

Dedicated to my friend Frank Iacobucci, who taught me – in his judgments and in the academic cooperation between us – what a proper balancing between the common good and the needs of the individual is.

1 *The right and the limitation*

At the foundation of any discussion of human rights lies a basic differentiation between two separate questions.<sup>1</sup> The first question is, What is the scope of the right? That question examines those entitled to the right and those obligated by it; the acts permissible and forbidden; and the application of the right in place and time. Where two or more rights clash, the question of the relationship between them arises. The second question relates to the limitation upon the scope of the right by non-constitutional norms (regular statutes or common law). That question examines the realization of the right in 'regular' law and the extent of protection granted it. The answer to the first question is found in the constitutional language that (explicitly or implicitly) entrenches the right. The answer to the second question is found in the constitutional scheme that allows limitation of or infringement upon the right. Constitutional interpretation is used in answering both questions.<sup>2</sup> This article focuses on the second question.

The possibility of limiting behaviour that falls within the scope of a constitutional right is entrenched in limitation clauses.<sup>3</sup> Limitation clauses are central to the understanding of constitutional democracy

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1 See Frederick Schauer, *Free Speech: a Philosophical Enquiry* (Cambridge: Cambridge University Press, 1982) at 89, distinguishing between coverage (which determines the scope of the right) and protection (which determines the extent of its realization). Blurring of this differentiation would deal a severe blow to the status of rights. Thus, for example, the proper location of considerations of public interest is not in the determination of the scope of the right but, rather, in the determination of the possibility of realizing it.

2 On constitutional interpretation see Aharon Barak, *Purposive Interpretation in Law* (Princeton, NJ: Princeton University Press, 2005) at 370 [Barak, *Purposive Interpretation*].

3 On limitations clauses, see Armand L.C. de Mestral *et al.*, eds., *The Limitation of Human Rights in Comparative Constitutional Law* (Cowansville, QC: Yvon Blais, 1986); Alexandre Charles Kiss, 'Permissible Limitations on Rights' in Louis. Henkin, ed., *The International*

and of judicial review of the constitutionality of statutes.<sup>4</sup> They are an expression of the democratic values of society. Limitation clauses can be explicit or implicit, general or particular. In Canada, they are entrenched in art. 1 of the Canadian Charter of Rights and Freedoms, which determines that

[t]he Canadian Charter of Rights and Freedoms guarantees the Rights and Freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.<sup>5</sup>

A similar provision appears in Israel's Basic Law: Human Dignity and Freedom:

There shall be no violation of freedom of occupation except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required, or by regulation enacted by virtue of express authorisation in such law.<sup>6</sup>

The similarity between the two provisions is great. It is not coincidental: the Israeli legislature was familiar with the Canadian limitation clause and was influenced by it.

Both provisions – the Canadian and the Israeli – have been interpreted by the courts as including the principle of proportionality.<sup>7</sup> The content that has been derived from this principle is similar in both legal systems. The Supreme Court of Israel has been influenced on this matter by the Supreme Court of Canada. I assume – without knowing – that the Supreme Court of Canada was influenced by the case law of the Supreme Court of Germany, or by the European Court of Human Rights, which, in turn, was influenced by German law. Otherwise, it is difficult to explain the great similarity between the conditions of proportionality in the three legal systems.<sup>8</sup>

*Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981) 290.

4 See David Beatty, *The Ultimate Rule of Law* (Oxford: Oxford University Press, 2004).

5 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, art. 1.

6 *Basic Law: Freedom of Occupation*, 1454 Sefer Ha-Chukkim (10 March 1994) at 90, online: Knesset [http://www.knesset.gov.il/laws/special/eng/basic4\\_eng.htm](http://www.knesset.gov.il/laws/special/eng/basic4_eng.htm).

7 On proportionality, see Juergen Schwarze, *European Administrative Law* (London: Sweet & Maxwell, 1992) at 677; Mahendra Pal Singh, *German Administrative Law in Common Law Perspective* (Berlin: Springer-Verlag, 2001) at 160; Robert Thomas, *Legitimate Expectations and Proportionality in Administrative Law* (Oxford: Hart Publishing, 2000) at 77; Evelyn Ellis, ed., *The Principle of Proportionality in the Laws of Europe* (Oxford: Hart Publishing, 1999).

8 See Robert J. Sharpe & Kent Roach, *Brian Dickson: A Judge's Journey* (Toronto: University of Toronto Press, 2004) at 334.

II *The conditions of proportionality: Proper objects and proper means*

Proportionality examines the relationship between the object and the means for realizing it. Both the object and the means must be proper. The relationship between them is an integral part of the proportionality test. Despite the centrality of the object component, no statute in Israel has been annulled merely because of the lack of a proper object. A similar approach exists in German constitutional law.<sup>9</sup> In practice, the main importance of the object has been in examining the means for realizing it; the main role of the object has been as a mechanism for examining the constitutionality of the means. That is regrettable. The object component should be given an independent and central role in examining constitutionality, without linking it solely with the means for realizing it. Indeed, not every object is proper from the constitutional perspective. This is not an expression of a lack of confidence in the legislature; rather, it is an expression of the status of human rights. True, an object may advance the general social interest. In certain circumstances, however, the advancing of that general interest might not justify limitation of a human right.

Canadian law has determined that an object is proper if it is necessary for the realization of collective goals of fundamental importance. Therefore, the object must be 'pressing and substantial.'<sup>10</sup> Canadian case law does not differentiate, with respect to the object, between the different rights. Any limitation – of whatever scope – must, in any case, uphold the permanent, unchanging standard regarding the object. Israeli case law originally adopted the Canadian approach.<sup>11</sup> A general formula was determined that applies to all limitations upon all rights. According to this formula, an object is proper if it is intended to realize societal objectives that are in line with the values of the state in general and are sensitive to the place of human rights in the general social arrangement. With respect to the need for realization of the object, it was determined, after some hesitation, and with influence from American case law, that the need varies according to the nature of the right.<sup>12</sup> I discussed this in one case, stating that,

for the purposes of safeguarding human rights against limitations by law, not all rights are of equal status. The status of the right to human dignity is not the same as the status of a property right, and, within the framework of the

9 See Dieter Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) U.T.L.J. ??? [Grimm, 'Proportionality'].

10 See Peter Hogg, *Constitutional Law of Canada*, student ed. (Toronto: Carswell, 2005) at 823 [Hogg, *Constitutional Law*].

11 See *Bank Hamizrahi Hameuchad v. Migdal*, C.A. 6821/93, PD 49(4) 221 at 435 (1994).

12 *Horev v. Minister of Transportation*, H.C. 5016/96, PD 51(4) 1 at para. 49 (1997) [translation mine].

same right, the extent of protection from limitation may vary. Thus, for example, the extent of protection from limitation of the freedom of political expression is not the same as the extent of protection from limitation of the freedom of commercial expression . . . in the framework of a specific aspect of a right (such as political speech), a limitation upon the core of the right is not the same as a limitation upon its outer rim.<sup>13</sup>

In all the cases that have arisen to date, the examination has been of a severe limitation of a right whose importance among human rights is great (*e.g.*, human dignity). Thus, a standard of ‘substantial social object’ or ‘pressing social need’ has been employed. Standards for limitations of other rights have yet to be determined.

Determining the proper object of a statute is difficult. A statute usually has a number of objects, at different levels of abstraction.<sup>14</sup> How is the level of abstraction for the purposes of constitutional examination determined? Is the statute’s object determined according to the (subjective) intent of the legislators, or does it include an objective aspect?<sup>15</sup> These are all difficult questions that have yet to be examined in depth.

Alongside the need for a proper object lies the need for the proper means. All three legal systems considered here – German, Canadian, and Israeli – determine that the means are proportional only if they withstand three steps (subtests). Only the simultaneous satisfaction of these three steps makes the means chosen by the legislature proper. The first step is that a link of fit or rational connection is needed between the objective and the means. The means employed by the statute must be derived from the achievement of the objective that the statute seeks. The second step is that the means employed by the statute must impair the right as little as reasonably possible. This is the necessity, or least drastic means, element. The third subtest requires that there exist a proper proportion between the means and the objects. This is the proportionate effect element, also referred to as ‘proportionality *stricto sensu*.’ In employing those three steps, reasonable room for legislative manoeuvre (*i.e.*, margin of appreciation) is recognized by the courts of all three countries.

### III *First step: Rational connection*

Peter Hogg notes that ‘obviously the requirement of rational connection has very little work to do.’<sup>16</sup> This conclusion is correct for Israel as well.

13 Ibid. at para. 59 [translation mine].

14 See Barak, *Purposive Interpretation*, supra note 2 at 113.

15 In interpreting the provisions of a statute, I subscribe to the objective view of the object. I recognize shifting objectives. This does not necessarily mean that a similar approach should apply to the understanding of the object for the purposes of a limitation clause.

16 Hogg, *Constitutional Law*, supra note 10 at 833.

Not even one judgment can be found in which that step constituted the sole reason for the determination that the statute is disproportionate. This does not mean that the requirement is unnecessary; it only shows that the scope of this requirement has yet to be examined in depth. Indeed, this first step raises difficult and complex problems that have not yet been sufficiently examined. Thus, for example, this step is based upon the probability that the means that the statute employed will realize the object. What is the required level of probability? How is it determined? Is the same level of probability needed for every right? How can the existence of the necessary probability be proved?<sup>17</sup> How can the rationality of the link be determined when the social considerations at the foundation of the law are polycentric?<sup>18</sup>

#### IV *Second step: Least drastic means*

This step is of great importance in the case law of the Supreme Court of Israel. As in Germany<sup>19</sup> and Canada,<sup>20</sup> so too in Israel the constitutionality of a statute that limits human rights is determined, in many cases, by the demands of this step. However, this step has an internal limitation that prevents it from granting proper protection to human rights. This limitation is due to the fact that the least drastic means must be able to realize the object that the statute is intended to realize. A means that is the least drastic but that realizes another object, or realizes the statute's object less properly, is of no use. It is required that the least drastic means realize the object of the statute in the same way that the means chosen in the statute would. Of course, a marginal difference is not decisive. Thus the difficulty latent in this step is revealed. Only if it is possible to realize the objects of the statute by less drastic means does this step grant protection to human rights. If there are no such means, this step does not have the power to protect human rights, even if the limitation of them is severe. This step is thus strongly linked to the object of the statute. As we have seen, a statute may have many objects on different levels of abstraction. The more the Court lowers the level of abstraction, the more difficult it is to find less drastic means for the realization of the object.

17 Sujit Choudhry, 'So What Is the Real Legacy of Oakes? Two Decades of Proportionality Analysis under the Canadian Charter's Section 1' (2006) 35 Sup.Ct.L.Rev. (2d) 501.

18 See Lon L. Fuller, 'The Forms and Limits of Adjudication' (1978) 92 Harv.L.Rev. 353; Aharon Barak, *Judicial Discretion* (New Haven, CT: Yale University Press, 1989) at 183.

19 See Grimm, 'Proportionality,' supra note 9 at ???.

20 See Hogg, *Constitutional Law*, supra note 10 at 836.

V *Third step: Proportional effect*

This third step deals with the correlation between the realization of the statute's objectives and its effect on human rights. The requirement, in the words of Dickson C.J., is that there be

a proportionality between the *effects* of the measure which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of sufficient importance . . . Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.<sup>21</sup>

This test examines the proper correlation between the benefit stemming from attainment of the proper object and the extent of its effect upon the constitutional right. It focuses upon the results of the statute. It examines the proper ratio between the benefit stemming from attainment of the object and the deleterious effect upon the human right. Whereas the rational connection test and the least harmful measure test are essentially determined against the background of the proper objective, and are derived from the need to realize it, the test of proportionality (*stricto sensu*) examines whether the realization of this proper objective is commensurate with the deleterious effect upon the human right. It is a principle of balancing.<sup>22</sup> It requires placing colliding values and interests side by side and balancing them according to their weight. In one case I wrote that

[t]his subtest examines the benefit versus the damage. According to it, the governmental agency's decision must maintain a reasonable balancing between the needs of the collective and the harm to the individual. The objective of the test is to examine whether the severity of the harm to the individual, and the reasons justifying it, are reasonably proportional to each other. That assessment is made against the backdrop of the general normative structure of the legal system.<sup>23</sup>

In another case I added that

21 *R. v. Oakes*, [1986] 1 S.C.R. 103 at 139.

22 See Robert Werner Alexy, *A Theory of Constitutional Rights* (Oxford: Oxford University Press, 2002) [Alexy, *Constitutional Rights*].

23 *Beit Sourik Village Council v. Israel*, H.C. 2056/04 (2006) 2 *Judgments of the Israel Supreme Court: Fighting Terrorism with the Law* 7 at 47 [*Beit Sourik*], online: Israel Supreme Court [http://elyon1.court.gov.il/files\\_eng/04/560/020/a28/04020560.a28.htm](http://elyon1.court.gov.il/files_eng/04/560/020/a28/04020560.a28.htm).

a balance should be made between the extent of the limitation upon the right and the extent to which the public interest is advanced. With regard to the right, we must take into account the nature of the right, and the scope of the limitation upon it. The more basic the right that is being limited, and the more severe the limitation, the greater the weight is that will be required from the considerations justifying that limitation. With regard to the public interest, we must take into account the importance of the interest, and the degree of benefit arising from it by limiting the human rights. The more important the public interest, the greater the justification of a more serious limitation of human rights.<sup>24</sup>

The third step found its full expression in two judgments of the Supreme Court of Israel. Both deal with the correlation between human rights and security considerations. The first is the *Beit Sourik* case.<sup>25</sup> The State of Israel decided upon the erection of a separation fence. Most of it is located in the West Bank. Its purpose is to prevent infiltration for purposes of terrorist activity from the West Bank into Israel or into Israeli settlements in the West Bank. The object of the fence – so ruled the Supreme Court – is a security object, not a political one: it is intended to prevent suicide bombings.<sup>26</sup> In the *Beit Sourik* case we determined that this security object is a proper one. We further ruled that the construction of the separation fence in the area of the village of Beit Sourik was decided on in order to achieve a proper security objective. A rational connection was proven between the construction of the fence in that place and the achievement of the security objective. It was held that there was no other route that would harm human rights less but still achieve the proper objective in full. Notwithstanding this, it was decided that the route of the fence was unlawful. This was because the security objective achieved by the route of the fence, as determined by the military commander, was not commensurate with the serious infringement upon the human rights of the residents of Beit Sourik. We held in that case that ‘a proportionate correlation between the degree of harm to the local inhabitants and the security benefit arising from the construction of the separation fence according to the route determined by the military commander does not exist.’<sup>27</sup> We pointed out that we had been

24 *Adalah v. Minister of the Interior*, H.C. 7052/03 at s. 74 (2006) [*Adalah*] [translation mine].

25 *Supra* note 22.

26 Regarding the relationship between this case law and the judgment of the International Court of Justice in ‘Advisory Opinion, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory’ (2004) 43 I.L.M. 1009, see *Mara’abe v. Israel (Prime Minister)*, H.C. 7957/04 (2006) 2 *Judgments of the Israel Supreme Court: Fighting Terrorism with the Law* 65.

27 *Beit Sourik*, *supra* note 22 at 34 [translation mine].

shown alternative routes that would also provide security for Israel, albeit to a lesser degree than the route that the military commander chose, while impinge upon the human rights of the local inhabitants to a far lesser degree. In light of this, I wrote,

The real question before us is whether the security benefit obtained by accepting the position of the military commander ... is proportionate to the additional injury resulting from his position ... Our answer to this question is that the military commander's choice of the route for the separation fence is disproportionate. The difference between the security benefits according to the military commander's approach and the security benefits of the alternate route is very small in comparison to the large difference between a fence that separates the local inhabitants from their lands and a fence that does not create such a separation or that creates a separation which is small and can be tolerated.<sup>28</sup>

Indeed, in *Beit Sourik* a proper (security) object was the basis for the separation fence; there was a rational connection between it and the achievement of the security object; no alternative route was found that realized the security purpose in full. Nevertheless, the route was disqualified because its limitation of the rights of the local inhabitants was disproportionate. An alternative route, which allowed security to be achieved to a lesser degree than that required by the proper object but harmed the local inhabitants far less, was pointed out to us. We said that this correlation – which provided slightly less security and much more protection of human rights – was proportionate.

The second case is *Adalah*.<sup>29</sup> This case examined an amendment to the Citizenship Law dealing with cases of Israelis married to residents of the Gaza Strip or the West Bank. Until that amendment, the non-Israeli spouse's entrance into Israel was possible, subject to an individual security background check. Security officials found that twenty-six non-Israelis who had entered Israel under the framework of family unification with their Israeli spouses were involved in terrorist activity. Not subject to security checks on roads because of their lawful presence in Israel, they led terrorists with explosive charges into Israeli cities, where the terrorists detonated themselves and caused many deaths. The amendment provided that for a period of one year (extendable annually by decision of the Knesset) there would be no family unifications between Israelis and their spouses from the Gaza Strip or the West Bank. A petition was submitted to the Supreme Court claiming that this statute was unconstitutional. In our judgment, we recognized the right to family life in Israel as a constitutional right derived from the right of human dignity. We also decided that

28 Ibid. at para. 61 [translation mine].

29 Supra note 23.

safeguarding the security of residents from suicide-bombing terrorists is a proper objective. With respect to the limitation clause, the Court ruled (with dissent) that there is a rational connection between the flat ban and the security objective. The Court further ruled that there are no less drastic means to realize the security objective. Individual security checks, which are undoubtedly less drastic means, do not attain the security objective. Was the third step, dealing with proportional effect, satisfied? In my judgment, I answered that question in the negative:

The question is whether the flat ban is proportionate *stricto sensu*. Is the correlation between the benefit derived from achieving the proper objective of the law (to reduce as much as possible the risk from the foreign spouses in Israel) and the damage to the human rights caused by it (limitation of the human dignity of the Israeli spouse) a proportionate one? The criterion we must adopt is one of values. We must balance between conflicting values and interests, against the background of the values of the Israeli legal system. We should note that the question before us is not the security of Israeli residents or the protection of the dignity of the Israeli spouses. The question is not life or quality of life. The question before us is much more limited. It is this: is the additional security obtained by the policy change, from the most stringent individual check of the foreign spouse that is possible under the law to a flat ban of the spouse's entry into Israel, proportionate to the additional deleterious effects upon human dignity of the Israeli spouses caused as a result of this policy change? My answer is that the additional security that the flat ban achieves is not proportionate to the additional damage caused to the family life and equality of the Israeli spouses. Admittedly, the flat ban does provide additional security; but it is achieved at too great a price. Admittedly, the chance of increasing security by means of a flat ban is not 'slight and theoretical.' Notwithstanding, in comparison to the severe violation of human dignity, it is disproportionate.<sup>30</sup>

Further in the judgment, I added that

[e]xamination of the test of proportionality (*stricto sensu*) returns us to first principles that are the foundation of our constitutional democracy and the human rights that are enjoyed by Israelis. These principles are: that the end does not justify the means; that security is not above all else; that the proper objective of increasing security does not justify serious harm to the lives of many thousands of Israeli citizens. Our democracy is characterized by the fact that it imposes limits on the ability to limit human rights; that it is based on the recognition that surrounding the individual there is a wall protecting his rights, which cannot

30 Ibid. at ss. 91–92 [translation mine].

be breached even by the majority. This is how the court acted in many different cases. Thus, for example, adopting physical measures ('torture') would without doubt increase security. But we held that our democracy was not prepared to adopt them, even at the price of a certain blow to security. We must adopt this path also in the case before us. The additional security achieved by abandoning the individual check and changing over to a flat ban involves such a serious violation of the family life and equality of many thousands of Israeli citizens, that it is a disproportionate change. Democracy does not act in this way. Democracy does not impose a flat ban and thereby separate its citizens from their spouses, nor does it prevent them from having a family life; democracy does not impose a flat ban and thereby give its citizens the option of living in it without their spouse or leaving the state in order to live a proper family life. Democracy does not impose a flat ban and thereby separate parents from their children. Democracy does not impose a flat ban and thereby discriminate between its citizens with regard to the realization of their family life. Indeed, democracy concedes a certain amount of additional security in order to achieve an incomparably larger addition to family life and equality. This is how democracy acts in times of peace and calm. This is how democracy acts in times of war and terrorism. It is precisely in these difficult times that the power of democracy is revealed... Precisely in the difficult situations in which Israel finds itself today, Israeli democracy is put to the test.<sup>31</sup>

On the question of the third step, the opinions in the Supreme Court were split. Four other justices supported my position; five supported the opposite position. Justice Cheshin, who authored the main opinion opposing mine, wrote that 'the additional security – security of human life – which the flat ban grants us, in comparison to the individual security check which is limited, is worthy.'<sup>32</sup> Justice Cheshin put life itself on one pan of the scales. He wrote that

[w]e are concerned with life. Life and death. It is the right of the residents of the state to live. To live in security. This right of the individual to life and security is of great strength. It has the chief place in the kingdom of rights of the individual, and it is clear that its great weight is capable of decisively determining the balance between damage and benefit.<sup>33</sup>

Against this – on the other pan of the scales – he placed the right to family life. According to Justice Cheshin, the right to life tips the scales; the right to life prevails. In my judgment, I rejected that approach:

31 Ibid. at s. 93 [translation mine].

32 Ibid. at. 182 [translation mine].

33 Ibid. at s. 120 [translation mine].

Indeed, I accept that if we weigh life against quality of life – life will prevail. But is this the proper comparison? Had we posed the question in this way – life against quality of life – we would certainly have held that we are permitted, and perhaps even obliged, to torture a terrorist who constitutes a ‘ticking bomb’ in order to prevent harm to life; that we are permitted, and perhaps even obliged, to reassign the place of residence of an innocent family member of a terrorist in order to persuade him to refrain from terror and to prevent an injury to life; that the security fence should be placed where the military commander wished to place it, since thereby the lives of the citizens of the state are protected, and any harm to the local population, whatever its scope may be as long as it does not harm life itself, cannot be compared to the harm to the lives of the citizens of the state. But this is not how we decided with regard to torture, with regard to assigned residence, or with regard to the harm caused by the separation fence to the fabric of the lives of the local residents. . . . In those cases and in many others we always put human life at the top of our concerns. We were sensitive to terrorism and its consequences in our decisions. Indeed, human life is dear to us all; and our sensitivity to terrorist attacks is as strong as in the past. We made the decisions that we made because we do not weigh life against the quality of life. In weighing life against quality of life, life always takes precedence and the result is to refrain from any act that endangers human life. Society cannot operate in this way, either in times of peace (such as with regard to road accident victims) or in times of war (such as with regard to victims of enemy attacks). The proper way of posing the question is to pose it on the level of the risks and the likelihood that they will occur, and their effect on the life of society as a whole. The questions that should be asked in our case are questions of probability. The question is what the probability is that human life will be harmed if we continue the individual check as compared with the likelihood that human life will be harmed if we change over to a flat ban, and whether this additional likelihood is comparable to the certainty of the increase caused thereby to the limitation of the rights of spouses who are citizens of the state.<sup>34</sup>

I then added,

Democracy and human rights cannot be maintained without taking risks. Professor Sajo rightly said that ‘liberty is about higher risk-taking’ (A. Sajo (ed.), *Militant Democracy* (2004), at p. 217). Indeed, every democracy is required to balance the need to preserve and protect the life and safety of citizens against the need to preserve and protect human rights. This ‘balance’ simply means that in order to protect human

<sup>34</sup> Ibid. at s. 111 [translation mine].

rights we are required to take risks that may lead to innocent people being hurt. A society that wishes to protect its democratic values and that wishes to have a democratic system of government even in times of terrorism and war cannot prefer the right to life in every case where it conflicts with the preservation of human rights. A democratic society is required to carry out the complex work of balancing between the conflicting values. This balance, by its very nature, includes elements of risk and elements of probability. . . . Naturally, we must not take any unreasonable risks. Democracy should not commit suicide in order to protect the human rights of its citizens. Democracy should protect itself and fight for its existence and its values. But this protection and this war should be carried out in a manner that does not deprive us of our democratic nature.<sup>35</sup>

#### VI *Evaluation of the third step*

The third step, which deals with the proportional effect, is the very heart of proportionality. The first two steps, rational connection and the least drastic means, focus on means to realize the objective. To be sure, they examine the limitation of the right, but if there is a rational connection between the attainment of the objective and the limitation of the right, and if there is no other, less drastic means that can attain the objective, the limitation of the right fulfils the first two steps. The third step, however, is of a different character. It does not focus on means of attaining the objective; instead, it focuses on the deleterious effects upon human rights resulting from the attainment of the objective. It recognizes the fact that not all means with a rational connection to the objective that are the least drastic ones possible do, in fact, justify the realization of the objective. The ends do not justify all means. There is a moral limit which democracy cannot surpass.

Three arguments can be made against this approach regarding the proportional effect step. *First*, it can be argued that in those cases in which the third step is not satisfied, it should be said that the objective is not proper. The emphasis should be put on the quality of the objective, not the quality of the means. This is the position of Hogg, who writes, regarding this third substep,

It is really a restatement of the first step, the requirement that a limiting law pursue an objective that is sufficiently important to justify overriding a Charter right. If a law is sufficiently important to justify overriding a Charter right (first step), and if the law is rationally connected to the objective (second step), and if the law impairs the Charter right no

35 Ibid. at 85. See Grimm, 'Proportionality,' supra note 9 at ???.

more than is necessary to accomplish the objective (third step), how could its effects then be judged to be too severe? A judgment that the effects of the law were too severe would surely mean that the objective was *not* sufficiently important to justify limiting a Charter right. If the objective is sufficiently important, and the objective is pursued by the least drastic means, then it must follow that the effects of the law are an acceptable price to pay for the benefit of the law. I conclude, therefore, that an affirmative answer to the first step – sufficiently important objective – will always yield an affirmative answer to the fourth step – proportionate effect. If this is so, then the fourth step has no work to do, and can safely be ignored.<sup>36</sup>

I cannot accept this approach. In a defensive democracy, or in a militant democracy,<sup>37</sup> the objective chosen by the legislature might be proper. However, it might not suffice to ensure the constitutionality of the statute, not because of flaws in it but, rather, because of its severe effect upon human rights. The constitutional emphasis should not be on the objective only but also on the proper proportion between the objective and the means employed to realize it. Only such a comparison leads to the conclusion of unconstitutionality of the statute without making the objective improper. The objective is proper; the means are rational, and are no more drastic than necessary for achieving the objective. However, they are nevertheless unconstitutional, since the achievement of the objective *via* these means leads to a deleterious effect on human rights that is not to be justified in a defensive or militant democracy. This is well demonstrated in the two examples mentioned. In both of them, the legislature wished to secure the lives of those who live in the state. That is a proper objective. However, the resulting limitation on human rights is so severe that cannot to be justified in a free and democratic society.

The *second* argument is that the values-based understanding of the third step empties it of any objective standard, turning it into a mechanism for judicial subjectivity and judicial activism. I cannot accept this argument. The third step does include an objective standard, according to which the greater the limitation of human rights is, the more important the purpose must be in order to justify it.<sup>38</sup> There is nothing unique about this standard. It is used in every case in which principles are in conflict. It lies at the foundation of the reasonableness standard, which is merely a proper balancing between conflicting

36 Hogg, *Constitutional Law*, supra note 10 at 843.

37 On militant democracy, see András Sajó, ed., *Militant Democracy* (Amsterdam: Eleven International, 2004).

38 Alexy, *Constitutional Rights*, supra note 21 at 102.

principles. A judge employing the third step does not act in a void and is not completely free. Admittedly, however, this test does at times grant judicial discretion. It does not purport to provide a single solution in every single case. However, this is not a novel situation; it exists in all branches of law, and it exists in constitutional law too. It certainly exists if we accept Hogg's position that the emphasis is transferred from the effect on the right to the objective itself. Does that transfer create more objectiveness and, thus, less activism and judicial discretion? Of course, the tests within the third step need to undergo sophistication. Instead of *ad hoc* balancing, we should aspire to principled balancing. Tests of causation and severity regarding the blow to the public interest should be balanced against tests of the limitation of the various human rights at issue.

The *third* argument is that the values-based aspect of the third step inserts a factor of reasonableness into proportionality. According to that argument, proportionality loses its uniqueness and becomes a special case of reasonableness. This argument is partially correct. The third step is based on a test of values. If we see reasonableness, as I do, as a balancing standard between conflicting principles, then the third step does insert an aspect of reasonableness into proportionality. This is an advantage. It does not replace the other steps; they are of great importance, and they introduce clarity and order in rights limitation. But without the third step there is no proper protection for rights.

#### VII *Conclusion*

I have touched upon certain aspects of proportionality as a constitutional standard that protects human rights and makes limitations upon them possible. The general constitutional structure requires recognition of the relativity of human rights and of the legislature's ability to prevent their realization where limitations upon them are proportional. The constitutional dialectic is as follows: human rights and the limitations on them derive from the same source. They reflect the same values.<sup>39</sup> Human rights can be limited, but there are limits to the limitations.<sup>40</sup> The role of the judge in a democracy is to preserve both of these limitations. Judges must ensure the security and existence of the state as well as the realization of human rights; they must determine and protect the integrity of the proper balance. All this can be achieved by the proper use of the third step. This was my view on my role as a judge. I am sure it was Frank's view, too.

39 *Oakes*, supra note 20.

40 See Aharon Barak, *The Judge in a Democracy* (Princeton, NJ: Princeton University Press, 2006) at 82.