case concerned a health and safety regulation in a school prohibiting the wearing of headscarves during physical education.

[740] *Lautsi v Italy* App. No. 30814/06, Grand Chamber judgment of 18 March 2011.

[741] It was held that the decision whether crucifixes should be permitted in class rooms formed part of the functions that the state had taken over and fell thus within the purview of this article. The court also held that article 2 of Protocol 1 forms a *lex specialis* of article 9 of the Convention.

the state's duty to neutrality in the exercise of public authority, which is especially relevant in the field of education.[742] The Grand Chamber reversed the decision.

The Italian government argued that the cross ought to not be conceived of as a religious symbol but that it had, despite its religious origins, taken on a different, 'humanist', meaning.[743] In the first place the ECtHR finds that the crucifix is above all a religious symbol and the question of whether the symbol carried any other meanings was in this case irrelevant.[744] The court also notes that there was no evidence that children were indoctrinated or proselytized by the crucifix.[745] Thus it did not threaten their right to freedom of religion. Then the court went on to state that:

> Furthermore, a crucifix on a wall is an *essentially passive symbol* and this point is of importance in the Court's view, particularly having regard to the principle of neutrality. … It cannot be deemed to have an influence on pupils comparable to that of didactic speech or participation in religious activities.[746]

The argument stands in stark contrast to the kinds of arguments found in *Dahlab* and *Sahin*, for a number of reasons.[747] There may be some truth to the claim that the court was here simply applying the same margin of appreciation that it had applied in *Dahlab* and *Sahin*. However, this does not justify the court finding that the crucifix is a passive symbol especially if a headscarf can be considered an ostentatious symbol. A number of commentators have expressed their dissatisfaction with this concept, arguing that the court's conceptual choice is a 'convenient ambiguity' allowing the court to reach its conclusion.[748] To my mind, the court's confusion runs deeper in that it has no principled approach to the way in which it would evaluate the effects of religious symbols and their effects. Instead, in one case the court will accept a symbol as having some effect, with no

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[742] *Lautsi v Italy* 30814/06 Chamber judgment of 03 November 2009 para 57.
[743] *Ibid* para 35.
[744] *Ibid* para 66.
[745] *Ibid* para 71.
[746] *Ibid* para 72.
[747] H-Y Liu 'The Meaning of religious symbols after the Grand Chamber judgment in *Lautsi v Italy*' (2011) 6 *Religion and Human Rights* 253 254-255.
[748] G Andreescu & L Andreescu 'Taking back *Lautsi*: Towards a theory of "neutralization"' (2011) 6 *Religion and Human Rights* 207 209.

evidence, and then later the court is happy to accept that a symbol is passive, with equally little evidence. What *Lautsi* does is to do away with any coherent basis for evaluating the empirical part of the harm done by a religious symbol.

The next case, *Eweida*,[749] is sometimes considered a landmark case because it is said to have introduced proportionality analysis into cases where employment and religion conflict. In my view this is overstated. A case like *Dahlab* displays the same feature of balancing the religious rights of an employee with those of the employer. What makes *Eweida* noteworthy is that for the first time the court found that the justification was insufficient. The case concerned a Christian employee of British Airways who desired to wear a cross around her neck in addition to her uniform. The court stated:

> It is clear, in the view of the Court, that these factors combined to mitigate the extent of the interference suffered by the applicant and must be taken into account. Moreover, in weighing the proportionality of the measures taken by a private company in respect of its employee, the national authorities, in particular the courts, operate within a margin of appreciation. Nonetheless, the Court has reached the conclusion in the present case that a fair balance was not struck. On one side of the scales was Ms Eweida's desire to manifest her religious belief. As previously noted, this is a fundamental right: because a healthy democratic society needs to tolerate and sustain pluralism and diversity; but also because of the value to an individual who has made religion a central tenet of his or her life to be able to communicate that belief to others. On the other side of the scales was the employer's wish to project a certain corporate image. The Court considers that, while this aim was undoubtedly legitimate, the domestic courts accorded it too much weight. Ms Eweida's cross was discreet and cannot have detracted from her professional appearance. There was no evidence that the wearing of other, previously authorised, items of religious clothing, such as turbans and hijabs, by other employees, had any negative impact on British Airways' brand or image. Moreover, the fact that the company was able to amend the uniform code to allow for the visible wearing of religious symbolic jewelry demonstrates that the earlier prohibition was not of crucial importance.'[750]

[749] *Eweida v UK Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10*, judgment 27 May 2013.
[750] *Eweida* para 94.

There are again a number of striking elements in comparison to previous case law. The structured proportionality analysis is certainly one of them, though not unprecedented. The first part of the quote, the statements that court makes about the need for tolerance in a pluralistic society and the value of religion, are trite and often repeated by the court. The reasoning becomes interesting when the court rejects the domestic court's and government's argument about why wearing a cross did not impact negatively on the BA brand.

Indeed, it is interesting to note that the arguments in this case regarding the plausibility of a cross causing damage to BA's image are almost diametrically opposed to those in *Dahlab*. In that case the teacher had been wearing the headscarf also for a number of years, no one had complained and the case only proceeded when an official took it up. None of that, however, mattered to the court's analysis and it simply dismissed it with the speculative paragraph quoted above. In this case, however, these are precisely the kinds of reason that lead the court to conclude that the limitation is unjustifiable. There may of course be important differences between *Eweida* and *Dahlab* (and *Sahin* and other cases) but in the court's reasoning these do not come out. Again, as was the case with *Lautsi*, *Eweida* goes entirely against the grain of the court's previous jurisprudence in terms of the empirical analysis of the impact of the religious symbol.

Finally, the latest judgment *SAS v France* seems to perform a volte-face on the developments in *Eweida*.[751] The case concerned a French ban on veils in public. The national authorities attempted to justify the ban by appealing to notion that covering one's face makes social interaction more difficult.[752] The court accepted this:

> Furthermore, admittedly, as the applicant pointed out, by prohibiting everyone from wearing clothing designed to conceal the face in public places, the respondent State has to a certain extent restricted the reach of pluralism, since the ban prevents certain women from expressing their personality and their beliefs by wearing the full-face veil in public. However, for their part, the Government indicated that it was a question

[751] *SAS v France* Application no 43835/11 judgment of 1 July 2014.
[752] Para 128.

> of responding to a practice that the State deemed incompatible, in French society, with the ground rules of social communication and more broadly the requirements of "living together". From that perspective, the respondent State is seeking to protect a principle of interaction between individuals, which in its view is essential for the expression not only of pluralism, but also of tolerance and broadmindedness without which there is no democratic society. It can thus be said that the question whether or not it should be permitted to wear the full-face veil in public places constitutes a choice of society.[753]

The reasoning in *SAS v France* is fundamentally different from the reasoning in the previous case law in that it is focused on how to attribute weight to religious practice and on who should make that decision, rather than constituting an argument about the impact of the symbol.

Moreover, and as a consequence of the way in which the court has decided the cases, we cannot tell how the court constructs the margin of appreciation in relation to the substantive statements. Although the margin seems widely based on the outcomes of the cases, the substantive statements that the court makes regarding the crucifix being a passive symbol or living together being an interest that is up to society to assess seem anything but deferential assessments. Ultimately, then European court's case law on religious symbols seems entirely arbitrary.

In general, the ECtHR has failed to construct a cohesive normative architecture for religion. In the sphere of religion, the court has a particularly arduous task in finding a common European baseline among the different varying systems. However, it cannot be said that the court could be said to have seriously attempted to explore those elements that are common to all European systems, (such as, possibly, multiculturalism) in order to determine those elements that are, even in the very diverse European landscape on state-religion relationships, unacceptable. So far, the case law does not show any coherent approach to this question according to which one could determine what is proportionate, why it is proportionate and what questions fall for the state to determine and which ones do not.

[753] Para 153.

6. Conclusion

The case law of the four courts in relation to freedom of religion displays yet another way in which the four courts apply proportionality and construct deference. The cases that were surveyed dealt with many aspects of religious practice but with a focus on religious symbols which require the courts to evaluate what harm can be caused by being exposed to a symbol. For the domestic courts, South Africa, Canada and Germany, this was dealt with practically entirely as a question of values. The question of whether a religious symbol could be regarded as causing harm was dealt with as a matter of values. In the case of South Africa and Canada this was done even against the existence of evidence of harm, in the form of fear or feelings of unfairness. The case law on religious symbols then seems to be informed primarily by a value judgment that may be difficult to overcome, even where the harm may be significant. The ECtHR is something of an outlier in that it at least frames its decisions in empirical terms with very little reference to values. Unfortunately, judging its case law it is difficult to see a consistent application of any kind of principles that would guide its balancing and as a consequence the margin of appreciation.

One way of understanding the case law more broadly is to consider it as the courts being profoundly confused as to what it means to be a neutral arbiter of religions. From this point of view, the courts have not found a cohesive theory as to what it means for the state to be neutral. As such courts have not been able to explain the relevance of the relevance criteria they employ to reach their conclusion, making the trenchant criticism directed at them hardly surprising.

1. Introduction

This thesis began with a reflection on the legitimacy of judicial review and the challenge that proportionality-based judicial review brought to it. The challenge was identified to lie in the form of reasoning required by proportionality and the discretion that it leaves to courts. Hence, proportionality must be coupled with a form of deference. This neat conclusion belies the complexity of the exercise in practice. In reality, the practice of the courts has shown us, the marriage of proportionality and deference is often a tumultuous one. Over the course of the past chapters the way in which courts have dealt with has been analyzed. This final, concluding, chapter will draw these questions together and consider them from the perspective of the bigger questions.

The first chapter placed those problems into the big picture and provided a framework for asking why these questions matter in the first place. The second chapter did some of the hardest work in the thesis by deconstructing what goes on when a court says that it is balancing interests. Here the question was about what kind of arguments a court has to make in order to be able to apply the proportionality test. This deconstruction was put to work in the subsequent chapters which analyzed the practice of four different courts – the German Federal Constitutional Court, the Supreme Court of Canada, the Constitutional Court of South Africa and the European Court of Human Rights – in respect of three different rights – freedom of expression, the right to privacy and freedom of religion.

Based on the analysis of those three rights we can draw conclusions on three broad questions about the relationship between balancing and deference. The first relates to the way in which courts use normative and empirical reasons in balancing competing rights. Here, in the first place, there is a striking similarity across all the courts and all the rights, as regards the place of deference and its

location within the proportionality inquiry. From a purely phenomenological point of view, the above analysis shows that courts defer by adapting – often implicitly – their normative and empirical judgments to their institutional role. Secondly, the way in which this happens varies from one right to the other. This is to say that the way in which a court balances, and accordingly defers, is different from one right to the next. Finally, these differences may reflect an understanding of courts' institutional limits in the balancing exercise.

2. The Relationship Between Balancing and Deference

The major question underpinning this thesis has been to seek the connection between the particular type of reasoning required by proportionality and balancing with the institutional being of a court of law. Throughout its analysis the thesis sought to show how courts employ normative and empirical arguments in balancing and how those arguments are influenced by courts' institutional position. As such deference – and its international law cousin the margin of appreciation – can take many forms, depending on the kinds of normative and empirical arguments advanced in the case.

The second chapter dealt with this question exhaustively and we can recap its central findings here briefly. Although proportionality and the separation of powers are understood differently in each of the four jurisdictions, there is a crucial similarity in the sense that the heart of proportionality is the final fourth step, balancing, and the separation of powers is given effect within the balancing exercise.

However, courts have not been meticulous in explaining the factors that it considers to deserve deference nor do they often explain how those factors affect its subsequent analysis. Thus often we find courts engaged in balancing competing interests without knowing how they have taken their institutional position into account, if at all. The landmark cases that deal with these questions

cannot always reflective of subsequent case law or in the very least the connection is often rather hidden. What must be, then, analyzed is how courts balance in the actual cases.

3. Substantive Reasons and Balancing

To this end, this thesis has looked at balancing in three different rights. The analysis revealed that balancing each right, although united by many similarities in the way in which weight is attached, the normative and empirical arguments lead to quite different types of institutional challenges for courts. The main differences between the balancing related to both differences in the normative arguments that were required for the balancing as well the different empirical questions that arise from regulating different human activities. In freedom of expression case law, the defining characteristics of balancing were the explicit reference and engagement with the reasons for freedom of expression and the empirical difficulty of regulating expression through a general law. The case law on the right to privacy was marked by the clear normative and empirical differences between different types of relevant reasons and the fact that frequently the limitation of the right required a discrete act by the state. Finally, in religious rights cases the defining characteristic was the extent to which normative arguments were used to attribute weight to factual situations. Here, the values of the constitution seemed to take the place of empirical evaluation.

The way in which courts balance and in doing so defer, then depends to a great extent on the activity in question. There are different reasons for protecting the right to a particular activity and courts are differently placed in evaluating how significant the intrusion is. There are no absolute standards here, nothing suggests that courts can engage with, say, reasons for freedom of expression but not those related to the right to privacy. Then, while it surely matters that the freedom of expression is rooted in three well-known and widely accepted reasons this does not mean that courts could not equally engage in reasoning about the reasons for privacy or religion. The point here is that the courts

approach these questions differently for different rights, leading to a different application of proportionality and thus deference.

Similarly, the different activities protected by different rights pose different empirical challenges. The impact of expression for example appears very difficult to predict and control. This requires legislation that is generally more broadly framed and then interpreted very attentively by courts, as exemplified by the Canadian case of *Keegstra*. Many privacy interests on the other hand, appear to be quite predictably limited and can be regulated with strict laws that place a burden on government to follow processes that protect the right to the greatest degree possible. Religious freedom presents a difficult blend of normative and empirical evaluations, where courts have had to decide whether the way in which a religious symbol is perceived. Again, there are no hard and fast rules as to what empirical determinations lie beyond the competence of courts, other than there are different ones even among different civil and political rights.

Different rights come with different empirical and normative questions, which shape the way in which courts balance the competing rights. It is in the way in which courts deal with these that we find the interaction between proportionality and deference. While there can be no absolute rules on what courts can and cannot do here, their past practice shows that different rights come with different kinds of challenges to the institutional capacities of a court.

One of the more striking results of the comparison between different courts was the similarity in how courts approach the same right a lot of the time. With very few exceptions the four courts balanced each of the rights in largely the same way. This poses a serious challenge to those authors, like Jacco Bomhoff[754] and Moshe Cohen-Eliya and Iddo Porat[755] who claim that balancing is deeply culturally embedded. While there are, of course, differences between the different courts (to which we will turn shortly), there are also significant and wide-ranging similarities in the style and substance of balancing freedom of

[756] See chapter 2.

expression, the right to privacy and freedom of religion across Germany, Canada, South Africa and the European Court of Human Rights. In fact, these similarities seem greater than the differences across the different rights.

The highest degree of similarity is probably found in the case law on the right to privacy. Here, all four courts have created very similar normative architectures distinguishing between different information in very similar ways. Then, we find that all four courts balance freedom of expression cases in a very similar manner. They all base the evaluation of the weight of a limitation on the same three reasons. However, when it comes to how to deal with the difficult evaluation of different instances we find differences. In Germany it seems accepted that courts can make a constitutional finding in each case and thus much of speech is regulated through broadly termed laws that courts interpret in accordance with the Basic Law. In Canada, this was seen as problematic in *Keegstra* where the court was concerned about whether such a criminal prohibition on hate speech could cause a chill on expression or even lead to false convictions. Finally, freedom of religion is possibly unsurprisingly the area where we find the highest degree of variation in terms of reasoning and outcomes, at least in the cases on religious symbols that were analyzed in that chapter. South Africa and Canada are very similar in their reasoning in *Pillay* and *Multani*, reading the harm that may ensue from wearing a religious symbol from a normative point. Germany falls largely within the same category albeit some of its outcomes, such as that in the *Crucifix* case, come out as quite different from what might be expected.

The comparative picture between the four courts, then, is one of nuanced differences and similarities when it comes to how proportionality is applied. It is only through a thorough deconstruction of what goes on in proportionality and a detailed reading of entire cases that these can be understood.

4. Putting It All Together: Towards a Theory of Crude Balancing

In order to tease out deference in the proportionality inquiry, we deconstructed balancing into its components, identifying different arguments that went into filling out the balancing equation. Based on that deconstruction we could, then, identify different ways in which courts balanced and how this left space for government. On the most general level, this puts meat on the bones sketched by those, who like Robert Alexy, Andrew Legg, and Matthias Klatt and Moritz Meister portray deference as 'attaching weight' to statements because of uncertainty or institutional constraints.[756] Similarly, it fleshes out the arguments by Canadian and some British theorists who call for 'deference as respect'.[757] It is not that I find there to be anything necessarily wrong with these conceptions of deference, my point is simply that when applied in practice these metaphorical (for lack of a better word) descriptions of the reasoning in balancing takes a particular form. It is then, not that I disagree with many of the characterizations of deference considered in Chapter 2 of the thesis, my labor is to bring a different perspective to the question: one that allows deference to be connected to proportionality as it is practiced by courts. The bulk of the thesis was dedicated to figuring out how this worked in practice across a number of courts and it is to the more detailed observations that we now turn.

The court's job is two-fold: it must establish the framework that determines the normative value of the respective limitations and gains to the right and general good. This requires an elaboration of the value for protecting the right that is limited. Often courts will refer to sources, such as universal reason or history, in order to root more concrete values. Often, they will also give examples of what constitutes a serious limitation of the right and what constitutes a light limitation.

[756] See chapter 2.
[757] See, also chapter 2.

4.1 Normative Reasoning

It is difficult to generalize about this 'theorization'. One way to do so is by measuring its depth. What is usually meant by this is that the court reasons more extensively about the reasons for protecting the rights in question. Freedom of expression would, then, be a more extensively theorized right than the right to privacy or freedom of religion. This theorization does not itself mean that the court is less deferential. In fact, in the case of the Canadian free expression case law, it was precisely the reliance on the reasons for free expression that contributed to the court's frequent findings that the justification was limited.

In the first place we can differentiate between *rights specific* normative reasoning and *general* normative reasoning. *Rights specific* reasoning relates to the reasons protected by the right in question. The majority of the reasoning in judgments relates to a particular right, such as the value of free expression, the right to freedom of religion and the right to privacy. General reasoning relates to considerations that could apply in the context of any right. An example may be the role that voluntariness can play in determining the severity of the rights limitation. This distinction does not does not tell us anything about the role of deference in itself, but when combined with questions about rights specific reasons it can add an additional layer of complexity. However, such general questions almost never arose in the course of this study.

With regard to theorizing the rights, all three seemed to be different from one another. Freedom of expression could be called *completely theorized*. This is reflected in the way in which the courts use the reasons behind the right to freedom of expression in order to determine the severity of the limitation of the right. In itself this does not imply that a court could not find in favor of the government – the Canadian Supreme Court's freedom of expression case law is a good example that it does not. The case law on privacy might be considered *indeterminately theorized*. In that while, it does not have the theoretical sophistication of freedom of expression, courts have developed normative arguments that inform the evaluation of the severity of the limitation. The

distinction between what is private and what is public rooting the case law of the courts. The normative theorization in the case of religion is perhaps best described as *untheorized*. Meaning that the courts have not developed theoretical underpinnings for the evaluation of the severity of the limitation. As a consequence, the attribution of weight to different limitations is almost arbitrary. These three different ways of conceptualizing the theorization of normative arguments in balancing shows, in the first place, that there is not one way to theorize the normative aspects of rights.

The type of theorization does not itself mean a higher or lower level of deference, rather it affects the kind of balancing, and in turn deference, the court will embrace. The deeper normative theorization of freedom of expression cases results in a more nuanced engagement with the effects of a law than it does in the shallower theorization of privacy cases. This is neither more or less deferential, it is simply different.

How should courts, then, approach the normative aspects of the reasoning in balancing? Is the highly theorized approach in relation to freedom of expression necessarily better than the more thinly theorized right to privacy? These questions cannot be conclusively answered here but there are reasons to suggest that the higher level of theorization in freedom of expression cases is justified whereas a similar approach would be questionable for the right to privacy. With regard to freedom of expression courts had the benefit of longstanding philosophical agreement with regard to the arguments relating to the main aspects freedom of expression. The courts could also rely on the practice of other courts in developing their own approaches. The right to privacy is more contested philosophically but from a comparative perspective there is significant convergence as to the relevant criteria. Arguably, for courts in these circumstances to embrace very nuanced or sophisticated theoretical arguments would be undesirable.

In general, it would be desirable if courts reflected more extensively on the reasons for which they adopt whatever normative framework they do adopt.

There is a sense that often they are developed on the basis of selected arguments by authors or foreign case law, and while there is nothing inherently wrong with this, it would be desirable if courts reflected somewhat more extensively on the metaethical questions that arise when judging.

4.2 Empirical Reasoning

The second task of the court is to evaluate the gains and detriments caused by the law in the real world. With this I mean the consequences that a law is likely to have and their impact on the right in question. This usually takes up a large part of the justification analysis and consists of an evaluation of the arguments made about what the effects of the law will be. Here, the question becomes one of the appropriate standard of review. This is somewhat misleading as the evidence will necessarily need to be matched to the normative arguments. The question is, then, not what all the effects of the law are but rather what the relevant effects of the law are for the implicated rights.

The range of empirical findings necessary here is wide. In fact, it is as wide as the range of human activity that is regulated by law. Indeed, the preceding chapters have dealt with questions of the impact of speech on the behavior of voters and consumers, the impact of pornography on the perception and role of women in society, the functioning of the police in different settings, the impact of limitations to privacy caused by the publishing of various types of pictures and video as well as the consequences of displaying religious signs.

There are two questions that are relevant in this regard. The first is about the appropriate level of empirical certainty required to prove a claim. Those who approach these questions from a quantitative perspective can represent these issues in a seamless fashion with certainties represented in percentages, In reality, however, the way of determining the consequences of a law depends on the evidence before the court.

The second question is about the evidence that is required to determine how likely a particular outcome is. This is a matter of translating various pieces of evidence into the probability of a law having a certain outcome. Following the Canadian case law and commentary this is often conceived of as in terms of evidence-based judgments opposed by common sense evaluations. While there is some truth to this juxtaposition, the foregoing analysis also reveals the possibility to read the case law in a more nuanced way.

The first step to understanding how evidence and common sense operate in proportionality is to appreciate that laws act as social mechanisms to achieve certain goals. They regulate human activity in order to achieve certain desired outcomes. The task for courts is to verify what causal relations between the legal regulation and the outcomes are likely to follow from the enactment of the impugned law. Here, there will always be an element of guesswork at play as any policy is enacted for the future. As such whatever evidence in the form of social scientific research will be presented to the court will be at least in part be inconclusive as it merely establishes a basis for an educated guess about how the society in question may react to the change in law. As such evidence must always be supplanted with arguments as to why the consequences of a study would be relevant. In return, the common-sensical checking of the legal mechanism may be much more reliable than what has been suggested.

There seems to be a distinction between laws regulating society at large and laws regulating state actors that plays a significant role in how courts approach empirical questions. While the actions of the general population may be unpredictable to a great extent, state officials perform their functions within the narrower confines of their official position. As such the field of action of action of officials of a state are narrower that those of people in general. As a consequence, they could plausibly also be considered to be easier to capture through common-sense (or rather they do not require social-scientific evidence). This distinction may explain in part why courts have been able to strike down laws in the area of privacy more often than in the area of freedom of expression and religion. Privacy cases often deal with cases of collection of information by state officials

and the use of this information, whereas expression and religion cases deal with the much less predictable actions of the public at large. Similarly, it may explain why the German Federal Constitutional Court has seemingly treated cases related to the regulation of broadcasting differently from other cases of expression.

In general, it would seem that courts are more comfortable dealing with legislation that regulates state activity rather than individuals at large. This may be at least in part explained by the fact that state behavior ought to be more closely in line with the law and as such more predictable and more controllable. This is, of course, not an exhaustive analysis of the capacity of courts to engage in empirical evaluations, it is simply one example of how the context affects the empirical evaluations to be made in a case and how a court's capacity depends on that context. The point is that, while each case will have its own nuances there are also some general guidelines that may help evaluate a court's capacity to deal with empirical questions.

4.3 Combining the Normative and Empirical Reasons: Crude Balancing and Institutional Capacity

The two sections on normative and empirical arguments give us some considerations as to the institutional competence of courts in making those. Before concluding the thesis there is one final point to be made about the general balancing exercise and how it can affect the over-all institutional competence to balance competing interests. This point is the relatively obvious one that in the end the balancing exercise has to be taken as a whole. The impact of this may be that if some of the evaluations in the balancing exercise very obviously come out in one way or another, other more difficult ones, may require less attention. The difficulty of the balancing exercise must be viewed as a whole where a number of easy evaluations may resolve the case, making it possible to pay less attention to other more difficult questions.

What we end up with is a picture of the court balancing different interests the weight of which it can determine to varying degrees of sophistication depending on the legitimacy constraints that the various evaluations require. The closer the interests the more sophisticated the court's analysis needs to be and the more precarious its institutional position becomes. Conversely, the less sophistication is needed or the cruder the court can be, the more secure its institutional position and the legitimacy of its judgment.

It may, then, be that the combination of relatively discrete normative categories in the privacy case law – the idea of what is and what is not private – coupled with the fact that privacy rights are often limited by state officials gives courts a greater capacity to intervene in that domain. Conversely, it may be that the reluctance to intervene with hate speech laws comes from the double difficulty of classifying hate speech – at once political and deserving of protection but also undesirable as promoting hatred – coupled with the difficulty of evaluating the real world consequences of expression in general.

In between, these arguably easier and more difficult cases lie most cases that come before courts in which some parts of the balancing equation are less challenging for the court and others more so. Balancing in most expression cases seems to fall into the medium category of difficulty, with some evaluations being relatively straight-forward – such as determining the value of the speech depending on its nature – while others are more difficult such as determining the impact of the expression in question. Religious rights cases may also often be considered to be on the more difficult side of the scales because of the difficulty of evaluating the seriousness of the limitation because of the limitations on courts for developing a theory of the weight of limitations of religion.

This is not intended as an exhaustive analysis of the different types of combinations that arise in balancing cases, it simply serves to illustrate the point that different combinations of facts and values give rise to different types of challenges. In this sense, the general message of this thesis has been that the

challenges to courts' legitimacy varies between cases and all that can be done here is to point at certain general features of this process.

5. Conclusion

If there is a final thought that the reader ought to take away from this thesis is that it has sought to complexify the relationship between strict evidentiary scrutiny and common sense in adjudication. Instead, the foregoing analysis ought to have revealed a much richer picture of how deference operates in proportionality. Instead of existing as a simplistic binary between 'a stringent test' and a looser 'common sense' test, each act of balancing requires a number of different elements to establish the abstract value judgments and more specific empirical claims that a court makes in applying the principle of proportionality. This picture involves as much the philosophical reflection on the value of free speech and reflection of whether a space is private or public as it does the scrutiny of social scientific evidence. This thesis has sought to show that the reasoning of courts and the consequent ways of deferring are complex and involve a number of different types of arguments. What it cannot show is where exactly the appropriate lines for deference lie, that would depend on a further analysis of the substantive competences of a court in relation to a particular case in a particular society. All the analysis undertaken here can show is that these questions come in many forms for a good reason.

List of Cases

Canada

R v. Big M Drug Mart [1985] 1 SCR 295.

R v Oakes [1986] 1 SCR 103.

R v Edward's Books and Art Ltd [1986] 2 S.C.R. 713

R v Jones [1986] 2 SCR 284.

Ford v Quebec (Attorney-General) [1988] 2 SCR 712

Irwin Toy v Quebec [1989] 1 S.C.R. 927.

R v Keegstra [1990] 3 SCR 697.

Rocket v Royal College of Dental Surgeons [1990] 2 SCR 232.

Reference re ss. 193 & 195.1(1)(c) of Criminal Code (Canada), (the Prostitution Reference) [1990] 1 S.C.R. 1123.

R v Wong [1990] 3 SCR 36.

R v Butler [1992] 1 S.C.R. 452.

R v Zundel [1992] 2 SCR 731.

Young v Young [1993] 4 SCR 3.

RJR MacDonald v Canada [1995] 3 S.C.R. 199.

R v Edwards [1996] 1 SCR 128.

R v Plant [1996] 3 SCR 281.

Adler v Ontario [1996] 3 SCR 609.

R v Feeney [1997] 2 SCR 13.

B. (R.) v. Children's Aid Society of Met. Toronto, [1997] 1 S.C.R. 315.

Thomson Newspapers [1998] 1 S.C.R. 877.

Little Sisters Book and Art Emporium v Canada (Minister of Justice) [2000] 2 S.C.R. 1120.

Harper v Canada [2004] 1 S.C.R. 827.

Multani v. Commission scolaire Marguerite-Bourgeoys 2006 SCC 6.

R v Bryan [2007] 1 SCR 527.

*R v Harris*on [2009] 2 SCR.

Carter v Canada (Attorney-General) [2015] 1 SCR 331.

Loyola High School v Quebec (AG) [2015] 1 S.C.R. 613.

Germany

Lüth BVerfGE 7, 198

Tobacco Atheist/ Glaubensabwerber BVerfGE 12, 1.

Schmidt-Spiegel BVerfGE 12, 113

Pharmacy Case BVerfGE 13, 97.

BVerfGE 16, 95.

Rag Collection Case BVerfGE 24, 236.

Blinkfüer BVerGE 25, 256

BVerfGE 30, 173.

Blood Transfusion / Gesundbeter BVerfGE 32, 98.

Deustchland-Magazin BVerGE 42, 143

Kalkar I BVerfGE 49, 89.

Falconing BVerGE 50, 159.

Codetermination Case BVerGE 50, 200.

BVerGE 53,135.

Diary/ Tagebuch BVerGE 54, 148

CSU-NPD / Wahlkampf Case BVerGE 62, 1.

Census Act BVerGE 65, 1.

Strauß-Karikatur BVerGE 75, 369.

National Anthem Case BVerGE 81, 289.

Cannabis BVerfGE 90, 145.

Holocaust Denial BVerGE 90, 241.

Crucifix BVerGE 93,1.

Tucholsky I / Soldiers are Murderers BverGE 93, 266.

Telekommunikationsüberwachung I Telekommunications Surveillance Case BVerGE 100, 313.

Headscarf II BVerfGE 138, 293.

South Africa

S v Zuma and Others [1995] ZACC 1; 1995 (2) SA 642.

S v Makwanyane 1995 (3) SA 391 (CC).

S v Williams and Others [1995] ZACC 6; 1995 (3) SA 632

Coetzee v Government of the Republic of South Africa, Matiso and Others v Commanding Officer Port Elizabeth Prison and Others [1995] ZACC 7; 1995 (4) SA 631.

Ferreira v Levin NO (1) 1996 SA 984 (CC).

Case and Another v Minister of Safety and Security and Others, Curtis v Minister of Safety and Security and Others [1996] ZACC 7; 1996 (3) SA 617; 1996 (5) BCLR 608.

Bernstein and Others v Bester NO and Others [1996] ZACC 2.

S v Lawrence, S v Negal, S v Solberg [1997] ZACC 11; 1997 (4) SA 1176.

Soobramoney v Minister of Health (kwaZulu-Natal) 1998 (1) SA 765 (CC).

Mistry v Interim National Medical and Dental Council 1998 (4) SA 1127

South African National Defense Force Union v Minister of Defense [1999] ZACC 7; 1999 (4) SA 469; 1999 (6) BCLR 615.

National Coalition for Gay and Lesbian Equality v Minister of Justice and Others 1999 (1) SA 6 (CC).

Government of the Republic of South Africa and Others v Grootboom and Others 2000 (1) SA 46.

Christian Education South Africa v Minister for Education [2000] ZACC 11; 2000 (4) SA 757.

S v Mamabolo (CCT 44/00) [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5).

Directorate: Serious Economic Offences v Hyundai Motor Manufacturers 2001 (SA) 545 (CC).

Treatment Action Campaign v Minister of Health and Others (No 2) 2002 (2) SA 721 (CC).

Prince v President of the Law Society of the Cape of Good Hope 2002 (2) SA 792.

Khumalo and Others v Holomisa [2002] ZACC 12; 2002 (5) SA 401; 2002 (8) BCLR 771.

Islamic Unity Convention v Independent Broadcasting Authority and Others [2002] ZACC 3; 2002 (4) SA 294; 2002 (5) BCLR 433.

S v Jordan [2002] ZACC 22; 2002 (6) SA 642 (CC).

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 (4) SA 490 (CC).

Minister of Home Affairs v Fourie and Another [2005] ZACC 19; 2006 (1) SA 524 (CC).

Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another [2005] ZACC 7; 2006 (1) SA 144 (CC)

Pillay v MEC for Education, KwaZulu-Natal, and Others [2007] ZACC 21; 2008 (1) SA 474 (CC).

European Court of Human Rights

Handyside v United Kingdom Judgment of 7 December 1976, 1 EHRR 737.

Dudgeon v the United Kingdom judgment of 22 October1981

Lingens v Austria Application No. 9815/82, judgment of 9 July 1986.

Kokkinakis v Greece 260 Eur. Ct. H.R. (ser. A).

Oberschlick v Austria Application No. 11662/85, Judgment of 23 May 1991.

Oberschlick v Austria (No 2) Application No. 20834/92, Judgment of 1 July 1991.

Jersild v Denmark (1994) 19 *EHRR* 1.

Otto-Preminger-Institut v Austria, *Application no.13470/87,* Judgment of 20 September 1994.

Wingrove v the United Kingdom, Judgment of 25 November 1996 *Reports* 1996-V, pp. 1957-58.

Y and Z v. the United Kingdom Judgment of 22 April 1997

Refah Partisi (the Welfare Party) and Others v Turkey [GC], Application no.s 41340/98.

Karatas v Turkey, Application no. 23168/94, Judgment of 8 July 1999.

Evans v United Kingdom 43 EHRR 21.

Alinak v Turkey, Application *no. 40287/98,* Judgment of 29 March 2003.

Odievre v France (Application no. 42326/98), Judgment of 13 February 2003.

Krone Verlag GMBH & Co v Austria (No 3) Application No. 39069/97 Judgment of 11 December 2003.

Dogru v France App. No. 31645/04.

Hirst v the United Kingdom (No 2) [2005] ECHR 68.

Nikowitz and Verlagsgruppe News GmbH v. Austria, no. 5266/03 at para 25, judgment of 22 February 2007.

Colaço Mestre and SIC – Sociedade Independente de Comunicação, S.A. v. Portugal, nos 1182/03 and 11319/03 26 April 2007.

Sapan v. Turkey, no. 44102/04 judgment of 8 June 2010.

Lautsi v Italy App. No. 30814/06 Judgment of 19 March 2011.

Eweida v UK Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10, judgment 27 May 2013.

SAS v France Application no 43835/11, judgment of 1 July 2014.

Bibliography

CH Aachen & LM Barterls *Democracy for Realists* (2016).

L Ackermann 'The Legal Nature of the South African Constitutional Revolution' *New Zealand Law Review* (2004) 633.

R Alexy *Theory of Constitutional Rights* (1985, transl 2002)

G Andreescu & L Andreescu 'Taking back *Lautsi*: Towards a theory of "neutralization"' (2011) 6 *Religion and Human Rights* 207 209.

Y Arai-Takahashi *The Margin of Appreciation and the Principle of Proportionality* (2002).

O M Arnardóttir 'Rethinking the Two Concepts of the Margin of Appreciation' *European Constitutional Law Review* (2016) 12 27-53.

PS Atiyah & RS Summers *Form and Substance in Anglo-American Law* (1987).

A Barak *Proportionality* (2012).

D Beatty *The Ultimate Rule of Law* (2004).

R Bellamy *Political Constitutionalism* (2007).

D Bello Hutt 'Against judicial supremacy in constitutional interpretation' *Revus. Journal for Constitutional Theory and Philosophy of Law* (2017).

G Bouchard & C Taylor *Building the Future: A Time for Reconciliation* (2008)

I Benson 'The Freedom of Conscience and Religion in Canada: Challenges and Opportunities' *Emory Journal of International Law* (2007) 21 111.

CD Beledieu 'The Headscarf as a Symbolic Enemy of the European Court of Human Rights' Democratic Jurisprudence: Viewing Islam Through a European Legal Prism in Light of the *Sahin* Judgment' (2006) 12 *Columbia Journal of European Law* 573.

E Benvenisti 'Margin of appreciation, consensus, and universal standards' *NYUJ Int'l L. & Pol.* 31 (1998): 843.

A Bickel, 'Foreword: The Passive Virtues' (1961)' *Harvard Law Reveu* 75: 40.

AM Bickel *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1986).

D Bilchitz 'Does balancing adequately capture the nature of rights?' *Southern African Public Law* 25.2 (2010): 423-444.

D Bilchitz & S de Freitas 'Introduction: the right to freedom of religion in South Africa and related challenges' *South African Journal on Human Rights* 28(2) (2012): 141.

F du Bois 'Rights trumped? Balancing in constitutional adjudication' *Acta Juridica* 2004.1 (2004).

J Bomhof *Balancing Constitutional Rights: The Origins and Meanings of Postwar Legal Discourse* (2013).

E Brems & L Larysen 'Don't Use a Sledgehammer to Crack a Nut': Less Restrictive Means in the Case Law of the European Court of Human Rights'

E Bonthuys 'Women's Sexuality in the South African Constitutional Court' *Feminist Legal Studies* 14.3 (2006): 391-406.

E-W Böckenförde *Staat, Verfassung und Recht* (1991).

E Cameron *Justice – A Personal Account* (2013).

J Cameron 'A Reflection on Section 2(b)'s Quixotic Journey' 1982-2012' (2012) *Supreme Court Law Review* 58, 163.

J Cameron Law, Politics, and Legacy Building at the McLachlin Court in 2014 Constitutional Cases 2014, 71 S.C.L.R. (2d) 1- 24, 2015.

C Chan A Preliminary Framework for Measuring Deference in Rights Reasoning *Int J Const Law* (2016) 14 (4): 851-882.

S Choudhry 'So What is the Real Legacy of Oakes? Two Decades of Proportionality Analysis under the Canadian Charter's Section 1' (2006). *Supreme Court Law Review* 34 501.

R Clayton 'Regaining a Sense of Proportion: The Human Rights Act and the Proportionality Principle' *European Human Rights Law Review* (2001)

A Cockrell 'Rainbow jurisprudence' (1996) *South African Journal of Human Rights* 13

M Cohen-Elia & I Porat *Proportionality and Constitutional Culture* (2013).

FB Cross *Constitutions and Religious Freedom* (2015).

I Currie & J de Waal *Bill of Rights Handbook* (1998).

Y Dawood 'Democracy, Power, and the Supreme Court: Campaign Finance Reform in a Comparative Perspective' *International Journal of Constitutional Law* (2006) 4 (2): 269-293.

R Dixon 'The Supreme Court of Canada, Charter Dialogue and Deference' *Osgoode Hall LJ* Vol 47(2) (2009).

D Dyzenhaus 'The Politics of Deference: Judicial Review and Democracy' in W Taggart *The Province of Administrative Law Determined* (1997) 279.

R Dworkin *Taking Rights Seriously* (1977).

R Dworkin 'Rights as Trumps' in J Waldron (ed.) *Theories of Rights* (1984).

R Elliot 'The Supreme Court of Canada and Section 1—the Erosion of the Common Front"(1987)' *Queen's LJ* 12: 277.

R Elliot 'Back to Basics: A Look at the *Irwin Toy* Framework for Freedom of Expression' *Rev. Const. Stud.* 15 (2010).

C Evans 'The "Islamic Scarf" in the European Court of Human Rights' (2006) 7 *Melbourne Journal of International Law* 52.

P Farlam 'Freedom of Religion' in S Woolman & M Bishop *Constitutional Law of South Africa* (2nd ed. 2008).

A Føllesdal. 'Much Ado About Nothing? International Judicial Review of Human Rights in Well Functioning Democracies' in A Follesdal, J. Schaffer & G Ulfstein (ed.s) *The Legitimacy of International Human Rights Regimes*. (2013) 272-299.

J Fowkes *Building the Constitution* (2017).

S Greer 'Book Review of A Theory of the Interpretation of the European Convention on Human Rights' *International Journal on Minority and Group Rights* 16 (2009) 503–510

Grimm *'Proportionality in Germany and Canada*'.

D Grimm 'The Holocaust Denial Case of the German Federal Constitutional Court' in I Hare & J Weinstein *Extreme Speech and Democracy* (2009).

J Habermas *Between Facts and Norms* (1992).

Michaela Hailbronner *Traditions and Transformations* (2016).

R. Harmsen, 'The European Convention on Human Rights after Enlargement' *International Journal of Human Rights* 5 (2001), 1843

Herzog 'Art' 4' in T Maunz & G Dürig *Grundgesetzkommentar* (2016)

R Hirschl *Towards Juristocracy: The Origin and Consequences of the New Constitutionalism* (2004).

R Hirschl *Comparative Matters: The Renaissance of Comparative Constitutional Law* (2014).

P Hogg *Constitutional Law of Canada* (2011).

W Hogg & A Buschell 'The Charter Dialogue between Courts and Legislatures, The (Or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)' *Osgoode Hall LJ* 35 75 (1997).

W Hogg, PM Allison A Bushell Thornton & W Wright. "Charter Dialogue Revisited-or Much Ado about Metaphors." *Osgoode Hall LJ* 45 (2007):

O Höffe 'Wieviel Politik Ist Dem Verfassungsgericht Erlaubt?' *Der Staat* Vol. 38, No. 2 (1999), pp. 171-193.

C Jestaed 'Proportionality – Its Strengths and Weaknesses' in Pavlakos (ed.) *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (2007).

A Kavanagh 'Participation and Judicial Review: A Reply to Jeremy Waldron' 22 *Law and Philosophy* 451 (2003) at 461.

A Kavanagh 'Defending deference in public law and constitutional theory' *Law Quarterly Review* 2010, 126 222-250.

M Khosla 'Proportionality: An assault on human rights?: A reply.' *International journal of constitutional law* 8(2) (2010).

G Millar 'Whither the Spirit of *Lingens*' 3 *EHRLR* (2009) 277.

M Kumm 'Review Essay of *Theory of Constitutional Rights*' 2 *International Journal of Constitutional Law* 574 (2004).

M Kumm 'Who's Afraid of the Total Constitution-Constitutional Rights as Principles and the Constitutionalization of Private Law' *German Law Journal* 7 (2006).

M Kumm 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' Vol 4. Iss.2 *Law and Ethics of Human Rights* (2010) 141.

M Klatt & M Meister *The Constitutional Structure of Proportionality* (2012)

M Klatt & J Schmidt 'Epistemic discretion in constitutional law' *International journal of constitutional law* 10.1 (2012): 69-105

M Klatt & M Meister 'Proportionality — a benefit to human rights? Remarks on the I·CON controversy.' *International journal of constitutional law* 10(3) (2012): 687.

DS Law 'Generic Constitutional Law' 89 *Minnesota Law Review* 652 (2005).

A Legg *The Margin of Appreciation in International Human Rights Law* (2012).

B Leiter *Why Should We Tolerate Religion* (2014).

A Lester 'Universality Versus Subsidiarity: A Reply' *European Human Rights Law Review* 73 (1998) 75.

G Letsas *A Theory of the Interpretation of the European Convention on Human Rights* (2007).

T Lewis 'What Not to Wear: Religious Rights, the European Court, and the Margin of Appreciation' (2007) 56 *International and Comparative Law Quarterly* 395.

H-Y Liu 'The Meaning of religious symbols after the Grand Chamber judgment in *Lautsi v Italy*' (2011) 6 *Religion and Human Rights* 253 254-255.

C Mac Amlaigh 'Putting Constitutional in Its Place' *International Journal of Constitutional Law* (2016) 14(1)

K McLean *Constitutional Deference, Courts and Socioeconomic Rights in South Africa* (2009).

A Marmor 'What is the Right to Privacy?' *Philosophy and Public Affairs* 43(1) (2015) 3-26.

D Merten 'Der Kruzifix-Beschluss des Bundesverfassungsgerichts' in J Burmeister (ed.) *Verfassungsstaatlichkeit* (2006) at 990-1.

R Moon *Freedom of Conscience and Religion* (2015).

Y De Montigny 'The Difficult Relationship Between Freedom of Expression and its Reasonable Limits' *Law and Contemporary Problems* 55.1 (1992) 35-52.

D Moseneke *My Own Liberator* (2016).

CR Munro 'The Value of Commercial Speech' 62(1) *Cambridge Law JournalJ* 134 (2003).

E Mureinik 'A Bridge to Where? Introducing the interim Bill of Rights' *South African Journal of Human Rights* 10 (1994) 31

K Möller *The Global Model of Constitutional Rights* (2012).

J Neethling 'The concept of privacy in South African law.' *S. African LJ* 122 (2005) 18.

K O'Regan 'Text matters: some reflections on the forging of a new constitutional jurisprudence in South Africa." *The Modern Law Review* 75.1 1-32 (2012).

N Petersen 'Proportionality and the incommensurability challenge in the jurisprudence of the South African Constitutional Court' *South African Journal on Human Rights* 30(3) (2014) 405-429

N Petersen *Verhältnissmäßigkeit als Rationalitätskontrolle* (2015).

N Petersen *Proportionality and Judicial Review* (2017)

L du Plessis 'Interpretation' in S Woolman & M Bishop *Constitutional Law of South Africa* (2008) at 32-2.

L du Plessis 'Religious Freedom And Equality As Celebration Of Difference: A Significant Development In Recent South African Constitutional Case-Law' PER/PELJ 2009 12 (4).

J Rivers Proportionality and variable intensity of review." *The Cambridge Law Journal* 65.01 (2006) 174-207

C Roederer 'Judicious engagement: Theory, attitude and community' (1999) *South African Journal of Human Rights* 486.

M Rosenfeld 'Hate speech in constitutional jurisprudence: a comparative analysis' *Cardozo Law. Review* (2002) 24 1523.

T Roux 'The dignity of comparative constitutional law' *Acta Juridica* 2008(1) (2008).

T Roux *The Politics of Principle*: *The First South African Constitutional Court, 1995-2005* (2013).

A Sachs *The Strange Alchemy of Life and Law* (2010).

B Schlinck *Abwägung im Verfassungsrecht* (1976).

B Schlink 'Der Grundsatz der Verhältnismässigkeit' in P Badura & H Dreier *Festschrift 50 Jahre Bundesverfassungsgericht* (2001).

B Schlink 'Abschied von der Dogmatik. Verfassungsrechtsprechung und Verfassungsrechtswissenschaft im Wandel' *JuristenZeitung* 62. Jahrg., Nr. 4 (16. Februar 2007), pp. 157-162.

VA da Silva 'Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decisions' *Oxford Journal of Legal Studies* Vol. 30 No.2 (2011) 273-301

M Stolleis 'Überkreuz Anmerkungen zum Kruzifix-Beschluß (BVerfGE 93, 1-37) und seiner Rezeption' *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft (KritV)*
Vol. 83, No. 3/4 (2000), pp. 376-387.

M Stolleis (trans. T Dunlap) *A History of Public Law in Germany 1914-1945* (2014).

A Stone Sweet & J Matthews 'Proportionality, Balancing and Global Constitutionalism' *Columbia J Transnational L* (2007) 73
J Waldron 'The Core of the Case Against Judicial Review' *The Yale Law Journal* (2006): 1346-1406.

J. J. Thomson 'The Right to Privacy' *Philosophy and Public Affairs* 4(4) (1975) at 295.

LB Tremblay 'The Bouchard-Taylor Report on Cultural and Religious Accommodation: Multiculturalism by Any Other Name' *European University Institute* Working Papers *2009/18.*

S Tsakyrakis 'Proportionality: An assault on human rights?' *International Journal of Constitutional Law* (2009) 468.

J van der Vyver 'Constitutional perspective of church-state relations in South Africa' *BYU Law Review* 2 (1999) 635.

A Walen 'Judicial review in review: A four-part defense of legal constitutionalism A review essay on Political Constitutionalism' *International Journal of Constitutional Law* (2009): 329-354.

SD Warren & LD Brandeis 'The right to privacy' *Harvard law review* (1890) 193.

G Webber. 'Proportionality, balancing, and the cult of constitutional rights scholarship' *Canadian Journal of Law and Jurisprudence* 23 (1) (2010).

J Weiler *Ein Christliches Europa: Erkundungsgedenke* (2004).

L Weinrib 'The Supreme Court of Canada and Section 1 of the Charter' Vol 10 [1988] 469.

L Weinrib (1990) 'Hate Promotion in a Free and Democratic Society: R. v. Keegstra' *McGill Law J*ournal *36*, 1416.

L Weinrib 'The Post-war Paradigm and American Exceptionalism' in S Choudhry (ed.) *The Migration of Constitutional Ideas* (2007).

S Woolman 'The amazing, vanishing bill of rights' (2007) *South African Law Journal* 762.

S Woolman *The Selfless Constitution* (2013).

G Wong 'Towards the Nutcracker Principle: Reconsidering Objections to Proportionality' *Public Law* (2000) 92.

H Yourow *The Margin of Appreciation Doctrine* (1996).

L Zucca *A Secular Europe* (2012).

Government of the Republic of South Africa and Others v Grootboom and Others 2000 (1) SA 46.

Christian Education South Africa v Minister for Education [2000] ZACC 11; 2000 (4) SA 757.

S v Mamabolo (CCT 44/00) [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5)

Directorate: Serious Economic Offences v Hyundai Motor Manufacturers 2001 (SA) 545 (CC).

Treatment Action Campaign v Minister of Health and Others (No 2) 2002 (2) SA 721 (CC).

Prince v President of the Law Society of the Cape of Good Hope 2002 (2) SA 792.

Khumalo and Others v Holomisa [2002] ZACC 12; 2002 (5) SA 401; 2002 (8) BCLR 771.

Islamic Unity Convention v Independent Broadcasting Authority and Others [2002] ZACC 3; 2002 (4) SA 294; 2002 (5) BCLR 433.

S v Jordan [2002] ZACC 22; 2002 (6) SA 642 (CC).

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 (4) SA 490 (CC).

Minister of Home Affairs v Fourie and Another [2005] ZACC 19; 2006 (1) SA 524 (CC).

Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another [2005] ZACC 7; 2006 (1) SA 144 (CC)

Pillay v MEC for Education, KwaZulu-Natal, and Others

European Court of Human Rights

Handyside v United Kingdom Judgment of 7 December 1976, 1 EHRR 737.

Dudgeon v the United Kingdom judgment of 22 October1981

Lingens v Austria Application No. 9815/82, judgment of 9 July 1986.

Kokkinakis v Greece 260 Eur. Ct. H.R. (ser. A).

Oberschlick v Austria Application No. 11662/85, Judgment of 23 May 1991.

Oberschlick v Austria (No 2) Application No. 20834/92, Judgment of 1 July 1991.

Jersild v Denmark (1994) 19 *EHRR* 1.

Otto-Preminger-Institut v Austria, *Application no.13470/87,* Judgment of 20 September 1994.

Wingrove v the United Kingdom, Judgment of 25 November 1996 *Reports* 1996-V, pp. 1957-58

Y and Z v. the United Kingdom Judgment of 22 April 1997

Refah Partisi (the Welfare Party) and Others v Turkey [GC], Application no.s 41340/98

Karatas v Turkey, Application no. 23168/94, Judgment of 8 July 1999.

Evans v UK

Alinak v Turkey, Application *no. 40287/98,* Judgment of 29 March 2003.

Odievre v France (Application no. 42326/98), Judgment of 13 February 2003.

Krone Verlag GMBH & Co v Austria (No 3) Application No. 39069/97 Judgment of 11 December 2003

Dogru v France App. No. 31645/04.

Hirst v the United Kingdom (No 2) [2005] ECHR 68.

Nikowitz and Verlagsgruppe News GmbH v. Austria, no. 5266/03 at para 25, judgment of 22 February 2007

Colaço Mestre and SIC – Sociedade Independente de Comunicação, S.A. v. Portugal, nos 1182/03 and 11319/03 26 April 2007

Sapan v. Turkey, no. 44102/04 judgment of 8 June 2010.

Lautsi v Italy App. No. 30814/06 Judgment of 19 March 2011.

Eweida v UK Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10, judgment 27 May 2013.

SAS v France Application no 43835/11 judgment of 1 July 2014.