PROPORTIONALITY AND THE INCOMMENSURABILITY CHALLENGE IN THE JURISPRUDENCE OF THE SOUTH AFRICAN CONSTITUTIONAL COURT

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ABSTRACT
The proportionality test is a central doctrine of the individual rights jurisprudence of the South African Constitutional Court. However, one core part of the proportionality test, the balancing of competing interests, is often severely criticised because it is supposed to lack rational standards of comparison. Therefore, many critics of balancing claim that courts make policy decisions by second-guessing legislative value-decisions. This article analyses how the Constitutional Court deals with this critique. It makes a detailed analysis of the case law and finds that the court, in fact, rarely balances when it overturns a piece of legislation. When correcting the legislature, the court usually bases its judgment on other arguments, such as over-breadth, less-restrictive-means, or lack of consistency. However, the court balances when it confirms legislation, or when it corrects common law rules. In both cases, the court does not come into conflict with the political branch so that balancing does not pose any legitimacy issues. In sum, 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.

Key words: Constitutional Court, constitutionality, constitutional principles, counter majoritarianism, limitation, proportionality, incommensurability

I INTRODUCTION
The principle of proportionality is one of the central doctrines of constitutional review in South Africa. However, the proportionality test has faced fierce criticism in legal scholarship. The balancing of competing interests that is
part of the test is often said to lack rational standards of comparison. This contribution analyses how the South African Constitutional Court deals with this critique. It does not try to add another dimension to an already rich normative discussion. Instead, it observes under which circumstances the Constitutional Court actually balances when it employs the proportionality test and whether the court has found ways to rationalise balancing.

The Constitutional Court developed the proportionality test in an early landmark judgment. 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. 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.

This approach was approved by the drafters of the Constitution of the Republic of South Africa, 1996, who drafted a limitations clause which expressly includes the factors that were mentioned in *Makwanyane* as part of the proportionality test. However, the approach of the South African Constitutional 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 courts 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.

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4 *S v Makwanyane* 1995 (3) SA 391 (CC).
5 Ibid para 104 (per Chaskalson CJ).
6 See Constitution s 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.’
8 See *R v Oakes* [1986] 1 SCR 103 (on Canada); D Grimm ‘Proportionality in Canadian and German Jurisprudence’ (2007) 57 *Univ Toronto LJ* 383 (on Germany).
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.

The South African Constitutional Court thus considers the same factors as its Canadian and German counterparts. However, these factors are not individual steps, but rather part of the overall balancing exercise. Prima facie, the court thus adopts a very broad approach. 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 applying 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.

Following the introduction, this article is organised into four parts with part II establishing the theoretical framework. 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 part III, I analyse the arguments on which the Constitutional Court bases the constitutional incompatibility of a statute. We will see that the court usually refrains from balancing when it wants to strike down legislation as unconstitutional. In part IV, I examine the few cases in which the South African Constitutional Court actually balances. The conclusion, part V, argues that the Constitutional Court is rather more concerned with holding the legislature accountable than with second-guessing legislative value decisions.

## II The Legitimacy Challenge of Balancing

Even though the proportionality principle is extremely popular in the practice of constitutional courts, it has a long list of critics. In particular, the critique focuses on the balancing of competing constitutional values at the core of

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9 *S v Manamela* 2000 (3) SA 1 (CC) para 32.
11 See Koutnatzis ibid 49, who claims that proportionality and balancing are basically the same in the South African context.
12 For criticism and responses voiced in South African constitutional law scholarship, see note 1 above.
the proportionality test, which is claimed to be irrational.\textsuperscript{13} Balancing is essentially a cost-benefit analysis: the limitation of an individual right passes constitutional muster if the marginal benefit of the state measure for a public purpose outweighs the marginal restriction of the constitutional right.\textsuperscript{14} However, a cost-benefit analysis usually requires that the compared goods be measured in one common normative currency, i.e. that they be commensurable. But commensurability is often lacking when it comes to the resolution of conflicts of competing constitutional rights and values.\textsuperscript{15} 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 the mother?

Now, the balancing of incommensurable values is part of our everyday life. We often have to choose between alternatives that cannot be translated into one common normative currency. 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 preferences of the citizens, in a democracy, they 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.\textsuperscript{16} Consequently, they claim that the balance that has been struck by the legislature should not be reviewed in the process of judicial review.\textsuperscript{17} striking a balance between competing aims and values is a decision about what kind of society we want to live in. Answering this question is the task of the elected representatives, who are accountable to the members of this society; it is not a decision for the courts.

\textsuperscript{13} Habermas (note 2 above) 259.
\textsuperscript{16} Aleinikoff ibid 973.
The core of the critique is thus that balancing allows courts to make political decisions behind the veil of legal reasoning. The hypothesis of this article 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 rather than political decisions. Therefore, they try to avoid any appearance that they might be pursuing a political agenda. Although it has become a truism today that decisions of constitutional courts are not free of political considerations, courts do frame even highly political decisions in legal terms. This is particularly relevant in the South African context. The 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. Therefore, the court has to strike a difficult balance between individual rights protection and securing its own institutional position.

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. 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, it will usually base its decisions on different grounds. This tendency will be the stronger, the more the court’s institutional position depends on a general acceptance of the court’s jurisprudence by the political branches.

There are several strategies that courts can use to resolve conflicts of constitutional values without directly resorting 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 to refrain 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; alternatively, 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.

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18 See also F Venter ‘The Politics of Constitutional Adjudication’ (2005) 65 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 129, 165 (‘whether a particular limitation on rights is proportionally justifiable still requires subjective evaluation’).
These strategies do not exclude each other. On 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. 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 revert to auxiliary arguments that 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 or for a justification of an empirical prognosis. On the other, legislative inconsistency is a sign that the legislature attributed less importance to the policy goal than it explicitly claims, or that it failed to perform a proper empirical prognosis.

III  BALANCING IN THE CASE LAW OF THE CONSTITUTIONAL COURT

When we analyse the case law of the 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:

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

In *Manamela*, the court used the famous dictum that the limitations clause ‘does not permit a sledgehammer to be used to crack a nut’. Furthermore, we often find references to the special importance of certain rights or public interests. In *Ex parte Minister of Safety and Security*, for example, Justice Kriegler argued for the unanimous court:

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25 *S v Bhulwana* 1995 (1) SA 388 (CC) para 18.

26 *Manamela* (note 9 above) para 34.

27 See the references in Woolman & Botha (note 7 above) 34-71–2 & 34-76.
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.  

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 strikes down a statute. The balancing rhetoric is no more than a ‘ritual bow’ to the losing party. Instead, most of the cases in which a statute is declared unconstitutional are solved through less restrictive means or over-breadth arguments.  

But the court also holds in certain cases that the regulation lacks a legitimate purpose or a rational connection between means and ends. Furthermore, we find consistency arguments, the imposition of a burden of proof or burden of justification on the state, or the requirement of additional procedural safeguards.

(a) 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. The most famous case in this respect is Makwanyane, already mentioned above. 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 favoured the abolition of the death penalty because it had disproportionately been used against black offenders in the apartheid era. In contrast, the political base supported the death penalty because of South Africa’s high crime rate. 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 judgment, President Chaskalson opined that the death penalty constitutes a cruel, inhuman and degrading punishment. However, he did not stop his analysis there, but asked whether this restriction could be justified according to the limitations clause of the interim Constitution. In particular, he asked whether a long prison term was a less restrictive punishment than the

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28 *Ex parte Minister of Safety and Security In Re S v Walters* 2002 (4) SA 613 (CC) para 28.
30 See Currie & Waal (note 10 above) 171.
31 See Makwanyane (note 4 above) para 127; *S v Williams* 1995 (3) SA 632 (CC) paras 64–77; *Ferreira v Levin NO* 1995 (1) SA 984 (CC) para 127; *S v Mbatu* 1996 (2) SA 464 (CC) para 26; *Mistry v Interim National Medical and Dental Council* 1998 (4) SA 1127 (CC) paras 29–30; *Manamela* (note 9 above) para 49; *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC) para 50; *Nyathi v Member of the Executive Council for the Department of Health Gauteng* 2008 (5) SA 94 (CC) para 51; *Johncom Media Investments Limited v M* 2009 (4) SA 7 (CC) para 30.
32 *Makwanyane* (note 4 above).
34 Roux (note 21 above) 118. See also Webb (note 3 above) 233.
35 *Makwanyane* (note 4 above) para 95.
death penalty, albeit equally deterrent.\(^\text{37}\) That imprisonment was a less severe means than capital punishment seemed to be obvious. The crucial question, however, was whether it had the same deterrent effect. Chaskalson imposed a burden of proof on the state and held that the state had not made a plausible case for the greater deterrent effect of the death penalty.\(^\text{38}\) He argued that the likelihood to be apprehended, convicted and punished had a much stronger deterrent effect than the severity of the punishment.\(^\text{39}\) Therefore, the state failed to provide the convincing empirical arguments necessary to justify the death penalty.\(^\text{40}\)

The court also used the less restrictive means argument in another seminal judgment, the \textit{Manamela} case, in which it had to decide about the constitutionality of a reverse onus clause in a provision of the penal code.\(^\text{41}\) If a person was found to be in possession of stolen goods, it was presumed that this person had believed at the time of acquisition that the individual from whom he had acquired the goods had no power of disposal over them. The offender thus had to prove the lack of mens rea in order to escape conviction. The court held that this reversal of the burden of proof infringed upon the presumption of innocence enshrined in s 35 (3)(h) of the Constitution.\(^\text{42}\)

The state had argued that the reverse onus clause was a necessary measure to eradicate the market in 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 they can use to prove the purchase.\(^\text{43}\) However, in practice, the provision often concerned people who were poor, unskilled and illiterate, so that they were not likely to keep records of the informal transactions they perform every day and thus had difficulties proving their innocence.\(^\text{44}\) The court argued that imposing an evidential burden on the accused would be a less restrictive means.\(^\text{45}\) This evidential burden would force the accused to provide a plausible basis as to why he reasonably believed that the acquired goods were not stolen without requiring formal proof. It would thus be less

\(^{37}\) \textit{Makwanyane} (note 4 above) paras 116–24.

\(^{38}\) Ibid para 127. See also P Lenta ‘Deterrence and Capital Punishment’ (2007) 22 \textit{SA Public Law} 385, 389–92 (making a review of the empirical literature on this issue and arguing that the evidence in favour of capital punishment is inconclusive).

\(^{39}\) \textit{Makwanyane} (note 4 above) para 122.

\(^{40}\) In \textit{Makwanyane} the court did not stop the analysis with the less restrictive means test. Instead, it did indeed perform a balancing. I will come back to this issue below, at III(f), when I discuss the consistency arguments.

\(^{41}\) \textit{Manamela} (note 9 above). The court had to deal with reverse onus clauses on several occasions. In \textit{Mbatha} (note 31 above), the court also relied on the less restrictive means argument. In \textit{S v Ntsele} 1997 (11) BCLR 1543 and \textit{S v Mello} 1998 (3) SA 712 (CC), it basically relied on the precedents of the previous decisions in this matter. See also the \textit{Bhulwana} case, notes 91 to 92 below and accompanying text, in which the court declared a reverse onus clause as unconstitutional because it lacked a rational connection with the goal.

\(^{42}\) \textit{Manamela} (note 9 above) para 26.

\(^{43}\) Ibid para 43.

\(^{44}\) Ibid para 44.

\(^{45}\) Ibid para 49.
burdensome for the accused and still supply the prosecution with the necessary information about the accused’s inner state of mind.

(b) Over-breath

In many cases the constitutional incompatibility is based on an over-breath argument. By finding that a statute is overbroad, the court indicates that the statute has a legitimate core, but that its scope violates the right in too broad a manner. The statute also applies to cases that do not stand in sufficient relation to the achievement of the statute’s aim. The over-breath argument is thus a special case of the less restrictive means test. 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. In Coetzee, the court had to decide about a provision of South African civil procedure law. According to the Magistrates’ 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 so. 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. Justice Kriegler pointed out that the provision often affected people who were poor and either illiterate or uninformed about the law.

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’. In his opinion for the unanimous court, Deputy Chief Justice Langa found that the challenged provision limited the freedom of expression. He acknowledged that the provision served an important purpose in promoting and protecting human dignity, equality and freedom. 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.

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46 See, for example, Coetzee v Government of the Republic of South Africa 1995 (4) SA 631 (CC) para 13; Mbotha (note 31 above) paras 21–4; Case v Minister of Safety and Security 1996 (3) SA 617 (CC) paras 48–61, 93; South African National Defence Union v Minister of Defence 1999 (4) SA 469 (CC) para 13; Manamela (note 31 above) para 43; Islamic Unity Convention (note 31 above) para 44; First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services 2002 (4) SA 768 (CC) para 108; Phillips v Director of Public Prosecutions 2003 (3) SA 345 (CC) para 28; Jaftha v Schoeman 2005 (2) SA 140 (CC) para 44, 48; Malachi v Cape Dance Academy International (Pty) 2010 (6) SA 1 (CC) para 38.

47 Currie & Waal (note 10 above) 171.

48 Coetzee (note 46 above).

49 Ibid para 8.


51 Ibid para 8.

52 Islamic Unity Convention (note 31 above).


54 Ibid para 45.
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 over-breadth 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 rastafarians to the general prohibition on the use of cannabis.\(^{56}\) In *Prince*, the applicant was a member of the Rastafari religion, which used cannabis in its religious rituals. The Law Society of the Cape of Good Hope refused to register his contract of community service – a requirement for becoming an attorney – because he had previous convictions for the possession of cannabis and expressed the intention to continue using 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 did not remain uncontested. Indeed, 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 the use or possession of drugs”.\(^{63}\) On the contrary, the government seemed to assume that the danger involved with cannabis could be controlled if an adequate scheme was set up.

Second, Justice Ngcobo imposed a burden of proof on the legislature to demonstrate that the strictly religious use of cannabis was indeed detrimental

\(^{55}\) Ibid para 44.
\(^{57}\) Ibid para 47.
\(^{58}\) Ibid para 81.
\(^{59}\) But see also Botha (note 1 above) 23–7 (arguing that the principal disagreement between majority and minority in *Prince* centres 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 marginalised minority).
\(^{60}\) *Prince* (note 56 above) para 132 (per CJ Chaskalson, and JJ Ackerman and Kriegler).
\(^{61}\) Ibid para 118.
\(^{62}\) Ibid para 54 (per J Ngcobo).
\(^{63}\) Ibid.
to one’s health. He then went on to argue why it was plausible that the religious use of cannabis did not necessarily endanger human health, and that it would be possible to set up an administrative scheme to control potential abuse effectively. He did not offer 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 right to 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 marginalised group in South African society, which could not rely on the political process to pursue their rights and interests. 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 was necessary to achieve the legislative goal.

(c) Absence of a legitimate goal

In a few cases, the Constitutional Court based its judgment on the lack of a legitimate goal for limiting an individual right. 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 countervailing normative consideration to the infringed individual right. Consequently, the question of incommensurability does not arise. 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’. A quite similar formulation can be found in the National Coalition for Gay and Lesbian Equality Case, where the court stated that ‘[t]here is accordingly nothing, in the proportionality enquiry, to weigh against the extent of the limitation and its harmful impact on gays’.

However, courts will be careful to qualify the purpose of a state measure as illegitimate, as such a verdict often implies a political evaluation. What

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64 Ibid para 56.
65 Ibid paras 58–62.
66 Ibid paras 66–74.
67 Ibid para 157 (per J Sachs).
68 See National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC) para 37; Dawood v Minister of Home Affairs 2000 (3) SA 936 (CC) para 56; Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO) 2005 (3) SA 280 (CC) paras 65–6 & 72–3; Richter v the Minister of Home Affairs 2009 (3) SA 615 (CC) para 76; Centre for Child Law v Minister for Justice and Constitutional Development 2009 (6) SA 632 (CC) paras 52, 57 & 60. Bhe v Magistrate Khayelitsha 2005 (1) SA 580 (CC).
69 Dawood (note 68 above) para 56.
70 National Coalition for Gay and Lesbian Equality (note 68 above) para 37.
are the standards for determining the legitimacy? 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 clearly 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 refer to additional arguments. One strategy might be to rely on consistency considerations. The inconsistency of a statute is an indication that the pursued aim is less important than explicitly claimed. 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. Justice Ackerman held in the majority judgment that the criminalisation of sexual intercourse between males not only constituted unfair discrimination, but that it also infringed the rights to dignity and privacy. In the justification analysis, he noted that the state had not suggested a valid purpose for the criminalisation. He went on to say that:

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\text{[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.}
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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 criminalisation of sexual intercourse between males.

The guarantee of voting rights for prisoners was at the centre of the NICRO case. The applicants were prisoners who contended that precluding them from registering as voters and from voting whilst in prison violated their right to vote, as laid down in s 19 (3)(a) of the 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; and second, they argued that allowing prisoners to vote would send a message to the public ‘that the government is soft on crime’.

72 National Coalition for Gay and Lesbian Equality (note 68 above).
73 Ibid para 32.
74 Ibid para 37.
75 Ibid.
76 Ibid paras 39–52. The lone exception is the Bowers v Hardwick case in the US. However, the Constitutional Court contended that the US constitution had a different wording than the South African Constitution, ibid para 53–5.
77 NICRO (note 68 above).
78 Ibid para 44.
79 Ibid para 55.
The court rejected both arguments. The first was unconvincing as the government had to make voting arrangements for certain categories of prisoners.\textsuperscript{80} And the second could not be a sufficient reason for the disenfranchisement of prisoners.\textsuperscript{81} 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.\textsuperscript{82} The court then backed up its verdict with a consistency argument.\textsuperscript{83} The challenged statute denied every prisoner the right to vote, regardless of the severity of the offence. In contrast, s 47(1)(e) of the Constitution permitted every prisoner serving a sentence of less than 12 months without the option of a fine to run for public office. Granting prisoners the right to stand for elections, yet not giving them the right to vote, thus contradicted the spirit of s 47 of the Constitution.

In \textit{Bhe}, 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.\textsuperscript{84} The challenged provision gave effect to the customary law of succession, according to which only male relatives of the deceased qualified as heirs. After finding that the statute was a limitation of the right to dignity as well as to the prohibition on unfair discrimination, 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.\textsuperscript{85}

An example of the court using consistency arguments in determining whether an individual rights restriction served a legitimate purpose can be found in \textit{Richter v Minister for Home Affairs}.\textsuperscript{86} In \textit{Richter}, the applicant had claimed that the fact that South African nationals 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 who were absent from the country during elections an opportunity to cast a vote. These included people working abroad for the South African government and people who were temporarily absent from the country, either on holiday, on business trips or for their studies. However, there was no such opportunity for people who were temporarily working abroad, but had the intention of returning to South Africa in the foreseeable future.

In its analysis as to 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.\textsuperscript{87} In the High Court proceedings, the state had

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\item \textsuperscript{80} Ibid para 108 (per J Madala). Prisoners who opted for imprisonment rather than for a fine actually had the right to vote.
\item \textsuperscript{81} See S Choudhry ‘“He had a Mandate”; The South African Constitutional Court and the African National Congress in a Dominant Party Democracy’ (2009) 2 Constitutional Court Review 1, 36.
\item \textsuperscript{82} NICRO (note 68 above) paras 65–6.
\item \textsuperscript{83} Ibid.
\item \textsuperscript{84} \textit{Bhe} (note 68 above).
\item \textsuperscript{85} Ibid para 72.
\item \textsuperscript{86} \textit{Richter} (note 68 above).
\item \textsuperscript{87} Ibid para 72.
\end{itemize}
argued that further opportunity for special votes would pose administrative difficulties for the state. However, the court dismissed this argument as inconsistent, as there were many groups to which the special opportunity to vote had been granted. It did not see a decisive difference between the groups that were afforded absentee voting rights and the people, who were absent from the country because they were temporarily working abroad.\footnote{Ibid para 76.} Therefore it concluded that the restriction lacked a legitimate government purpose.\footnote{Ibid para 78.}

In three of the four examples discussed, the court used additional arguments when it found that the individual rights restriction did not serve a legitimate purpose. 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 criminalisation 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, the court even referred to three additional arguments: first, it held 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. The only exception is Bhe where the purpose of implementing a racist and discriminatory programme was so obviously illegitimate that the court did not need the support of an additional argument.

\textbf{(d) Lack of a rational connection}

In other cases, the court relied on the lack of a rational connection between the restriction and its purpose.\footnote{See, for example, Bhulwana (note 25 above) paras 23–4; South African National Defence Union (note 46 above) para 35; Brümmer v Minister for Social Development 2009 (6) SA 323 (CC) paras 65–6; Law Society of South Africa v Minister for Transport 2011 (1) SA 400 (CC) para 99.} 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.\footnote{Bhulwana (note 25 above).} According to the challenged provision, it was presumed until proof of the contrary that anybody who was found in possession of more than 115 grams of dagga was dealing in 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 for mere consumers of the drug, there was no sufficient connection between the proved fact of possession and the presumed fact of dealing.  

In *South African National Defence Union*, the applicants were members of the military, who were denied permission to join a trade union by statute. As the right to form and join a trade union was explicitly guaranteed by s 23(2) of the Constitution, the court had no difficulty establishing a limitation of an individual right. The state defended the prohibition because it claimed that the organisation of military personnel into trade unions endangered the discipline of the South African Defence Force. However, the court argued that the mere 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.

In support of the argument, the court referred to the practice of other countries, where trade unions for military personnel were partly permitted.

In *Brümmer*, the court supported its verdict that a statute lacked a rational connection to the pursued goal with a consistency argument. 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 filed well after a 30-day limit mentioned in the Promotion of Access to Information Act. The High Court referred the case to the Constitutional Court since it had doubts as to the constitutionality of the prescription period.

The Constitutional Court found that it would be almost impossible to get legal advice, to raise money and to prepare for such a proceeding within the limit of 30 days. Therefore it held that the prescription period restricted the right of access to information in s 32 of the Constitution and the right of access to court in s 34. In its justification analysis, the court acknowledged that time bar provisions had important functions: they provided legal security and guaranteed the efficiency of justice because evidence might be lost with the lapse of time. However, the court argued that these considerations did

93 *South African National Defence Union* (note 46 above).
94 Ibid para 30.
95 Ibid para 35.
96 Ibid para 34.
97 *Brümmer* (note 90 above).
98 Ibid paras 54–6.
99 Ibid para 57.
100 Ibid para 64.
not apply in this case.\footnote{Ibid paras 65–6.} There was little danger that evidence would be lost because litigation in these cases was not dependent on witnesses so that the decreasing availability or the fading memory of witnesses was no great concern.\footnote{Ibid para 65.} Even though the goal of protecting evidence was thus legitimate in principle, there was no rational connection between the concrete provision and the goal. Furthermore, the court pointed out that time limits in other contexts were much more generous, as they usually allowed individuals to sue the state up to six months after the decision.\footnote{Ibid para 67.} Therefore, there was no coherent reason why, in the case of public information, a time limit of merely 30 days should have been necessary to protect legal certainty and the efficiency of justice.\footnote{Ibid para 69.}

The three cases discussed above 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 predominantly 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.\footnote{Bhulwana (note 25 above) para 24.} 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.\footnote{Ibid para 23.} 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 in other countries. In Brümmer, finally, the court argued that the reasons for time limits did not apply in the concrete case, and combined its argument with a consistency consideration, pointing out that in other contexts time limits were much more generous.

### (e) 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.\footnote{See Venter (note 18 above) 145.} The political process is often prone to disregard the interests of societal minorities\footnote{This danger is usually described by the term ‘tyranny of the majority’; see A de Tocqueville De La Démocratie En Amérique (1835); J.S Mill On Liberty (1859).} or to be captured by particularistic interests of strong lobby groups.\footnote{Seminally, M Olson The Logic of Collective Action Public Goods and the Theory of Groups (1965) 127–8.} This danger seems to be particularly prevalent in political systems such as the South African one, which features
one dominant party that is not concerned for the foreseeable future of being voted out of power. 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 performing this task 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 favour certain particularistic interests. However, neither reason is sufficient to justify the limitation of a constitutional right.

For the reasons outlined, it is not reasonable either 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 deterrent effect and thus contributes to reducing crime rates will not be a significant factor in the parliamentary decision. Rather, the decisive consideration is whether the electorate believes that capital punishment has such a deterrent effect. In such cases, the government has little 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 requesting disclosure of the empirical basis of the political decision and by 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 legitimate purpose 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 criminalisation of sexual intercourse between males. 115 In Makwanyane, it held that capital punishment was no necessary means

111 See S Issacharoff ‘Constitutional Courts and Democratic Hedging’ (2011) 99 Georgetown LJ 961, 994 (arguing that the ‘[South African] Constitutional Court was created … to guarantee that the structures and limits of democratic rule would be honored’).
112 See JHH Weiler ‘Comment: Brazil – Measures Affecting Imports of Retreaded Tyres (DS32)’ (2009) 8 World Trade Rev 137, 144.
113 See Petersen (note 24 above) 310.
114 See Makwanyane (note 4 above) paras 127 & 146; Case (note 46 above) para 93; S v Steyn 2001 (1) SA 1146 (CC) para 32; NICRO (note 68 above) paras 65–6; Centre for Child Law (note 68 above) paras 54–5.
115 National Coalition for Gay and Lesbian Equality (note 68 above) para 37.
of deterrence because the state had not shown that the death penalty had a stronger deterrent effect than imprisonment.\footnote{Makwanyane (note 4 above) para 127.}

In \textit{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 s 28 of the Constitution, according to which detention can only be the last resort when punishing juveniles under 18 years of age.\footnote{Centre for Child Law (note 68 above).} 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.\footnote{Ibid para 52.}

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?\footnote{Ibid para 57.} Furthermore, the court rebuked the state for not producing any empirical evidence to assess the legitimacy of the purpose.\footnote{Ibid para 54.} 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 between the ages of 16 to 18.\footnote{Ibid para 55.} As the state had not substantiated the legitimacy of the purpose, the restriction on s 28 of the Constitution could not be justified.\footnote{Ibid para 60.}

In \textit{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.\footnote{S v Steyn (note 114 above).} He contended that this provision violated his right of appeal guaranteed by s 35(3)(o) of the Constitution. The state had argued that the restriction was necessary in order to reduce the burden on 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.\footnote{Ibid para 32.}

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

\textbf{(f) Consistency arguments}

Consistency arguments 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 consistency of the measure with other elements of the law. 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.

Consistency 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. Sometimes, however, 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 had an additional deterrent effect. However, the court did not stop its analysis there. On the contrary, it went on to consider whether retribution could justify the death penalty.

President Chaskalson argued that retribution ‘carries less weight than deterrence’. 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.'

By pointing out that punishment is not usually 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. 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

127 NICRO (note 68 above) para 67; Brümmer (note 90 above) paras 67 & 69; Richter (note 68 above) para 76.
128 See note 38 above and accompanying text.
130 Ibid para 129.
131 Ibid.
132 Ibid para 130.
dignity’ and that the death sentence for murder could therefore not be justified under the Constitution.\footnote{133}

(g) \textit{Proceduralisation}

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.\footnote{134} 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 becomes of greater importance where the interests at stake are more fundamental. 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.\footnote{135}

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 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 minimise wrong administrative or judicial decisions.

Such a procedural approach can be observed in a few cases of the Constitutional Court.\footnote{136} In \textit{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 protection.\footnote{137} 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.

\footnotesize{\begin{flushleft} 133 \textit{Ibid} para 146. \\
136 See \textit{Chief Lesapo v North West Agricultural Bank} 2000 (1) SA 409 (CC); \textit{Lawyers for Human Rights v Minister of Home Affairs} 2004 (4) SA 125 (CC); \textit{C v Department of Health and Social Development, Gauteng 2012 (2) SA 208 (CC).} \\
137 \textit{C v Department of Health} (note 136 above).\end{flushleft}}
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 s 28(1)(b) of the Constitution.

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

In Lawyers for Human Rights, the court dealt with the treatment of illegal immigrants arriving at a seaport before their removal or deportation. According to the impugned provision of the South African Immigration Act, an immigration officer could, whenever 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 s 12 of the Constitution.

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. 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 immigrant was detained. 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.

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

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138 Ibid para 75.
139 Ibid para 76.
140 Ibid para 77.
141 Ibid paras 81–2.
142 Lawyers for Human Rights (note 136 above).
143 Ibid para 33.
144 Ibid para 42.
145 Ibid para 43.
146 Ibid para 45.
the constitutionality of a statute, or it uses the balancing test when it analyses common law provisions that deal with the relationship of private individuals or principles of customary law. 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 authorise teachers to exercise corporal punishment. The applicant contended that corporal punishment is a vital aspect of the Christian religion and Christian education.

Justice Sachs agreed in his judgment for the unanimous court that the prohibition of corporal punishment limited the parents’ freedom of religion. 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, 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. On the other side of the balance, he found that the state had an interest in protecting pupils from degradation and indignity. He supported this argument by referring to several international documents and judgments of other constitutional courts that sought to protect children from potentially injurious consequences of their parents’ religious practices. 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.

Therefore, he held that the prohibition on corporal punishment was justified. In this process, Justice Sachs employed a systematic balancing exercise. However, he did this while confirming the constitutionality of the 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

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147 See *Bernstein v Bester NO* 1996 (2) SA 751 (CC) paras 54–5; *Beinash v Ernst & Young* 1999 (2) SA 91 (CC) paras 17–21; *S v Dlamini* 1999 (4) SA 623 (CC) paras 54–7; *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) paras 36–51; *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* 2004 (1) SA 406 (CC) paras 59–91; *Mohunram v National Director of Public Prosecutions (Law Review Project as amicus curiae)* 2007 (4) SA 222 (CC) paras 76–102; *Road Accident Fund v Mdleyide* 2011 (2) SA 26 (CC) paras 65–94; *South African Transport and Allied Workers Union v Garvas* [2012] ZACC 13 (CC) paras 61–84.

148 See *Khumalo v Holomisa* 2002 (5) SA 401 (CC) paras 41–4; *Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Development Bank of South Africa t/a The Land Bank* 2011 (3) SA 1 (CC) paras 56–65.

149 *Bhe* (note 68 above) paras 96–7.

150 *Christian Education* (note 147 above).

151 Ibid para 27.


153 Ibid para 38.

154 Ibid para 43.

155 Ibid para 41.

156 Ibid para 50.

157 Ibid para 52.
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 confirm 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 is particularly obvious in Justice O’Regan’s judgment for a unanimous court in the *Khumalo* case. 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. O’Regan J found that imposing a full burden of proof on either side would lead to a zero-sum result, and that:

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

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. 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.

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 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.

The cases in which the court employs 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. Justice Kriegler held for the unanimous court that the provision violated the right to life. In his justification analysis, Kriegler J pointed out that there may be circumstances in which it might be

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158 *Khumalo* (note 148 above).
159 Ibid para 42.
160 Ibid para 43.
161 Ibid.
162 *Ex parte Minister of Safety and Security* (note 28 above).
163 Ibid para 30.
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.\footnote{164}

However, the challenged provision allowed the use of lethal force even in cases of relatively petty offences, like pickpocketing.\footnote{165} Therefore, the court held that there was a ‘manifest disproportion between the rights infringed and the interests sought to be advanced.’\footnote{166} 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 those in which, on the one hand, there is a manifest disproportionality 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 particularly concerns cases like \textit{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 forum. Furthermore, the majority of the population are not involved in criminal acts, but rather fear becoming victims of crime. Being lenient in criminal affairs thus does 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 immunise 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.

\textbf{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 to 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 Constitutional Court seems to be particularly prone to such a critique. The court has adopted a global proportionality test that consists in an overarching balancing enquiry and it thus seems to be particularly vulnerable to the challenge that incommensurable values cannot be compared in a rational way.

\footnote{164} Ibid para 39.  
\footnote{165} Ibid para 41.  
\footnote{166} Ibid para 46.
However, a closer look at the case law of the South African Constitutional 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 the 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. 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. 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.

167 See Bishop (note 71 above) 322–35.
168 This problem is even aggravated by the under-developed approach to the inquiry into empirical fact-finding that is underlying the challenged legislation; see D Bilchitz ‘How Should Rights be Limited?’ (2011) TSAR 568, 573–6.
169 For a defence of such a minimalist approach of the South African Constitutional Court, see I Currie ‘Judicious Avoidance’ (1999) 15 SAJHR 138, 147–50. But see also the critiques of A Cockrell ‘Rainbow Jurisprudence’ (1996) 12 SAJHR 1, who classifies the jurisprudence of the court as ‘rainbow jurisprudence’, finding consensus where there is none; CJ Roederer ‘Judicious Engagement: Theory, Attitude and Community’ (1999) 15 SAJHR 486, who challenges the minimalist approach because it is under-theorised; and P Lenta ‘Judicial Restraint and Overreach’ (2004) 20 SAJHR 544 576, who argues that the court has, on occasion, been too restrained and failed to protect individual rights adequately.