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Proportionality and the Incommensurability Challenge – Some Lessons from the South African Constitutional Court

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PROPORTIONALITY AND THE INCOMMENSURABILITY CHALLENGE – SOME LESSONS FROM THE SOUTH AFRICAN CONSTITUTIONAL COURT

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I. Introduction

The principle of proportionality is on the rise. An increasing number of constitutional courts adopt the proportionality test as the main doctrinal instrument to resolve conflicts between individual rights and public interests.[1] The South African Constitutional Court is one of the courts that utilizes proportionality in its interpretation of the limitations clause. It developed the principle of proportionality in an early landmark judgment.[2] In *Makwanyane*, the Court had to decide whether the restriction of the right to life by capital punishment could be justified under the limitations clause of the South African interim constitution.[3] It held that

> "The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. […] 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."[4]

This approach was approved by the drafters of the final constitution of 1996,[5] whose limitations clause expressly includes the factors that were mentioned in *Makwanyane* as part of the proportionality test.[6] However, the approach of the South African Constitutional

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[1] AHARON BARAK, PROPORTIONALITY — CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 175-210 (2012).

[2] *Cf.* Hoyt Webb, *The Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law*, 1 U. PA. J. CONST. L. 205, 228 (1998) (comparing *Makwanyane* to *Marbury v. Madison*).

[3] S v Makwanyane and Another (CCT 3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995).

[4] *Id.*, at ¶ 104 (per Chaskalson CJ).

[5] *See* Constitution of the Republic of South Africa No. 108 of 1996 (Dec. 18, 1996), sect. 36 (1): "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including- (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose."

[6] *See* Stuart Woolman & Henk Botha, *Limitations*, *in* CONSTITUTIONAL LAW OF SOUTH AFRICA ¶ 34.69 (Stuart Woolman, Michael Bishop & Jason Brickhill eds., 2006); Kevin Iles, *A Fresh Look at Limitations:*

Court differs in one important respect from proportionality concepts of other courts like the Canadian Supreme Court or the German Federal Constitutional Court. Both the German and the Canadian Court have adopted a structured test with several steps that comprise the legitimacy of the aim of the limitation, a rational connection between the restriction and the aim, the existence of a less restrictive means, and finally a balancing of the competing values.[7]

The South African Constitutional Court has explicitly rejected this structured approach. In *Manamela*, it held that

> "It should be noted that the five factors expressly itemised in section 36 are not presented as an exhaustive list. They are included in the section as key factors that have to be considered in an overall assessment as to whether or not the limitation is reasonable and justifiable in an open and democratic society. In essence, the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list."[8]

The South African court thus considers the same factors as the Canadian and the German courts. However, these factors are not individual steps, but they are part of the overall balancing exercise.[9] *Prima facie*, the court thus adopts a very broad approach.[10] However, a closer look at the South African case law reveals a more nuanced picture. The court only balances when it affirms the constitutionality of challenged legislation or when it examines Common Law principles that apply to the relationship between individuals. In contrast, when the court strikes down a statute because it violates a constitutional right, it uses other argumentation strategies to justify its decisions. Despite using balancing terminology, the court does not engage in a balancing exercise in substance.

This piece is organized in four parts. In the first part, I will establish the theoretical framework (II.). Critics often argue that balancing basically comes down to taking a political decision. Courts have to be sensitive to this critique in order not to undermine their own legitimacy. Therefore, I establish the hypothesis that courts will usually try to adopt strategies to avoid balancing. In the second part, I will analyze the arguments, on which the South African Constitutional Court bases the constitutional incompatibility of a statute (III.). We will see that the Court usually refrains from balancing when it wants to strike down legislation as unconstitutional. In the third part, we will examine the few cases, in which the South African Court actually balances (IV.). The conclusion will advance the argument that the South African Constitutional Court is rather concerned with holding the legislature accountable than with second-guessing legislative value decisions (V.)

Unpacking Section 36, 23 S. AFR. J. HUM. RTS. 68, 77 (2007); Johannes Saurer, *Die Globalisierung des Verhältnismäßigkeitsgrundsatzes*, 51 DER STAAT 3, 17 (2012).

[7] *See* R v. Oakes, [1986] 1 S.C.R. 103 (Can.).

[8] S v Manamela and Another (Director-General of Justice Intervening) (CCT 25/99) [2000] ZACC 5; 2000 (3) SA 1; 2000 (5) BCLR 491 (14 Apr 2000), at ¶ 32.

[9] ZIYAD MOTALA & CYRIL RAMAPHOSA, CONSTITUTIONAL LAW 417 (2002); IAIN CURRIE & JOHAN DE WAAL, THE BILL OF RIGHTS HANDBOOK 178 (5 ed. 2005); GERHARD VAN DER SCHYFF, LIMITATION OF RIGHTS. A STUDY OF THE EUROPEAN CONVENTION AND THE SOUTH AFRICAN BILL OF RIGHTS 278 (2005); Woolman & Botha, *supra* note 6, at ¶ 34.93; HEINZ KLUG, THE CONSTITUTION OF SOUTH AFRICA. A CONTEXTUAL ANALYSIS 117 (2010); Stylianos-Ioannis G. Koutnatzis, *Verfassungsvergleichende Überlegungen zur Rezeption des Grundsatzes der Verhältnismäßigkeit in Übersee*, 44 VERFASSUNG UND RECHT IN ÜBERSEE 32, 51 (2011).

[10] *See* Koutnatzis, *supra* note 9, at 49, who claims that proportionality and balancing are basically the same in the South African context.

II. The Legitimacy Challenge of Balancing

Despite its popularity in the practice of constitutional courts, the proportionality principle has a long list of critics.[11] The critique focuses, in particular, on the balancing of competing constitutional values at the core of the proportionality test, which is claimed to be irrational.[12] Balancing is essentially a cost-benefit-analysis: The limitation of an individual right passes the constitutional muster if the marginal benefit of the state measure for a public purpose outweighs the marginal restriction of the constitutional right.[13] However, a cost-benefit analysis usually requires that the compared goods can be measured in one common normative currency, i.e., that they are commensurable. But commensurability is often lacking when it comes to the resolution of conflicts of competing constitutional rights and values.[14] How do we compare the dignity of a public figure to the freedom of artistic expression? How do we compare the right to life of an unborn child to the freedom of self-determination of a mother?

Now, the balancing of incommensurable values is part of our everyday life. We often have to make choices between alternatives that cannot be translated into one common normative currency. And this necessity of comparing incommensurable options is not limited to our private life. It is also part of political or moral decision-making. When the legislature decides about the admissibility of abortions, it has to strike a balance between the right to life of the embryo and the right to self-determination of the mother. When it adopts a law allowing for the wire-tapping of private apartments, it has to strike a balance between the right to privacy and the effectiveness of crime prevention and prosecution. However, the legislature is asked to make such 'subjective' decisions. If legislative decisions do not fit the taste of the citizens, the citizens can react by replacing the legislative majority with a new one.

In contrast, the critics of balancing argue that judicial balancing presupposes the development of a scale that is external to the judges' personal preferences.[15] Consequently, they claim that the balance that has been struck by the legislature should not be reviewed in

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[11] For criticism voiced in South African constitutional law scholarship, *see* Stuart Woolman, *Out of Order? Out of Balance? The Limitation Clause of the Final Constitution*, 13 S. AFR. J. HUM. RTS. 102, 114-121 (1997); Loammi Blaauw-Wolf, *The 'balancing of interests' with reference to the principle of proportionality and the doctrine of Güterabwägung – a comparative analysis*, 14 SA PUBL. L. 178, 210 (1999); Henk Botha, *Rights, Limitations, and the (Im)possibility of Self-Government*, *in* RIGHTS AND DEMOCRACY IN A TRANSFORMATIVE CONSTITUTION 13, 21-23 (Henk Botha, André van der Walt & Johan van der Walt eds., 2003); Stuart Woolman & Henk Botha, *Limitations: Shared Constitutional Interpretation, an Appropriate Normative Framework & Hard Choices*, *in* CONSTITUTIONAL CONVERSATIONS 149, 157-160 (Stu Woolman & Michael Bishop eds., 2008). But see also the normative defence of Iain Currie, *Balancing and the limitation of rights in the South African Constitution*, 25 SA PUBL. L. 408, 408 (2010).

[12] JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 259 (1996).

[13] Julian Rivers, *Proportionality and Variable Intensity of Review*, 65 CAMBRIDGE L.J. 174, 200 (2006).

[14] BERNHARD SCHLINK, ABWÄGUNG IM VERFASSUNGSRECHT 134-135 (1976); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L. J. 943, 972-976 (1987); Stavros Tsakyrakis, *Proportionality: An assault on human rights?*, 7 INT'L J. CONST. L. 468, 474 (2009); GRÉGOIRE C.N. WEBBER, THE NEGOTIABLE CONSTITUTION 92-93 (2009); Moshe Cohen-Eliya & Iddo Porat, *American balancing and German proportionality: The historical origins*, 8 INT'L J. CONST. L. 263, 269-270 (2010).

[15] Aleinikoff, *supra* note 14, at 973.

the process of judicial review:[16] Striking a balance between competing aims and values is a decision about what kind of society we want to live in. To decide this question is the task of the elected representatives, who are accountable to the members of this society, not a decision of courts.

The core of the critique is thus that balancing allows courts to make political decisions behind the veil of legal reasoning.[17] The hypothesis of this paper is that courts react to this critique. A key element of their legitimacy is that they are perceived to be neutral arbiters that take legal and not political decisions.[18] They thus try to avoid any appearance that they might be pursuing a political agenda. Although it is a commonplace today that decisions of constitutional courts are not free of political considerations,[19] courts frame even highly political decisions in legal terms.[20] This is particularly relevant in the South African context. The South African Constitutional Court is, to a considerable extent, dependent on the support of the African National Congress (ANC), the unchallenged dominant party in the political system.[21] Therefore, the Court has to strike a difficult balance between individual rights protection and securing its own institutional position.[22]

Consequently, constitutional courts have to develop strategies to dissipate the suspicion that they are taking political decisions when they are in fact reviewing legislation. They have to show deference to the legislature.[23] While balancing does not interfere with the political sphere when judges want to uphold challenged legislation or when they are dealing with conflicts of private individuals, a court will try to avoid balancing when it intends to strike down a law as unconstitutional. In the latter case, they will usually base their decisions on

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[16] Bernhard Schlink, *Der Grundsatz der Verhältnismäßigkeit*, *in* FESTSCHRIFT 50 JAHRE BUNDESVERFASSUNGSGERICHT. ZWEITER BAND: KLÄRUNG UND FORTBILDUNG DES VERFASSUNGSRECHTS 445, 461 (Peter Badura & Horst Dreier eds., 2001); Webber, *supra* note 14, at 147-148.

[17] *See* François Venter, *The Politics of Constitutional Adjudication*, 65 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 129, 165 (2005) ("whether a particular limitation on rights is proportionally justifiable still requires subjective evaluation.").

[18] Martin Shapiro, *The Success of Judicial Review and Democracy*, *in* ON LAW, POLITICS, AND JUDICIALIZATION 149, 165 (Martin Shapiro & Alec Stone Sweet eds., 2002).

[19] There is a lot of empirical research, particularly on the U.S. Supreme Court, in this respect. *See* Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SC. REV. 557 (1989); Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SC. REV. 323 (1992); Jeffrey A. Segal, Lee Epstein, Charles M. Cameron & Harold J. Spaeth, *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812 (1995); Saul Brenner & Marc Stier, *Retesting Segal and Spaeth's Stare Decisis Model*, 40 AM. J. POL. SC. 1036 (1996); Jeffrey A. Segal & Harold J. Spaeth, *The Influence of Stare Decisis on the Votes of United States Supreme Court Justices*, 40 AM. J. POL. SC. 971 (1996); Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SC. REV. 305 (2002); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002); Stefanie A. Lindquist & David E. Klein, *The Influence of Jurisprudential Considerations on Supreme Court Decision Making: A Study of Conflict Cases*, 40 L. & SOC. REV. 135 (2006); Michael A. Bailey & Forrest Maltzman, *Does Legal Doctrine Matter? Unpacking Law and Policy Preferences on the U.S. Supreme Court*, 102 AM. POL. SC. REV. 369 (2008).

[20] ALEC STONE SWEET, GOVERNING WITH JUDGES. CONSTITUTIONAL POLITICS IN EUROPE 200 (2000).

[21] *See* Theunis Roux, *Principle and pragmatism on the Constitutional Court of South Africa*, 7 INT'L J. CONST. L. 106, 111 (2009).

[22] Heinz Klug, *Introducing the Devil: An Institutional Analysis of the Power of Constitutional Review*, 13 S. AFR. J. HUM. RTS. 185, 189 (1997).

[23] *See* Patrick Lenta, *Judicial deference and rights*, 2006 TYDSKRIF VIR DIE SUID-AFRIKAANSE REG 456, 463 (2006).

different grounds. This tendency will be the stronger the more the court's institutional position depends on a general acceptance of the work of the court by the political branches.

There are several strategies that courts can use to resolve conflicts of constitutional values without directly recurring to balancing. The most obvious strategy is to resolve the case at an earlier stage of the proportionality analysis. Although the South African Constitutional Court does not follow the structured approach of the German Constitutional Court or the Canadian Supreme Court, the different elements of the proportionality test form part of the balancing test. The court may thus use a less restrictive means argument in the course of balancing. Other strategies of refraining from balancing are less obvious. A court may, for example use consistency arguments in order to determine the weight of an aim in the balancing test; or it may put a burden of justification for the restriction of an individual right on the legislation; or it might make a procedural argument in order to guarantee substantive justice by securing the quality of the procedure.

These strategies do not exclude each other. To the contrary, they are often closely interrelated. In particular, consistency considerations and imposing a burden of justification can have an auxiliary function. The proportionality test contains normative and empirical elements. The question of whether a measure pursues a legitimate goal and the balancing test involve normative evaluations about the importance of the pursued goal. In contrast, the rational connection stage and the less-restrictive-means stage predominantly involve empirical considerations.[24] Rational connection is concerned with the effectiveness of the legislative measure, and less restrictive means requires an empirical prognosis of the effectiveness of potential alternative measures.

For the reasons highlighted above, courts will be reluctant to evaluate the importance of a legislative goal. Moreover, they have neither the resources nor the methodological training for empirical prognoses. They will thus often recur to auxiliary arguments, which help them to avoid making these determinations themselves. On the one hand, imposing a burden of justification allows the Court to ask the legislature for reasons for a particular policy choice. On the other, legislative inconsistency is a sign that the legislature attributed less importance to the policy goal than it explicitly claims.

III. Balancing in the Case-Law of the South African Constitutional Court

When we analyze the case law of the South African Constitutional Court on proportionality, we often find a strong balancing rhetoric. In *S v. Bhulwana*, for example, Justice O'Regan held for the unanimous court that

> "[i]n sum, therefore, the court places the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the

[24] Niels Petersen, *Avoiding the Common Wisdom Fallacy: The Role of Social Sciences in Constitutional Adjudication*, 11 INT'L J. CONST. L. (forthcoming 2013). *See also* Brun-Otto Bryde, *Tatsachenfeststellungen und soziale Wirklichkeit in der Rechtsprechung des Bundesverfassungsgerichts*, *in* FESTSCHRIFT 50 JAHRE BUNDESVERFASSUNGSGERICHT, BAND I 533, 555 (Peter Badura & Horst Dreier eds., 2001); Christoph Engel, *Das legitime Ziel als Element des Übermaßverbots*, *in* GEMEINWOHL IN DEUTSCHLAND, EUROPA UND DER WELT 103, 113 (Winfried Brugger, Stephan Kirste & Michael Anderheiden eds., 2002); Mark Elliott, *Proportionality and Deference: The Importance of a Structured Approach*, *in* EFFECTIVE JUDICIAL REVIEW: A CORNERSTONE OF GOOD GOVERNANCE 264, 270 (Christopher Forsyth, Mark Elliott, Swati Jhaveri, Michael Ramsden & Anne Scully-Hill eds., 2010).

> other. The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be."[25]

In *Manamela*, the Court used the famous dictum that the limitations clause "does not permit a sledgehammer to be used to crack a nut."[26] Furthermore, we often find references to the special importance of certain rights or public interests.[27] In *Ex parte Minister of Safety and Security*, e.g., Justice Kriegler argued for the unanimous court

> "that the right to life, to human dignity and to bodily integrity are individually essential and collectively foundational to the value system prescribed by the Constitution."[28]

By attributing weight to one or both of the conflicting values, the Court is arguing within the balancing framework. However, when we look at the reasons on which it bases its judgment, the court rarely refers to balancing when it wants to strike down a statute. The balancing rhetoric is no more than a "ritual bow" to the losing party.[29] Instead, most of the cases in which a statute is declared as unconstitutional are solved through less restrictive means or overbreadth arguments.[30] But the Court also holds, in certain cases, that the regulation lacks a legitimate purpose or a rational connection between means and end. Furthermore, we find consistency arguments, the imposition of a burden of proof or justification on the state, or the requirement of additional procedural safeguards.

1. Less Restrictive Means

In a significant portion of cases, the constitutional incompatibility of a statute is based on the argument that a less restrictive means would have achieved the same purpose.[31] The most famous case in this respect is the already mentioned *Makwanyane* case.[32] In the drafting process of the new constitution, there was a dispute between the political elite of the ANC and its political support base. The elite favored the abolition of the death penalty because it had disproportionately been used against black offenders in the apartheid era.[33]

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[25] S v Bhulwana, S v Gwadiso (CCT 12/95, CCT 11/95) [1995] ZACC 11; 1996 (1) SA 388; 1995 (12) BCLR 1579 (29 Nov. 1995), at ¶ 18.

[26] Manamela, *supra* note 8, at ¶ 34.

[27] See the references in Woolman & Botha, *supra* note 6, at ¶¶ 34.71-72 and 34.76.

[28] Ex parte Minister of Safety and Security and Others: In Re S v. Walters and Another (CCT 28/01) [2002] ZACC 6; 2002 (4) SA 613; 2002 (7) BCLR 663 (21 May 2002), at ¶ 28.

[29] *See* Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COL. J. TRANSNAT'L L. 73, 90 (2008).

[30] *See* Currie & Waal, *supra* note 9, at 184.

[31] *See* Makwanyane, *supra* note 3, at ¶ 127; S v Williams and Others (CCT 20/94) [1995] ZACC 6; 1995 (3) SA 632; 1995 (7) BCLR 861 (CC) (9 June 1995), at ¶¶ 64-77; Ferreira v Levin NO and Others, Vryenhook and Others v Powell NO and Others (CCT 5/95) [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (6 Dec 1995), at ¶ 127; S v Mbatha, S v Prinsloo (CCT 19/95, CCT 35/95) [1996] ZACC 1; 1996 (3) BCLR 293; 1996 (2) SA 464 (9 Feb 1996), at ¶ 26; Mistry v Interim National Medical and Dental Council and Others (CCT 13/97) [1998] ZACC 10; 1998 (4) SA 1127; 1998 (7) BCLR 880 (29 May 1998), at ¶¶ 29-30; Manamela, *supra* note 8, at ¶ 49; Islamic Unity Convention v Independent Broadcasting Authority and Others (CCT 36/01) [2002] ZACC 3; 2002 (4) SA 294; 2002 (5) BCLR 433 (11 Apr 2002), at ¶ 50; Nyathi v Member of the Executive Council for the Department of Health Gauteng and Another (CCT 19/07) [2008] ZACC 8; 2008 (5) SA 94 (CC); 2008 (9) BCLR 865 (CC) (2 June 2008), at ¶ 51; Johncom Media Investments Limited v M and Others (CCT 08/08) [2009] ZACC 5; 2009 (4) SA 7 (CC); 2009 (8) BCLR 751 (CC) (17 March 2009), at ¶ 30.

[32] Makwanyane, *supra* note 3.

[33] RICHARD SPITZ & MATTHEW CHASKALSON, THE POLITICS OF TRANSITION. A HIDDEN HISTORY OF SOUTH AFRICA'S NEGOTIATED SETTLEMENT 331 (2000).

In contrast, the political base supported the death penalty because of South Africa's high crime rate.[34] The question had been left open in the interim constitution, so that the court was asked in one of its very first cases to decide the issue.

In his opinion, President Chaskalson found that the death penalty constitutes a cruel, inhuman and degrading punishment.[35] However, he did not stop his analysis there, but asked whether this restriction could be justified according to the limitations clause of the constitution.[36] In particular, he asked whether a long prison term is a less restrictive punishment than the death penalty, albeit equally deterrent.[37] That imprisonment is a less severe means than capital punishment seems to be obvious. The crucial question, however, is whether it has the same deterrent effect. Chaskalson imposed a burden of proof on the state and held that it had not made a plausible case for the greater deterring effect of the death penalty.[38] He found that the likelihood to be apprehended, convicted, and punished had a much stronger deterring effect than the severity of the punishment.[39] Therefore, the state would have had to come up with convincing empirical arguments to justify the death penalty.[40]

The Court also used the less restrictive means argument in another seminal judgment, the *Manamela* case, in which it had to decide about the constitutionality of a reverse onus clause in a provision of the penal code.[41] If somebody was found to be in possession of stolen goods, it was presumed that he believed at the time of acquisition that the person from whom he acquired the goods had no right to dispose about them. The convicted thus had to prove the lack of *mens rea* in order to escape conviction. The Court held that the provision infringed upon the presumption of innocence enshrined in section 35 (3)(h) of the Constitution.[42]

The state had argued that the reverse onus clause was a necessary measure to eradicate the market of stolen property, as only the accused had relevant information about his internal beliefs. The Court held that a reverse onus clause might be reasonable in cases in which purchasers usually keep a record of documents, with which they can prove the purchase.[43] However, in practice, the provision often concerns people who are poor, unskilled and illiterate, so that they are not likely to keep records of the informal transactions they

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34 Roux, *supra* note 21, at 118. *See also* Webb, *supra* note 2, at 233.

35 Makwanyane, *supra* note 3, at ¶ 95.

36 Sect. 33 of the Constitution of the Republic of South Africa Act 200 of 1993.

37 Makwanyane, *supra* note 3, at ¶¶ 116-124.

38 *Id.*, at ¶ 127. *See also* Patrick Lenta, *Deterrence and capital punishment*, 22 SA PUBL. L. 385, 389-392 (2007) (making a review of the empirical literature on this issue and arguing that the evidence in favor of capital punishment is inconclusive).

39 Makwanyane, *supra* note 3, at ¶ 122.

40 In *Makwanyane* the Court did not stop the analysis with the less restrictive means test. Instead, it did indeed perform a balancing. We will come back to this issue *infra*, at III.6, when we discuss the consistency arguments.

41 Manamela, *supra* note 8. The Court had to deal with reverse onus clauses on several occasions. In Mbatha, *supra* note 31, the Court also relied on the less restrictive means argument. In S v Ntsele (CCT 25/97) [1997] ZACC 14; 1997 (11) BCLR 1543 (14 Oct 1997) and S v Mello (CCT 5/98) [1998] ZACC 7; 1998 (3) SA 712; 1998 (7) BCLR 908 (28 May 1998), it basically relied on the precedents of the previous decisions in this matter. *See also* the *Bhulwana* case, *infra* notes 92-93 and accompanying text, in which the court declared a reverse onus clause as unconstitutional because it lacked a rational connection with the goal.

42 Manamela, *supra* note 8, at ¶ 26.

43 *Id.*, at ¶ 43.

perform every day and thus have difficulties proving their innocence.[44] The Court argued that imposing an evidential burden on the accused would be a less restrictive means.[45] This evidential burden would force the accused to make plausible why he reasonably believed that the acquired goods were not stolen without requiring formal proof. It would thus be less burdensome for the accused and still supply the prosecution with the necessary information about his inner state of mind.

2. Overbreadth

In many cases the constitutional incompatibility is based on an overbreadth argument.[46] By finding that a statute is overbroad, the court indicates that it has a legitimate core, but that the statute is too broad. The statute also applies to cases that do not stand in a sufficient relation to the achievement of the statute's aim. The overbreadth argument is thus a special case of the less restrictive means test.[47] A narrower statute confined to the core that the legislative measure seeks to target would thus be a less restrictive means.

One example is Justice Kriegler's majority opinion in the Coetzee case.[48] In Coetzee, the court had to decide about a provision of South African civil procedure law. According to the Magistrate's Court Act, it was possible to imprison a judgment debtor who had failed to satisfy a judgment debt and not proven that he was unable to pay. The goal of the provision was to force payment by the debtor who had the means to pay, but was unwilling to do it.[49] However, as its scope also extended to those debtors who could not pay the debt and failed to prove this at a hearing, the court considered it to be overbroad.[50] Justice Kriegler pointed out that the provision often struck people who were poor and either illiterate or uninformed about the law.[51]

A second example is the *Islamic Unity Convention* case, in which the Court had to examine a broadcasting regulation that prohibited broadcasting any material "likely to prejudice the safety of the State or the public order or relations between sections of the population".[52] In

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[44] *Id.*, at ¶ 44.

[45] *Id.*, at ¶ 49.

[46] *See*, e.g., Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer Port Elizabeth Prison and Others (CCT 19/94, CCT 22/94) [1995] ZACC 7; 1995 (10) BCLR 1382; 1995 (4) SA 631 (22 Sept. 1995), at ¶ 13; Mbatha, *supra* note 31, at ¶¶ 21-24; Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others (CCT 20/95, CCT 21/95) [1996] ZACC 7; 1996 (3) SA 617; 1996 (5) BCLR 608 (9 May 1996), at ¶¶ 48-61, 93; South African National Defence Union v. Minister of Defence (CCT 27/98) [1999] ZACC 7; 1999 (4) SA 469; 1999 (6) BCLR 615 (26 May 1999), at ¶ 13; Manamela, *supra* note 31, at ¶ 43; Islamic Unity Convention, *supra* note 31, at ¶ 44; First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance (CCT 19/01) [2002] ZACC 5; 2002 (4) SA 768; 2002 BCLR 702 (16 May 2002), at ¶ 108; Phillips and Another v Director of Public Prosecutions and Others (CCT 20/02) [2003] ZACC 1; 2003 (3) SA 345; 2003 (4) BCLR 357 (11 March 2003), at ¶ 28; Jaftha v Schoeman and Others, Van Rooyen v. Stoltz and Others (CCT 74/03) [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC) (8 Oct 2004), at ¶¶ 44, 48; Malachi v Cape Dance Academy International (Pty) and Others (CCT 05/10) [2010] ZACC 13; 2010 (6) SA 1 (CC); 2010 BCLR 1116 (CC) (24 Aug 2010), at ¶ 38.

[47] Currie & Waal, *supra* note 9, at 184.

[48] Coetzee, *supra* note 46.

[49] *Id.*, at ¶ 8.

[50] *Id.*, at ¶ 13.

[51] *Id.*, at ¶ 8.

[52] Islamic Unity Convention, *supra* note 31.

his opinion for the unanimous court, Deputy Chief Justice Langa found that the challenged provision limited the freedom of expression.[53] He acknowledged that the provision served an important purpose in promoting and protecting human dignity, equality, and freedom.[54] However, he held that

> "The prohibition is so widely-phrased and so far-reaching that it would be difficult to know beforehand what is really prohibited or permitted. No intelligible standard has been provided to assist in the determination of the scope of the prohibition. It would deny both broadcasters and their audiences the right to hear, form and freely express and disseminate their opinions and views on a wide range of subjects."[55]

How the overbreadth argument can be combined with consistency and burden of proof arguments is demonstrated in Justice Ngcobo's minority opinion in the *Prince* case on whether the constitution requires a religious exception for the prohibition of cannabis.[56] In Prince, the applicant was a member of the Rastafari religion, which uses cannabis in its religious rituals. He had been denied a contract of community service with the Law Society of the Cape of Good Hope, a requirement for becoming an attorney, because he had previous convictions for the possession of cannabis. He claimed that the prohibition on the use or possession of cannabis violated his freedom of religion.

Justice Ngcobo acknowledged the importance of the prohibition of narcotic drugs.[57] However, he argued that a religious exception would not constrain the legislative purpose, so that the provision – by not granting a religious exception – was overbroad.[58] The claim that the religious exception did not harm the overall goal was not uncontested. To the contrary, this assumption was the main point of disagreement between majority and minority.[59] The majority of the Court firmly rejected the notion that a religious exception would not cause any harm. On the one hand, the judges feared that an exception would impair the effectiveness of the state's strategy to combat narcotic drugs.[60] On the other, they disputed that the religious use of cannabis had no negative health effects.[61]

To justify his empirical claim, Justice Ngcobo first made a consistency argument. He pointed out that the provision prohibiting the use and possession of cannabis contained exceptions for research or analytical purposes or for medical use.[62] Thus, "the government does not contend that the achievement of its goals requires it to impose an absolute ban on

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53 *Id.*, at ¶¶ 25-36.

54 *Id.*, at ¶ 45.

55 *Id.*, at ¶ 44.

56 Prince v President of the Law Society of the Cape of Good Hope (CCT 36/00) [2002] ZACC 1; 2002 (2) SA 794; 2002 (3) BCLR 231 (25 Jan 2002) (per J Ngcobo with JJ Mokgoro and Sachs and AJ Madlanga concurring).

57 *Id.*, at ¶ 47.

58 *Id.*, at ¶ 81.

59 But see also Botha, *supra* note 11, at 23-27 (arguing that the principal disagreement between majority and minority in Prince centers around the relevant contexts of the case, on the conflict between the states' interest in an effective regulation of narcotic drugs and the accommodation of the Rastafari as a marginalized minority).

60 Prince, *supra* note 56, at ¶ 132 (per CJ Chaskalson, and JJ Ackerman and Kriegler).

61 *Id.*, at ¶ 118.

62 *Id.*, at ¶ 54 (per J Ngcobo).

the use or possession of drugs."[63] On the contrary, it seemed to assume that the danger involved with cannabis could be controlled if an adequate scheme was set up.

Second, he imposed a burden of proof on the legislature that the strictly religious use of cannabis was indeed dangerous for human health.[64] He then went on to argue why it was plausible that the religious use of cannabis did not necessarily endanger human health, that abuse could be controlled,[65] and that it would be possible to set up an administrative scheme to control potential abuse effectively.[66] He did not offer an empirical proof for his argument. Instead, he made a *prima facie* case against the prohibition of cannabis and contended that it was up to the legislature to supply the court with empirical data for its case against the religious exception.

The discussion of *Prince* shows that the Court refrained from merely balancing the freedom of religion and the state's interest in combating narcotic drugs. Instead, the minority opinion questioned that the legislature did an appropriate job in clarifying the facts that underlay the value conflict. This is particularly highlighted in Justice Sachs' dissenting opinion, in which he pointed out that the Rastafari were a marginalized group in South African society, which could not rely on the political process to pursue their rights and interests.[67] Therefore, it was up to the courts to hold the legislature accountable to make an appropriate fact-finding procedure and to tailor the provision no more broadly than necessary to achieve the legislative goal.

3. Absence of a Legitimate Goal

In a few cases, the South African Constitutional Court based its judgment on the lack of a legitimate goal for limiting an individual right.[68] If the legislation already lacks a legitimate goal, there is no conflict of competing values that has to be resolved by courts, as there is no legitimate counterpart to the infringed individual right. Consequently, the question of incommensurability does not occur. This intuition is expressed in several judgments. In *Dawood*, for example, the Court held that "[t]here is no reason therefore for the legislative omission that can be weighed in the limitations analysis".[69] A quite similar formulation can be found in the *National Coalition for Gay and Lesbian Equality* Case, where the Court stated

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63 *Id.*

64 *Id.*, at ¶ 56.

65 *Id.*, at ¶¶ 58-62.

66 *Id.*, at ¶¶ 66-74.

67 *Id.*, at ¶ 157 (per J Sachs).

68 *See* National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others (CCT 11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 Oct 1998), at ¶ 37; Dawood and Another v Minister of Home Affairs and Others, Shalabi and Another v Minister of Home Affairs and Others, Thomas and Another v Minister of Home Affairs and Others (CCT 35/99) [2000] ZACC 8; 2000 (3) SA 936; 2000 (8) BCLR 837 (7 June 2000), at ¶ 56; Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others (CCT 03/04) [2004] ZACC 10; 2005 (3) SA 280 (CC); 2004 (5) BCLR 445 (CC) (3 March 2004), at ¶¶ 65-66; Bhe and Others v Khayelitsha Magistrate and Others (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 Oct 2004), at ¶¶ 72-73; Richter v the Minister of Home Affairs and Others (with the Democratic Alliance and Others Intervening, and with Afriforum and Another as Amici Curiae) (CCT 03/09, CCT 09/09) [2009] ZACC 3; 2009 (3) SA 615 (CC); 2009 (5) BCLR 448 (CC) (12 March 2009), at ¶ 76; Centre for Child Law v Minister for Justice and Constitutional Development and Others (CCT 98/08) [2009] ZACC 18; 2009 (2) SACR 477 (CC); 2009 (6) SA 632 (CC); 2009 (11) BCLR 1105 (CC) (15 July 2009), at ¶¶ 52, 57, 60.

69 Dawood, *supra* note 91, at ¶ 56.

that "[t]here is accordingly nothing, in the proportionality enquiry, to weigh against the extent of the limitation and its harmful impact on gays".[70]

However, courts will be careful to qualify the purpose of a state measure as illegitimate, as such a verdict often implies a political evaluation.[71] What are the standards for determining the legitimacy?[72] Sometimes, these standards can be derived from the constitution. If the aim of a state measure directly contradicts a constitutional prohibition, it can be deemed to be illegitimate. A norm that intends to establish racial segregation already follows an illegitimate purpose because it runs counter to the constitutional guarantee of equality.

However, such cases will not occur very often. In other cases, in which the court wants to qualify the purpose as illegitimate, it thus has to recur to additional arguments. One strategy might be to rely on consistency considerations, which show that an aim that has been followed with the challenged statute has been considered unimportant in other circumstances. Another strategy may be to impose a burden of justification on the state. If the state officials do not come up with a plausible reason for the legislation challenged in the court proceedings, the court may assume that such legislation did not have a legitimate purpose.

In *National Coalition for Gay and Lesbian Equality*, the Court had to deal with a provision that made sexual intercourse between consenting males a criminal offence.[73] Justice Ackerman held in the majority judgment that the criminalization of sexual intercourse between males not only constituted an unfair discrimination, but that it also infringed the rights to dignity and privacy.[74] In the justification analysis, he noted that the state had not suggested a valid purpose for the criminalization.[75] He went on to say that

> "[t]he enforcement of the private moral views of a section of the community, which are based to a large extent on nothing more than prejudice, cannot qualify as such a legitimate purpose. There is accordingly nothing, in the proportionality enquiry, to weigh against the extent of the limitation and its harmful impact on gays."[76]

The Court thus imposed a burden of justification on the state. In order to support the legitimacy of its position further, the Court engaged in a long comparative analysis that showed that other democratic societies had equally outlawed the criminalization of sexual intercourse between males.[77]

The guarantee of voting rights for prisoners was at the center of the *NICRO* case.[78] The applicants were prisoners who contended that precluding them from registering as voters and from voting whilst in prison violated their right to vote of section 19 (3)(a) of the

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70 National Coalition for Gay and Lesbian Equality, *supra* note 68, at ¶ 37.

71 Michael Bishop, *Rationality is dead! Long live rationality! Saving rational basis review*, 25 SA PUBL. L. 312, 322-325 (2010).

72 There have been a few attempts in the German legal doctrine to determine legitimate purposes; *see*, e.g., Engel, *supra* note 24.

73 National Coalition for Gay and Lesbian Equality, *supra* note 68.

74 *Id.*, at ¶ 32.

75 *Id.*, at ¶ 37.

76 *Id.*

77 *Id.*, at ¶¶ 39-52. The lone exception is the Bowers v Hardwick case in the United States. However, the South African Court contended that the US constitution had a different wording than the South African constitution, *id.*, at ¶¶ 53-55.

78 NICRO, *supra* note 68.

Constitution. The government tried to justify the exclusion of prisoners from voting with two arguments: First, they alleged that establishing voting opportunities for prisoners was too costly;[79] and second, they argued that allowing prisoners to vote would send a message to the public "that the government is soft on crime".[80]

The Court rejected both arguments. The first argument was unconvincing as the government had to make voting arrangements for certain categories of prisoners.[81] And the second could not be a sufficient reason for the disenfranchisement of prisoners.[82] As the government had failed to come up with a legitimate purpose for denying voting rights for prisoners, the limitation of the right to vote could not be justified.[83] The Court then backed up its verdict with a coherency argument.[84] The challenged statute denied every prisoner the right to vote, regardless of the severity of the offence. In contrast, section 47 (1)(e) of the Constitution permitted every prisoner serving a sentence of less than twelve months without the option of a fine to run for a public office. To grant prisoners the right to stand for elections, but not to give them the right to vote, thus contradicted the spirit of section 47 of the Constitution.

In *Bhe v Khayelitsha Magistrate*, the Court dealt with a provision of the Black Administration Act from 1927, which exclusively regulated the intestate deceased estates of black Africans, while the intestate succession of whites was regulated in a different statute.[85] The challenged provision gave effect to the customary law of succession, according to which only male relatives of the deceased qualified as heirs. The Court had to decide on the constitutionality of the statute, as well as the constitutionality of the customary rules to which it referred. After finding that the statute was a limitation of the right to dignity as well as the prohibition of discriminations, the court dealt with the purpose of the statute in its justification analysis. It held that the statute "was enacted as part of a racist programme intent on entrenching division and subordination" so that it lacked a legitimate purpose because its aims were contrary to the founding principles of the new constitution.[86]

An example of the Court using consistency arguments in determining whether an individual rights restriction served a legitimate purpose can be found in *Richter v Minister for Home Affairs*.[87] In *Richter*, the applicant had claimed that the fact that South African nationals, who were temporarily living abroad, could not vote in the country of their temporary residence violated their right to vote. The South African Electoral Act gave specific groups of people absent from the country during elections the opportunity for a special vote. These included people working for the South African government abroad and people being temporarily absent from the country for purposes of a holiday, a business trip, or for studying. However, there was no such opportunity for people who were temporarily working abroad, but had the intention to return to South Africa in the foreseeable future.

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79 *Id.*, at ¶ 44.

80 *Id.*, at ¶ 55.

81 *Id.*, at ¶ 108 (per J Madala). Prisoners that opted for imprisonment, although they could have opted for a fine as well, actually had the right to vote.

82 *See* Choudhry, *supra* note 110, at 36.

83 NICRO, *supra* note 68, at ¶¶ 65-66.

84 *Id.*

85 Bhe v Khayelitsha Magistrate, *supra* note 68.

86 *Id.*, at ¶ 72.

87 Richter v Minister for Home Affairs, *supra* note 68.

In its analysis whether the restriction of the right to vote could be justified, the Court noted that the counsel for the Minister could not offer a justification for the limitation.[88] In the High Court proceedings, the state had argued that further opportunity for special votes would pose administrative difficulties for the state. However, the court dismissed this argument as inconsistent as there are many groups to which the opportunity for a special vote was granted. It did not see a decisive difference between the groups that were afforded special voting rights and the people, who were absent from the country because they were temporarily working abroad.[89] Therefore, it concluded that the restriction lacked a legitimate government purpose.[90]

The four discussed examples show that the Court always uses additional arguments when it finds that the individual rights restriction does not serve a legitimate purpose. In *Bhe*, the Court found that the aim of the regulation was a discriminatory one and thus directly contradicted the fundamental principles of the constitution. In *National Coalition for Gay and Lesbian Equality*, it imposed a burden of justification on the state and found that the state had not come up with a legitimate reason for the criminalization of sexual intercourse between males. Furthermore, it engaged in a comparative exercise to show that the vast majority of other democratic states had adopted similar positions. In *Richter*, it supported its finding that the government purpose was not legitimate with consistency arguments. In the *NICRO* case, finally, the Court even referred to three additional arguments: First, it stated that the state had failed to meet its burden of justification; second, the provision was deemed overbroad; and third, the considerations behind the denial of voting were held to be inconsistent with the spirit of the constitutional guarantee to run for public office.

4. Lack of a Rational Connection

In other cases, the Court relied on the lack of a rational connection between the restriction and its purpose.[91] The rational connection test basically concerns the empirical relationship between the measure and the aim. Does the specific state measure further the aim in any way? The main question is an empirical one that only relates to one side of the competing value equation. Courts, therefore, do not face the difficulty of comparing incommensurable values. As the rational connection test tries to determine the effect of the challenged measure, it may often be combined with burden-of-proof requirements.

In *Bhulwana*, the Court had to deal with another reverse onus clause in criminal law.[92] According to the challenged provision, it was presumed until the proof of the contrary that anybody who was found in possession of dagga exceeding 115 grams dealt with the substance. The state argued that the purpose of the presumption was to assist in controlling the illegal drug trade. However, Justice O'Regan held for the unanimous Court that there was no rational connection between the presumption and the aim. As the evidence suggested that the possession of more than 115 grams of dagga was not unusual

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88 *Id.*, at ¶ 72.

89 *Id.*, at ¶ 76.

90 *Id.*, at ¶ 78.

91 *See*, e.g., Bhulwana, *supra* note 25, at ¶¶ 23-24; South African National Defence Union, *supra* note 46, at ¶ 35; Brümmer v Minister for Social Development and Others (CCT 25/09) [2009] ZACC 21; 2009 (6) SA 323 (CC); 2009 (11) BCLR 1075 (CC) (13 Aug 2009), at ¶¶ 65-66; Law Society of South Africa and Others v Minister for Transport and Another (CCT 38/10) [2010] ZACC 25; 2011 (1) SA 400 (CC); 2011 (2) BCLR 150 (CC) (25 Nov 2010), at ¶ 99.

92 Bhulwana, *supra* note 25.

for mere consumers of the drug, there was no sufficient connection between the proved fact of possession and the presumed fact of dealing.[93]

In *South African National Defence Union*, the applicants were members of the military, who were denied to join a trade union by statute.[94] As the right to form and join a trade union was explicitly guaranteed by section 23 (2) of the Constitution, the Court had no difficulty to establish a limitation of an individual right.[95] The state defended the prohibition because an organization of military personnel in trade unions endangered the discipline of the South African Defence Force. However, the Court argued that simply the right to join a trade union did not necessarily include the right to strike or to collective bargaining. Therefore, it was not persuaded that the simple right to join a trade union

> "will undermine the discipline and efficiency of the Defence Force. Indeed, it may well be that in permitting members to join trade unions and in establishing proper channels for grievances and complaints, discipline may be enhanced rather than diminished."[96]

In order to support the argument, the Court referred to the practice of other countries, where trade unions for military personnel are partly permitted.[97]

In *Brümmer*, the Court supports its verdict that a statute lacks a rational connection to the pursued goal with a consistency argument.[98] In the case, the applicant, a journalist, sought information from the Department of Social Development for a report that he was working on. The Department denied this request, and the applicant's appeal was refused as well. When he instituted review proceedings in the High Court, the respondent contended that the claim was barred because the application was brought well after a 30-day-limit that was contained in the Promotion of Access to Information Act. The High Court referred the case to the Constitutional Court as it had doubts with regard to the constitutionality of the prescription period.

The Constitutional Court found it almost impossible to get legal advice, to raise money, and to prepare for such a proceeding within the limit of thirty days.[99] Therefore, it held that the prescription period restricted the right of access to information in section 32 of the Constitution and the right to access to court in section 34.[100] In its justification analysis, the Court acknowledged that time bar provisions had important functions: They provide legal security and guarantee the efficiency of justice because evidence might be lost with the lapse of time.[101] However, the Court argued that these considerations did not apply in this case.[102] Furthermore, it pointed out that time limits in other contexts were much more generous, as they usually allow individuals to sue the state up to six months after the decision.[103] Therefore, there was no coherent reason why, in the case of public information,

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93 *Id.*, at ¶¶ 23-24.

94 South African National Defence Union, *supra* note 46.

95 *Id.*, at ¶ 30.

96 *Id.*, at ¶ 35.

97 *Id.*, at ¶ 34.

98 Brümmer, *supra* note 91.

99 *Id.*, at ¶¶ 54-56.

100 *Id.*, at ¶ 57.

101 *Id.*, at ¶ 64.

102 *Id.*, at ¶¶ 65-66.

103 *Id.*, at ¶ 67.

a time limit of merely thirty days should have been necessary to protect legal certainty and the efficiency of justice.[104]

The three discussed cases show that the question of whether there is a rational connection between the restriction and its goal often has an empirical background. However, the Court often seems to treat these questions as analytical ones. In *Bhulwana*, it referred to a lack of a "logical connection" between the proved and the presumed fact.[105] But it backed this "logical" argument with evidence showing that the minimum quantity established by the statute was far too low to conclude that the person in possession of the dagga was actually a dealer.[106] In *South African National Defence Union*, the Court made an empirical assumption about the effect of trade union membership, but supported this assumption with a comparative perspective on the practice of other countries. In *Brümmer*, finally, the Court argued that the reasons for time limits did not apply in this case, and combined its argument with a coherency consideration, pointing out that in other contexts time limits were much more generous.

5. Burden of Justification

Imposing a burden of justification on the legislature is a way of holding the legislature accountable. Even though political accountability is usually achieved through elections, the political elites sometimes have incentives not to act in the public interest.[107] The political process is often prone to disregard the interests of societal minorities[108] or to be captured by particularistic interests of strong lobby groups.[109] This danger seems to be particularly prevalent in political systems such as the South African one, which features one dominant party that is nothing but guaranteed to be re-elected.[110]

It is, therefore, one of the tasks of constitutional courts to hold political actors accountable when the structure of the political process is such that the threat of elections does not provide sufficient incentives to act in the interest of the public at large.[111] One way of doing this is to ask the legislature for reasons for its decisions. If the legislature does not provide a convincing justification for a parliamentary statute, it stands to reason that the piece of legislation was either not diligently drafted or that the legislature wanted to favor certain

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[104] *Id.*, at ¶ 69.

[105] Bhulwana, *supra* note 25, at ¶ 24.

[106] *Id.*, at ¶ 23.

[107] *See* Venter, *supra* note 17, at 145.

[108] This danger is usually coined with the term "tyranny of the majority"; *see* ALEXIS DE TOCQUEVILLE, DE LA DÉMOCRATIE EN AMÉRIQUE (1835); JOHN STUART MILL, ON LIBERTY (1859).

[109] *Seminally* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 127-128 (1965). *See also* Claus Offe, *Politische Legitimation durch Mehrheitsentscheidung?*, *in* AN DEN GRENZEN DER MEHRHEITSDEMOKRATIE 150, 161 (Bernd Guggenberger & Claus Offe eds., 1984); Giandomenico Majone, *Redistributive und sozialregulative Politik*, *in* EUROPÄISCHE INTEGRATION 225, 242-244 (Markus Jachtenfuchs & Beate Kohler-Koch eds., 1996); FAREED ZAKARIA, THE FUTURE OF FREEDOM. ILLIBERAL DEMOCRACY AT HOME AND ABROAD 169-177 (2003).

[110] *See* Patrick Lenta, *Democracy, Rights Disagreements and Judicial Review*, 20 S. AFR. J. HUM. RTS. 1, 30 (2004); Sujit Choudhry, *'He had a mandate'; The South African Constitutional Court and the African National Congress in a dominant party democracy*, 2 CONST. CT. REV. 1, 33 (2009).

[111] *See* Samuel Issacharoff, *Constitutional Courts and Democratic Hedging*, 99 GEO. L.J. 961, 994 (2011) (arguing that the "[South African] Constitutional Court was created […] to guarantee that the structures and limits of democratic rule would be honored").

particularistic interests. However, neither reason is sufficient to justify the limitation of a constitutional right.

For the outlined reasons, it is equally not reasonable to assume that the legislature always makes proper factual prognoses.[112] The introduction of capital punishment may be a good example in this respect. In an environment of rampant violent crime, the parliamentary majority may feel pressured to show its toughness in this matter. Therefore, it might introduce the death penalty to appease the public. Whether the death penalty actually has an additional deterring effect and thus contributes to reducing crime rates will not be a significant factor in the parliamentary decision. The decisive consideration, rather, is whether the electorate *believes* that capital punishment has such a deterring effect. Therefore, the government has no incentive to do research on the underlying empirical assumptions.[113] However, the mere appeasement of the public is no legitimate reason for such a severe infringement of the right to life. Courts, therefore, have to try to hold the legislature accountable by asking it to disclose the empirical basis of its political decisions and imposing a burden of proof.

There are several cases in which the Court struck down a piece of legislation because the state had failed to comply with its burden of justification or burden of proof.[114] Both arguments can often be found in combination with elements of the proportionality test, such as the establishment of a legitimate purpose for the restriction or the less restrictive means analysis. In *National Coalition for Gay and Lesbian Equality*, the Court imposed a burden of justification on the legislature to establish a legitimate aim for the criminalization of sexual intercourse between males.[115] In *Makwanyane*, it found that capital punishment was no necessary means of deterrence because the state had not shown that the death penalty had a stronger deterring effect than imprisonment.[116]

In *Centre for Child Law*, the applicant, a law clinic of the University of Pretoria, contended that the introduction of minimum sentences for juveniles for certain offences violated section 28 of the Constitution, according to which detention can only be the last resort when punishing juveniles under 18 years of age.[117] It argued that minimum sentences did not give judges sufficient flexibility to react to the specific circumstances of the case and to take a decision in the best interest of the juvenile. The state retorted that the measure was necessary to counter the rampant crime rate in South Africa.[118]

However, in its justification analysis, the Court argued that the state had not come up with a specific purpose for the restriction: Did the measure seek to increase deterrence, or did it try to satisfy public anger with regard to juvenile crime?[119] Furthermore, the Court rebuked the state for not producing any empirical evidence to assess the legitimacy of the

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112 *See* Joseph H.H. Weiler, *Comment: Brazil – Measures Affecting Imports of Retreaded Tyres (DS32)*, 8 WORLD TRADE REV. 137, 144 (2009).

113 *See* Petersen, *supra* note 24.

114 *See* Makwanyane, *supra* note 3, at ¶¶ 127, 146; Case, *supra* note 46, at ¶ 93; S v Steyn (CCT 19/00) [2000] ZACC 24; 2001 (1) BCLR 52; 2001 (1) SA 1146; 2001 (1) SACR 16 (29 Nov 2000), at ¶ 32; NICRO, *supra* note 68, at ¶¶ 65-66; Centre for Child Law, *supra* note 68, at ¶¶ 54-55.

115 National Coalition for Gay and Lesbian Equality, *supra* note 68, at ¶ 37.

116 Makwanyane, *supra* note 3, at ¶ 127.

117 Centre for Child Law, *supra* note 68.

118 *Id.*, at ¶ 52.

119 *Id.*, at ¶ 57.

purpose.[120] The respondent did not show that juvenile crime was a particular concern. It did not justify why a specific policy was necessary to target juveniles of the age of 16 to 18.[121] As the state had not substantiated the legitimacy of the purpose, the restriction of section 28 of the Constitution could not be justified.[122]

In *S v Steyn*, the applicant attacked a provision according to which the right to appeal against a conviction even in cases of a serious offence depended on the discretion of the trial judge.[123] He contended that this provision violated his right of appeal guaranteed by section 35 (3)(o) of the Constitution. The state had argued that the restriction was necessary in order to unburden the appeal courts and not to waste valuable court time with hopeless appeals. However, the Court held that the state had

> "failed to adduce any evidence on the clogging of appeal rolls, the impact of unmeritorious appeals, and the existence of any resource-related problems or other relevant considerations that could justify the existence of the [challenged] procedure."[124]

The Court thus found that the challenged procedure violated the constitutional right to appeal as the state had not met its burden of justification.

6. Consistency and Coherency Arguments

Consistency and coherency arguments[125] try to control the balance between two competing constitutional values that the legislature has struck without directly evaluating the importance of the legislative aim. Instead, the court tries to infer the value of the legislative purpose by looking at the coherency and consistency of the measure.[126] If the implementation of the purpose is inconsistent, this is an indication that the legislature did not deem the legislative goal as important as it claimed; or that it did not perceive the risk for a particular public goal as imminent as it stated explicitly. For this reason, there is suspicion that the primary purpose of the restriction might have been a different one.[127]

Consistency or coherency arguments will usually be raised in combination with other arguments, such as the lack of a legitimate purpose or a rational connection between means and purpose.[128] However, sometimes, consistency considerations support the Court in its balancing exercise. The principal example is the Court's judgment in *Makwanyane*. In *Makwanyane*, the Court considered several justifications for the death penalty. With regard to deterrence, it came to the conclusion that imprisonment was the less restrictive means, as the state had not shown that capital punishment has an additional deterring effect.[129] But

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120 *Id.*, at ¶ 54.

121 *Id.*, at ¶ 55.

122 *Id.*, at ¶ 60.

123 S v Steyn, *supra* note 114.

124 *Id.*, at ¶ 32.

125 For a distinction between consistency and coherency arguments, *see* Gjermund Mathisen, *Consistency and Coherence as Conditions for Justification of Member State Measures Restricting Free Movement*, 47 COM. MKT. L. REV. 1021, 1023-1025 (2010).

126 *See* Mehrdad Payandeh, *Das Gebot der Folgerichtigkeit: Rationalitätsgewinn oder Irrweg der Grundrechtsdogmatik?*, 136 ARCHIV DES ÖFFENTLICHEN RECHTS 578, 610 (2011).

127 Niels Petersen, *Gesetzgeberische Inkonsistenz als Beweiszeichen*, 138 ARCHIV DES ÖFFENTLICHEN RECHTS (forthcoming 2013).

128 NICRO, *supra* note 68, at ¶ 67; Brümmer, *supra* note 91, at ¶¶ 67, 69; Richter, *supra* note 68, at ¶ 76.

129 *See supra* note 38 and accompanying text.

the Court did not stop its analysis there. On the contrary, it went on to consider whether retribution could justify the death penalty.[130]

President Chaskalson held that retribution "carries less weight than deterrence."[131] He went on to state that

> "[w]e have long outgrown the literal application of the biblical injunction of 'an eye for an eye, and a tooth for a tooth'. Punishment must to some extent be commensurate with the offence, but there is no requirement that it be equivalent or identical to it. The state does not put out the eyes of a person who has blinded another in a vicious assault, nor does it punish a rapist, by castrating him and submitting him to the utmost humiliation in gaol."[132]

By pointing out that punishment usually is not identical to the committed offence, the President highlighted that capital punishment was not the only coherent means of retribution when it comes to punishing murder. But he went one step further by stressing that giving undue weight to the principle of retribution would be inconsistent with the principle of reconciliation, which played an important role in the transition from the old apartheid system to a new constitutional democracy.[133] Reconciliation was exactly the opposite of trying to seek exact retribution for every wrong committed. For this reason, President Chaskalson came to the conclusion that "[r]etribution cannot be accorded the same weight under our Constitution as the rights to life and dignity" and that the death sentence for murder could therefore not be justified under the constitution.[134]

7. Proceduralization

Courts do not always have to deal with conflicts of material values. Sometimes, they have to deal with procedural issues. Our perception of reality always depends on our perspective.[135] Different people may reasonably have different beliefs about reality. If our normative evaluation thus depends on our perception of reality, the procedures in which reality is constructed assume vital importance. Now, courts may face conflicts between procedural efficiency and the quality of procedures. These conflicts also involve a balancing exercise. The state may have interests in abbreviating procedures to unburden the administration and courts, and to save money. On the other hand, the quality of the procedure is the more important the more important are the interests at stake. Courts are probably more confident to balance the competing interests in this context because answering questions of procedural justice pertains to the very core of their job description.[136]

In some cases, procedural safeguards may be necessary to make certain limitations of substantial rights acceptable. The more severely individual rights are restricted, the more important it is to ensure that the factual requirements of the limitation are met. Errant state decision-making is never desirable, but it is much more severe in cases in which a person's

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[130] *See* Makwanyane, supra note 3, at ¶¶ 129-131.

[131] *Id.*, at ¶ 129.

[132] *Id.*

[133] *Id.*, at ¶ 130.

[134] *Id.*, at ¶ 146.

[135] HANS-GEORG GADAMER, WAHRHEIT UND METHODE. GRUNDZÜGE EINER PHILOSOPHISCHEN HERMENEUTIK 270-312 (1960); Charles Taylor, *Interpretation and the Sciences of Man*, 25 THE REVIEW OF METAPHYSICS 3, 10-17 (1971).

[136] Alistair Price, *Rationality Review of Legislation and Executive Decisions: Poverty Alleviation Network and Albutt*, 127 S. AFR. L.J. 580, 590 (2010).

freedom is restricted through incarceration or imprisonment than in cases that merely concern the imposition of administrative fines. In such a case, the Court may accept the limitation of the substantive right, but require the legislature to set up sufficient procedural safeguards to minimize wrong administrative or judicial decisions.

Such a procedural approach can be observed in a few cases of the South African Constitutional Court.[137] In *C v Department of Health and Social Development*, the Court had to deal with a provision that allowed social workers to remove children from family care if they were in need of care and protection.[138] In urgent cases, the social workers were allowed to remove a child without a prior court order. They then had to investigate the matter and file a report within 90 days. After this period, the child had to be brought before the children's court for a determination of whether she or he was indeed in need of care and protection. The applicants contended that the lack of an earlier automatic judicial review of the decision of the social worker violated the right of the children to parental care, as guaranteed by section 28 (1)(b) of the Constitution.

Justice Yacoob held for the majority of the Court that the removal of the child from its family was, in principle, in the best interest of the child.[139] However, there was always the possibility that such a decision was made erroneously.[140] Therefore, it was in the interest of the children that procedural safeguards minimizing the chances of erroneous decisions were in place.[141] As the state had not offered a legitimate reason for the lack of an automatic judicial review of child removals by social workers, the provision was found to be unconstitutional for lack of adequate procedural safeguards.[142]

In *Lawyers for Human Rights*, the Court dealt with the treatment of illegal immigrants arriving at a seaport before their removal or deportation.[143] According to the provision of the South African Immigration Act, an immigration officer could, when he noticed an immigrant trying to enter South Africa by ship, order the master of the ship to detain the illegal immigrant on the ship and to remove him from the country or remove the illegal immigrant in custody from the ship. The Court found that this provision limited the right to freedom and security of the immigrants enshrined in section 12 of the Constitution.[144]

In its justification analysis, the Court argued that it was, in principle, reasonable and justifiable to detain illegal immigrants until they leave the country when the ship leaves.[145] However, the Court found that the provision did not allow for adequate procedural safeguards. It expressed concern that the provision did not require the state to seek a judicial confirmation of the detention regardless of the length of the period for which the

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137 *See* Lesapo v North West Agricultural Bank and Another (CCT 23/99) [1999] ZACC 16; 2000 (1) SA 409; 1999 (12) BCLR 1420 (16 Nov 1999); Lawyers for Human Rights and another v Minister of Home Affairs and another (CCT 18/03) [2004] ZACC 12; 2004 (4) SA 125 (CC) 2004 (7) BCLR 775 (CC) (9 March 2004); C and Others v Department of Health and Social Development, Gauteng and Others (CCT 55/11) [2012] ZACC 1; 2012 (2) SA 208 (CC); 2012 (4) BCLR 329 (CC) (11 Jan 2012).

138 C v Department of Health and Social Development, *supra* note 137.

139 *Id.*, at ¶ 75.

140 *Id.*, at ¶ 76.

141 *Id.*, at ¶ 77.

142 *Id.*, at ¶¶ 81-82.

143 Lawyers for Human Rights, *supra* note 137.

144 *Id.*, at ¶ 33.

145 *Id.*, at ¶ 42.

immigrant was detained.[146] Therefore, it held that the provision was inconsistent with the Constitution to the extent that it did not ask for a court order for detentions of more than 30 days.[147]

IV. Balancing

The Court does not totally refrain from balancing. Indeed, it balances quite often. However, in most cases, the Court either balances in order to confirm the constitutionality of a statute,[148] or it uses the balancing test when it analyzes Common Law provisions that deal with the relationship of private individuals[149] or principles of customary law.[150] In *Christian Education*, for example, the applicants had argued that the prohibition of corporal punishment in schools violated the freedom of religion of parents who want to authorize teachers to exercise corporal punishment.[151] The applicant contended that corporal punishment is a vital aspect of Christian religion and Christian education.

Justice Sachs agreed in his judgment for the unanimous court that the prohibition of corporal punishment limited the freedom of religion of the parents.[152] However, he held that the provision was justified under the limitations clause. In his justification analysis, he systematically applied the balancing test: He acknowledged the importance of the freedom of religion,[153] but argued that the restriction was not particularly severe as the parents were not generally deprived of the opportunity to bring up their children according to Christian beliefs.[154] On the other side of the balance, he found that the state had an interest in protecting pupils from degradation and indignity.[155] He supported this argument by referring to several international documents and judgments of other constitutional courts

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146 *Id.*, at ¶ 43.

147 *Id.*, at ¶ 45.

148 *See* Bernstein and Others v Bester NO and Others (CCT 23/95) [1996] ZACC 2; 1996 (4) BCLR 449; 1996 (2) SA 751 (27 March 1996), at ¶¶ 54-55; Beinash and Another v Ernst & Young and Others (CCT 12/98) [1998] ZACC 19; 1999 (2) SA 91; 1999 (2) BCLR 125 (2 Dec. 1998), at ¶¶ 17-21; S v Dlamini, S v Dladla and Others, S v Joubert, S v Schietekat (CCT 21/98, CCT 22/98, CCT 2/99, CCT 4/99) [1999] ZACC 8; 1999 (4) SA 623; 1999 (7) BCLR 771 (3 June 1999), at ¶¶ 54-57; Christian Education South Africa v Minister of Education (CCT 4/00) [2000] ZACC 11; 2000 (4) SA 757; 2000 (10) BCLR 1051 (18 Aug 2000), at ¶¶ 36-51; De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others (CCT 5/03) [2003] ZACC 19; 2004 (1) SA 406; 2003 (12) BCLR 1333 (CC) (15 Oct 2003), at ¶¶ 59-91; Mohunram and Another v. National Director of Public Prosecutions and Another (Law Review Project as Amicus Curiae) (CCT 19/06) [2007] ZACC 4; 2007 (4) SA 222 (CC); 2007 (6) BCLR 575 (CC) (26 March 2007), at ¶¶ 76-102; Road Accident Fund and Another v Mdeyide (CCT 10/10) [2010] ZACC 18; 2011 (1) BCLR 1 (CC); 2011 (2) SA 26 (CC) (30 Sept 2010), at ¶¶ 65-94; South African Transport and Allied Workers Union and Another v Garvas and Others (CCT 112/11) [2012] ZACC 13 (13 June 2012), at ¶¶ 61-84.

149 *See* Khumalo and Others v. Holomisa (CCT 53/01) [2002] ZACC 12; 2002 (5) SA 401; 2002 (8) BCLR 771 (14 June 2002), at ¶¶ 41-44; Twee Jonge Gezellen (Pty) Ltd and Another v Land and Agricultural Development Bank of South Africa t/a The Land Bank and Another (CCT 68/10) [2011] ZACC 2; 2011 (5) BCLR 505 (CC); 2011 (3) SA 1 (CC) (22 Feb 2011), at ¶¶ 56-65.

150 Bhe, *supra* note 68, at ¶¶ 96-97.

151 Christian Education, *supra* note 148.

152 *Id.*, at ¶ 27.

153 *Id.*, at ¶¶ 36-37.

154 *Id.*, at ¶ 38.

155 *Id.*, at ¶ 43.

that sought to protect children from potentially injurious consequences of their parents' religious practices.[156] Furthermore, he highlighted that

> "[the outlawing of physical punishment] had a principled and symbolic function, manifestly intended to promote respect for the dignity and physical and emotional integrity of all children."[157]

Therefore, he held that the prohibition of corporal punishment was justified.[158] In this process, Justice Sachs showcased a systematic balancing exercise. However, he did this while confirming the constitutionality of a law. If courts uphold a legislative decision, they cannot be accused of interfering with the political sphere because the judges' evaluations of the conflict are in line with the evaluations of the legislature. Therefore, the legitimacy challenge does not apply in this case. The critique that courts take political decisions behind the veil of the proportionality principle has no bite if the court does nothing but confirming a decision taken by the political branches.

A second range of cases in which the Constitutional Court regularly applies balancing relates to the constitutional review of common law principles that apply between private individuals. Here, we can observe that the Court is concerned with striking a fair balance between the involved parties, attempting to give each side a share of the cake. This becomes particularly obvious in Justice O'Regan's judgment for a unanimous Court in the Khumalo case.[159] In the judgment, the Court had to deal with the conflict between the freedom of the press and human dignity in defamation cases when a newspaper published potentially defamatory facts without being able to prove them. The Justice found that imposing a full burden of proof on either side would be a zero-sum result, and that

> "[s]uch a zero-sum result, whomsoever's favour, fits uneasily with the need to establish an appropriate constitutional balance between freedom of expression and human dignity."[160]

She therefore required the publisher only to show that the publication was reasonable under all circumstances in order not to be held liable for defamation.[161] She went on to say that

> "[t]he defence of reasonable publication avoids therefore a winner-takes-all result and establishes a proper balance between freedom of expression and the value of human dignity."[162]

The constitutional review of Common Law principles does not pose the same legitimacy challenge as the review of legislation. The constitutional court only reviews a body of law that has been developed by other courts. When declaring a common law principle as unconstitutional, it does, therefore, not interfere with the political sphere. Certainly, it has to engage in a comparison of incommensurable values. But we have seen that this is a necessary element of our daily lives and of judicial decision-making in such cases. It is, consequently, not surprising to observe that the constitutional court is pre-eminently concerned with striking a fair balance between the private parties involved when it comes to the review of Common Law principles.

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156 *Id.*, at ¶ 41.

157 *Id.*, at ¶ 50.

158 *Id.*, at ¶ 52.

159 Khumalo, *supra* note 149.

160 *Id.*, at ¶ 42.

161 *Id.*, at ¶ 43.

162 *Id.*

The cases in which the Court recurs to a pure balancing test when striking down legislation are very rare, but they do exist. The case *Ex parte Minister of Safety and Security* concerned a provision of the Criminal Procedure Act, which allowed persons to kill a suspect if they could not arrest him or otherwise prevent him from fleeing.[163] Justice Kriegler held for the unanimous court that the provision violated the right to life.[164] In his justification analysis, the Justice pointed out that there may be circumstances in which it might be justified to kill a fleeing suspect, in particular when the fugitive poses a threat to the people on the scene or to the public at large.[165]

However, the challenged provision allowed the use of lethal force even in cases of relatively petty offences, like pickpocketing.[166] Therefore, the Court held that there was a "manifest disproportion between the rights infringed and the interests sought to be advanced."[167] Consequently, it seems that judges in some cases cannot just rely on controlling the rationality of the political process, but also have to interfere with the substantive evaluations of the political branch. However, such cases will often be cases in which, on the one hand, there is a *manifest* disproportion between the purpose and the severity of the individual rights restriction, and, on the other, the electoral accountability of the legislature is only weak or non-existent.

This concerns, in particular, cases like *Ex parte Minister of Safety and Security*, which deal with provisions of criminal justice. Criminals often come from a socio-economic group that has no lobby in the political business. Furthermore, the majority of the population is not involved in criminal acts, but rather fears to be a victim of crime. Being lenient in criminal affairs does thus not score any points with the electorate. It is rather the opposite: Being hard on crime may win votes and elections. There is no denying that criminal justice and criminal sanctions are necessary elements of social order. However, this does not disburden the legislature from incorporating procedural safeguards against false convictions and from refraining from inappropriate and disproportional punishment. If the political process fails to guarantee the application of the rule of law in the criminal justice system, this role falls to the courts. It is therefore no surprise that the Court might be forced to use balancing when reviewing and striking down statutes of criminal procedure or criminal law.

V. Conclusion

Critics of the proportionality principle have accused courts of taking political decisions under the banner of balancing competing rights and values. The solution of such a balancing exercise is in almost all cases not determined by the constitution and thus strongly depends on the social and political background of the deciding judges. Deciding conflicts of competing values is a decision about the society we want to live in, and such a decision should be left to the political institutions that are accountable to the electorate. *Prima facie*, the South African Constitutional Court seems to be particularly prone to such a critique. As the Court has adopted a global proportionality test that consists only of the balancing stage, it seems to be particularly vulnerable to the challenge that incommensurable values cannot be compared in a rational way.

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163 Ex parte Minister of Safety and Security, *supra* note 28.

164 *Id.*, at ¶ 30.

165 *Id.*, at ¶ 39.

166 *Id.*, at ¶ 41.

167 *Id.*, at ¶ 46.

However, a closer look at the case law of the South African Court provides a more nuanced picture. In fact, the Court rarely engages in balancing when it wants to strike down a piece of legislation. It balances when it upholds a statute or judges a principle of Common Law. However, in neither of the latter cases does the Court interfere with the political sphere. When it upholds a statute, it only confirms a political decision instead of overturning it. When it deals with a principle of Common Law, it passes judgment on a body of judge made law so that the Court does not face a separation of powers issue.

When the Court intends to declare a statute as unconstitutional, it usually refrains from balancing. Instead, it bases its decisions on different considerations. On the one hand, these may be other elements of the proportionality principle, such as the lack of a rational connection between the restriction and its purpose or the existence of a less restrictive means. On the other hand, it uses burden of justification or consistency arguments, or requires the legislature to set up additional procedural guarantees. These arguments may not always totally exclude judicial determinations of normative value conflicts.[168] In particular, one may sometimes debate whether a less restrictive means identified by the Court is indeed as effective as the one adopted by the legislature.[169] However, by and large, the Court is rather concerned with holding the legislature accountable to take decisions that represent all groups of the society than with determining the resolution of deep value conflicts.[170]

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[168] *See* Bishop, *supra* note 71, at 322-335.

[169] This problem is even aggravated by the under-developed approach to the inquiry into empirical fact-finding that is underlying the challenged legislation; *see* David Bilchitz, *How Should Rights Be Limited?*, 2011 TYDSKRIF VIR DIE SUID-AFRIKAANSE REG 568, 573-576 (2011).

[170] For a defense of such a minimalist approach of the South African Constitutional Court, see Iain Currie, *Judicious Avoidance*, 15 S. AFR. J. HUM. RTS. 138, 147-150 (1999). But see also the critiques of Alfred Cockrell, *Rainbow Jurisprudence*, 12 S. AFR. J. HUM. RTS. 1 (1996), who classifies the jurisprudence of the court as "rainbow jurisprudence", finding consensus where there is none (*id.*, at 12), Christopher J. Roederer, *Judicious Engagement: Theory, Attitude and Community*, 15 S. AFR. J. HUM. RTS. 486 (1999), who challenges the minimalist approach because it is under-theorized, and Patrick Lenta, *Judicial Restraint and Overreach*, 20 S. AFR. J. HUM. RTS. 544 (2004), who argues that the court has, on occasion, been too restrained and failed to protect individual rights adequately (*id.*, at 576).