**A Service Conception of the Constitution:**

**The concept of (the rule of) law in South Africa’s limitations jurisprudence**

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# I Introduction

South Africa’s 1996 Constitution, like others in the family of post-war, dignity-protecting constitutions, entrenches a handful of liberal democratic rights that can only be limited by the state if it is reasonable and justifiable to do so.[[1]](#footnote-1) In a seminal decision under South Africa’s 1993 interim Constitution, the Constitutional Court understood the inquiry into the reasonableness and justifiability of a rights limitation to require ‘the weighing up of competing values, and ultimately an assessment based on proportionality.’[[2]](#footnote-2) A few years later, the Court described this analysis as ‘a balancing exercise’ that must ‘arrive at a global judgment on proportionality,’ and which demands that ‘the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be’.[[3]](#footnote-3)

The principle of proportionality has become the analytical fulcrum of limitations jurisprudence in South Africa, as it has in other jurisdictions with similar constitutional limitations clauses.[[4]](#footnote-4) In this paper I want to explore two paths along which the pursuit of proportionality has proceeded in South Africa’s constitutional jurisprudence since the 1990s. In parts II and III of the paper I look at two recent cases emblematic of these two paths of jurisprudence – *Lawyers for Human Rights v Minister of Home Affairs*[[5]](#footnote-5)and *Chevron v Wilson*[[6]](#footnote-6) – highlighting how the Constitutional Court’s reasoning has run along both. I Then suggest in part IV that these two ways of doing proportionality analysis correspond to two quite different conceptions of law in general, and of the rule of law in particular. Which of these two paths of proportionality analysis dominates South Africa’s jurisprudence going forward, will reflect the conception of law that underpins the South African legal order.

The first path of analysis understands the principle of proportionality, ‘in its strict sense’, to mean that the Constitution accommodates only those rights limitations that achieve goals valuable enough to justify curtailing the protections that constitutional rights provide. In the language of balancing, when the benefits achieved by a course of action that limits rights are proportional to or are greater than the harm caused by that action, then the limitation is a justifiable one.[[7]](#footnote-7) An analysis of proportionality in its strict sense demands moral reasoning on the part of judges, in weighing up whether the value of some purported goal outweighs the harm of limiting a right, or indeed, the value of a right remaining uninfringed.

This moralistic value balancing is the target of strong academic criticism, however. One objection is that the value of rights and the value of the competing goals the state might wish to pursue cannot be measured or compared against each other in a comprehensible way.[[8]](#footnote-8) Because these two goods or values are inherently incommensurable, it is meaningless to inquire whether the benefits a rights limitation brings justify the harm it produces.[[9]](#footnote-9) Any application of the principle of proportionality in its strict sense, the critics warn, can be nothing more than an ad hoc, subjective and impressionistic assessment based on each judge’s own moral preferences.[[10]](#footnote-10) We should be wary of such reasoning, the critics continue, because it is inconsistent with rule-of-law demands for the predictable, stable, clear, and consistent operation of legal rules.[[11]](#footnote-11) When judges rely on moral intuition and subjective moral preferences to settle legal disputes and tell us what the law and the constitution require, the law becomes unpredictable, inconsistent, vague, and impossible to set out as rules or standards that guide social conduct.[[12]](#footnote-12)

The second pathway of proportionality analysis may avoid this criticism. The rubric by which the Constitutional Court assesses the global proportionality of rights limitations is not confined to strict proportionality balancing, but includes three more targeted inquiries into whether the limitation pursues an important objective, whether there is a rational connection between that objective and the means the rights-impugning measure adopts, and whether there are means to achieve that objective which restrict rights less.[[13]](#footnote-13) Assessing proportionality through these more mechanical and evidentiary questions allows judges to skirt the moral minefield of proportionality in the strict sense, since they need bring no moral reasoning to bear in deciding whether there are, in fact, less restrictive ways to achieve the same goals or whether the law or conduct in question is not likely, in fact, to achieve those goals.

I have argued elsewhere that it is very difficult to avoid moral reasoning in limitations analysis, and that even those courts that attempt to avoid overt moral reasoning by walking only the second pathway of proportionality analysis inevitably rely on some degree of moral reasoning.[[14]](#footnote-14) But I do not wish to rehearse those arguments here. Rather, I want to consider the normative implications of these two pathways of proportionality analysis.

On one hand, in relying on the mechanical and algorithmic reasoning that inquiries into rationality and the availability of less restrictive means promise, judges necessarily adopt what I call, adapting Joseph Raz’s language, a service conception of the constitution.[[15]](#footnote-15) Raz’s normal justification for the authority of law is that in following clear rules, people’s actions map more closely onto the law’s underlying normative commitments than if people attempted to work out for themselves which actions best uphold a society’s most basic normative commitments. The legal system provides a service by absolving law’s subjects of having to do any moral reasoning themselves to decide how they should act. And as a by-product, the legal system upholds the rule-of-law requirements of certainty and predictability because there is no longer a need for subjective moral reasoning about how people should behave and in turn what the law should say.

In a similar way, reducing judges’ decisions about the acceptability of rights limitations to the application of morally neutral, value-free, algorithmic and mechanical rules, eliminates moral reasoning about what the constitution says. On this Razian view, adhering to algorithmic decision rules will produce judicial decisions about rights that map better onto the constitution’s underlying normative commitments than if judges tried to work out for themselves what those underlying commitments require. The service conception of the constitution absolves judges from moral reasoning about what the constitution requires, just as Raz’s service conception of authority absolves ordinary legal subjects from moral reasoning about how they should behave.

On the other hand, a Fullerian conception of the rule of law that demands that the operation of law be justified to its subjects, as morally autonomous agents, demands precisely the kind of moral reasoning that strict proportionality balancing involves. In order for the law to work as a technology of ordering social conduct, it must accept that we, its subjects, are capable of understanding what the law means and conforming our behaviour to it. Law has to see us as morally autonomous, rational and free-thinking agents in order for it to work at all, and reciprocally, the operation of legal rules must be justified to us as moral agents.[[16]](#footnote-16)

On this conception of law, judges are required to explain, or at least attempt to make an argument that explains why it’s worth limiting rights in the first place. It isn’t clear that the algorithmic reasoning involved in the inquiries into rationality and less restrictive alternatives meet this demand for justification. And if the rule of law is about making sure that it is the law that governs us, and not the whims of princes or bureaucrats, then the law must not only be clear and stable but also clearly justifiable to free-thinking people who themselves have moral values and the capacity for moral reasoning. The question about which path of proportionality is suitable for South Africa depends on whether we are committed to a conception of law that avoids or demands the moral justification of the law.

# II *Lawyers for Human Rights* andstrict proportionality balancing

The proportionality inquiry that section 36 instructs courts to conduct, when assessing whether the limitation of a rights is reasonable and justifiable in an open and democratic society based on dignity, equality and freedom, must inquire into five distinct questions (section 36(1)(a)-(e)). These are the nature of the right (section 36(1)(a)), the importance of the purpose of the limitation (section 36(1)(b)), the nature and extent of the limitation (section 36(1)(c)), the relation between the limitation and its purpose (section 36(1)(d)), and less restrictive means to achieve the purpose (section 36(1)(e)).

The inquiries in this analysis largely correspond to what has become a standard judicial approach to limitations analysis in jurisdictions with similar constitutional limitations clauses. In Canada[[17]](#footnote-17) and Germany,[[18]](#footnote-18) for example, the high courts have set out a proportionality analysis that requires courts and lawmakers to consider whether a rights-limiting measure pursues a worthy or legitimate purpose, whether the limitation is rationally connected to that purpose, whether there are less restrictive means to achieve that purpose, and whether the extent of the rights limitation is proportional to the purpose.[[19]](#footnote-19)

The text of section 36 of the South African Constitution reflects all four elements of this model of proportionality analysis. The Court frequently recites the incantation that section 36 requires a global or holistic assessment of proportionality driven by the values at the heart of the Constitution, and that more serious infringements of rights must be justified by more compelling reasons. Consider, for example, Justice Sachs, writing in a separate concurring judgment:

The notion of an open and democratic society is thus not merely aspirational or decorative,it is normative, furnishing the matrix of ideals within which we work, the source from which we derive the principles and rules we apply, and the final measure we use for testing the legitimacy of impugned norms and conduct. If I may be forgiven the excursion, it seems to me that it also follows from the principles laid down in *Makwanyane* that we should not engage in purely formal or academic analyses, nor simply restrict ourselves to ad hoc technicism, but rather focus on what has been called the synergetic relation between the values underlying the guarantees of fundamental rights and the circumstances of the particular case.[[20]](#footnote-20)

Perhaps more forcefully, a unanimous Court had this to say in *Manamela* in 2000:

It should be noted that the five factors expressly itemised in s 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. As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected.[[21]](#footnote-21)

These incantations suggest that the Court is committed to a path of morally rich reasoning in proportionality analysis, and that the mechanical or technicist inquiries of the first three legs of the proportionality inquiry should merely support the primary inquiry into whether a rights limitation can be persuasively justified in light of the most basic values the Constitution aims to protect. On the face of these statements and the Court’s frequent reference to or recitation of them, it would seem that proportionality in the strict sense is the touchstone of South Africa’s limitations jurisprudence.

At most, though, proportionality in the strict sense is determinative in only some of the Court’s decisions. Niels Petersen takes the view that proportionality in the strict sense plays almost no role in the Constitutional Court’s record of limitations decisions, finding only four cases in a sample of 44 to rely on a finding that the limitation was strictly disproportional to strike it down.[[22]](#footnote-22) My view is that proportionality in the strict sense plays a role in somewhat more than just four of the Constitutional Court’s rights cases, but the difference between my reading of the cases and Petersen’s is not the point here. Rather, the point is that there is a handful of cases, however large that handful actually is, in which the Court’s determination that a rights limitation is unjustifiable depends on proportionality in the strict sense rather than on the mechanical and algorithmic inquiries into rational connection and less restrictive means.

## The morality of strict proportionality

*Lawyers for Human Rights v Minister of Home Affairs* does not present a particularly challenging set of facts or abound with ground-breaking or impressive judicial reasoning. It is in fact a quite straightforward case, involving a challenge to the constitutionality of sections of the Immigration Act 13 of 2002 on the grounds that they unjustifiably infringed the constitutional protections against detention without trial and arbitrary deprivation of freedom contained in section 12(1)(a) and (b) of the Constitution.[[23]](#footnote-23) The Constitutional Court agreed with the Pretoria High Court that the impugned sections did indeed limit section 12 rights, and that these limitations were not reasonable and justifiable.

The Immigration Act aims to regulate the admission to and departure of foreigners from South Africa. The preamble to the Act sets out the detection, reduction and deterrence of illegal immigration as one of the objectives of the Act. While the preamble also acknowledges that the contributions of migrants to South Africa are valuable and that it is important to promote human rights and minimise xenophobia, much of the scheme of the Act is geared towards finding and deporting illegal migrants. The Act signals its intentions early on: section 2(1)(c) provides that one of the primary objectives of the Department of Home Affairs is ‘detecting and deporting illegal foreigners’; section 1 defines an ‘illegal foreigner’ as a person who is neither a citizen nor a permanent resident and is in contravention of the Act or is a ‘prohibited person’; and section 29 in turn identifies prohibited persons to include those sick with infectious diseases, people with criminal convictions, or previously deported people.[[24]](#footnote-24)

To achieve this objective, the Act includes provisions that grant wide-ranging powers to authorities to detain migrants for the purposes of ultimately deporting them. Section 34 of the Act, the provision at the heart of the case, empowers immigration officers to arrest ‘illegal foreigners’ without a warrant and detain them ‘at a place determined by the Director-General’ of the Department of Home Affairs until they are deported. Section 34(1)(d) provided that such persons may not be detained for longer than 30 days without a warrant of court, and for up to 90 days thereafter with a warrant of court. As the Constitutional Court put it, the section ‘grants drastic power to an administrative official’.

The applicants’ primary complaint against the provision was that this drastic administrative power was conferred on officials without any guidelines or indications as to how it should be exercised, nor with any opportunity for judicial scrutiny prior to 30 days. Even at the point where the Department of Home Affairs seeks judicial warrant for detention beyond 30 days, section 34(1)(d) did not require that the court hear the detainee in person. The Court held that the drastic and unchecked powers conferred by section 34(1) of the Immigration Act limited the prohibition on detention without trial (section 12(1)(b) read with section 37(6) of the Constitution), the protection against arbitrary deprivation of freedom (section 12(1)(a)), and the right to challenge the lawfulness of one’s detention in person (section 35(2)(d)).[[25]](#footnote-25) Quoting from its 1998 discussion of the prohibition on detention without trial in *De Lange v Smuts*, the Court noted:

History nevertheless emphasises how important the right not to be detained without trial is and how important proper judicial control is in order to prevent the abuses which must almost inevitably flow from such judicially uncontrolled detention.[[26]](#footnote-26)

Having decided that the impugned provisions limited constitutional rights, the Court spent a few short paragraphs determining that the limitations were not reasonable or justifiable and could not therefore be saved by section 36 of the Constitution. The state sought to justify the rights limitations on the basis that it would prove costly and judicially onerous to have to bring every detained illegal migrant before court. The objective served by limiting illegal migrants’ fair trial and freedom rights, the state argued in other words, was saving the costs that would be incurred in respecting those rights.[[27]](#footnote-27)

In responding to this argument, the Court did not bother to go through the usual section 36 inquiries into whether saving costs is an important or legitimate objective by itself,[[28]](#footnote-28) if the rights-limiting measure was rationally connected to that objective or whether there were less restrictive means available to achieve it. Rather, the Court satisfied itself with what seems to be an uncomplicated conclusion that the harm caused by limiting rights to fair trial and personal freedom outweighs or is disproportionate to any benefits attendant on saving the costs of judicial oversight of immigration detention. Finding the state’s arguments ‘woefully short of justifying the limitations’, the Court held:

A limitation of rights like physical freedom cannot be justified on the basis of general facts and estimates to the effect that there will be an increase in costs. The mere increase in costs alone cannot be justification for denying detainees the right to challenge the lawfulness of their detention.[[29]](#footnote-29)

This is an example of strict proportionality balancing. The Court’s reasoning is driven by the weighing up of the value of cost-saving and the value of upholding rights to personal freedom and fair trail, and its conclusion is that the latter value is greater than the former. In the Court’s assessment it is more important, morally speaking, for the law to prohibit the limitation of the rights to fair trial and personal freedom than it is for the legal system to save the costs of additional court hearings.

The Court’s reliance in this case on proportionality in the strict sense to determine that the limitation of a constitutional right is not justifiable is not unique. There are numerous examples of cases where proportionality in the strict sense plays a role in the Court’s conclusion that, as matter of global proportionality, a rights limitation is not justifiable. In a handful of cases, proportionality in the strict sense does all of the logical work, with no reference to the inquiries into rational connection or less restrictive alternatives.

In *In re: S v Walters,* for example, the Court concluded – uncontroversially, I would suggest – that the harm consequent on shooting dead a person suspected of having committed a crime as petty as pickpocketing is manifestly disproportionate to the value of apprehending people suspected of having committed crimes.[[30]](#footnote-30) In *S v Niemand* the Court considered statutory requirements that persons who are declared to be ‘habitual criminals’, for the commission of crimes ‘which do not constitute violence or a danger to society’, serve at least 7 years of a prison sentence before being considered for parole. The Court held that the provisions limited the right not to be arbitrarily deprived of freedom, and further that the limitation was ‘grossly disproportionate’ to the value to society of having people guilty of non-violent crimes automatically incarcerated for so long.[[31]](#footnote-31)

More recently, the Court was asked to decide whether the law should continue to recognise a delictual action lying to a non-adulterous spouse against a third person with whom an adulterous spouse has engaged in an affair. The crisp question was whether protecting the dignity of the non-adulterous spouse and preserving the institution of marriage justified the intrusions into the third person’s privacy rights. Although not a traditional section 36 limitations inquiry, the Court nevertheless relied on morally rich balancing to decide that the action is inconsistent with constitutional rights:

This potential infringement of dignity must be weighed against the infringement of the fundamental rights of the adulterous spouse and the third party to privacy, freedom of association and freedom and security of the person. These rights demand protection from state intervention in the intimate choices of, and relationships between, people. … I am led to the conclusion that the act of adultery by a third party lacks wrongfulness for purposes of a delictual claim of *contumelia* and loss of consortium; it is not reasonable to attach delictual liability to it.[[32]](#footnote-32)

Cases like these are somewhat rare in the Court’s record, in that they rely only on proportionality in the strict sense. In many other cases, the Court’s conclusion that a rights limitation is disproportionate in the strict sense buttresses or follows from its conclusion that the limitation is not rationally connected to its objective or fails to adopt the least restrictive means to achieve the objective.

One recent case illustrates the interplay between proportionality in the strict sense and the inquiry into less restrictive alternatives. In *Gaertner*, the Court found provisions in the Customs and Excise Act 91 of 1964, allowing customs inspectors to enter a wide range of premises with no warrant, to be unjustifiable limitations of the right to privacy.[[33]](#footnote-33) Key to the Court’s reasoning was a conclusion that the requirement of a warrant for entry into certain premises where the expectation of privacy is at its highest, such as a person’s home, is a less restrictive means to achieve the Act’s objectives of effectively collecting customs and duties.[[34]](#footnote-34)

This finding does not stand on its own, however. The Court accepts that a warrantless search of a person’s home is a more serious or more extensive infringement of the right to privacy than a warrantless search of a person’s place of business or warehouse.[[35]](#footnote-35) Some searches, the Court remarked, ‘are generally more invasive and involve a greater limitation of the right to privacy’.[[36]](#footnote-36) And these more invasive searches that impose more extensive limitations on the right to privacy in turn require more compelling justifications. At the core of the Court’s logic here is the view that while the Act’s objectives are important enough to justify the less extensive privacy violations involved in warrantless searches of business premises, they are not important enough to justify warrantless searches of a person’s home.

The fact that there is a less restrictive means to achieve the Act’s objectives where peoples’ homes are involved – i.e. a search on warrant – is not the reason for the Court’s conclusion that the limitation was unjustifiable. The unjustifiability of warrantless home searches stands on its own, regardless of whether there are less restrictive alternatives or not. The less restrictive search on warrant of a person’s home is thus a solution to the underlying problem, that the warrantless search of a person’s home imposes harms that are disproportionate to the benefits of ensuring the effective collection of customs and duties. The Court’s conclusion that there are less restrictive means to achieve the Act’s objectives works in concert with its moral reasoning about the importance of the Act’s objectives and the value of the right to privacy.

Furthermore, the Court’s finding that there are less restrictive alternatives itself involves the implicit moral conclusion that the harm flowing from a less restrictive, judicially constrained search of a person’s home is proportional to, or outweighed by, the value of achieving the Act’s objectives. Proportionality in the strict sense is doing much of the argumentative work here, even though the Court goes through the checklist of section 36’s algorithmic and mechanical inquiries.

## The rule-of-law objection to moral reasoning

The cases I identify in the previous section are emblematic of a kind of moral reasoning in the Court’s limitations jurisprudence. In these hard cases, the decision whether to uphold rights or allow their limitation depends on the persuasiveness of the arguments that one course of action produces better results. The assessment of which option is better is guided by the values on which the constitutional order depends, and which section 36(1) explicitly articulates. In balancing rights and their limitations, section 36(1) instructs judges to consider which option more faithfully advances the Constitution’s commitment to openness, democracy, equality, freedom and dignity.[[37]](#footnote-37)

But this form of reasoning faces the criticism that it undermines the certainty of law, and in turn the efficacy of law as a tool for ordering the conduct of law’s subjects. The premise of this criticism is that if the law is to guide social conduct and provide a framework of rules within which people can act, then those rules need to have certain characteristics. Lon Fuller offers one laundry list of these characteristics, which he famously called the principles of legality: laws must be clear, public, applicable to everyone generally, consistent with one another, non-retroactive, stable over time, and they cannot command the impossible. In addition, public officials’ conduct must be congruent with the rules.[[38]](#footnote-38)

One of the most basic commitments of the rule of law is that authority over people be exercised only through law, and in accordance with law’s previously promulgated rules. It is the law that should instruct people how to behave, rather than princes, dukes, or a highwayman with a gun. And when public officials instruct members of society what and what not to do, those instructions must themselves remain within the limits of the law. Now, whenever the administration of a legal system, by officials or by judges, prevents the law from displaying any of Fuller’s principles of legality, it compromises this most basic commitment of the rule of law. Laws that are not clear or public, for example, make it difficult for people to know how they are supposed to behave, and makes official enforcement of those laws against them arbitrary and unpredictable. Even if laws meet the first seven of Fuller’s principles of legality, the rule of law will be replaced by the rule of officials if the officials’ conduct is incongruent with the laws.

How does the rule of law cash out in the courtroom? Just about every legal dispute between private parties involves a disagreement about what the law allows or requires. In the hard cases where the law has no answer as to how to resolve a dispute, judges must exercise a degree of discretion to create a new rule.[[39]](#footnote-39) There is an area of indeterminacy at the penumbra of law’s settled core,[[40]](#footnote-40) but judging in this marginal penumbra can remain consistent with the rule of law if in settling disputes judges make new rules that will apply generally and clearly to similar disputes in the future.[[41]](#footnote-41)

Judicial decisions that rely on proportionality in the strict sense, however, appear to some to evade formulation as general rules applicable to future cases. There is no clear, public, or even comprehensible standard or metric by which judges determine the moral weight of rights and the competing objectives that rights limitations serve. On the contrary, the concern about strict proportionality analysis is that the weight that judges attach to these competing interests is a product of nothing other than the subjective moral intuitions of each judge.[[42]](#footnote-42) The balancing inquiry, as the Canadian constitutional scholar David Beatty puts it, is a ‘freewheeling’ and ‘unprincipled’ moral frolic.[[43]](#footnote-43) And because the analysis is so subjective and unprincipled, it neither relies on nor generates clear, stable, predictable, or publicly knowable rules of conduct. It is for this reason, incompatible with a commitment to the rule of law.

# III *Chevron v Wilson*: the path of least restrictive means

Not unlike *Lawyers for Human Rights*, the Court’s reasoning in *Chevron v Wilson* is not likely to make it into a handbook of constitutional law. This isn’t because it’s faulty or suspect, but rather that the judgment doesn’t add much to the existing jurisprudence. The view I take of the case is that it is the most recent in a string of judgments in which the Court rests its conclusion that a limitation is unjustifiable entirely on the factual finding that there are means less restrictive than those chosen by the government to achieve the same objectives.

The case involved an arrangement between the operator of a transport company (Wilson) and the supplier of petroleum products to Caltex petrol stations (Chevron) in terms of which the transport company filled its vehicles with petrol at Caltex stations on credit and paid in bulk at the end of each month. At some point a dispute arose as to the accuracy of Chevron’s billing, and after Wilson refused to pay the amounts that Chevron claimed was owing to it, Chevron brought suit in the magistrate’s court. During proceedings it became clear that Chevron was not a registered credit provider in terms of section 40 of the National Credit Act 34 of 2005. The Act provided that credit arrangements made by unregistered credit providers are unlawful from the moment they were concluded, and that any amounts paid to the credit provider under the terms of the agreement must be paid back to the consumer (section 89(5)(a) and (b)). Applying these provisions to the dispute before it, the magistrate’s court found itself obliged to order Chevron to pay back to Wilson all money it had already paid to Chevron – some R33 million.

Chevron approached the Cape Town High Court and in turn the Constitutional Court for an order declaring that section 89(5) of the National Credit Act amounts to an unjustifiable limitation of the Constitution’s section 25(1) right not to be arbitrarily deprived of property. Both courts agreed that requiring the refund of monies already paid by a credit consumer by an unregistered credit provider amounts to a deprivation of property, and further that in leaving courts no discretion to make an order that is just and equitable in the circumstances, the deprivation was arbitrary.[[44]](#footnote-44)

Turning to whether the limitation of the right could be justified, the Constitutional Court began with a statement that genuflects at the altar of proportionality in the strict sense: ‘To determine whether there is sufficient reason for a deprivation’ the Court said, ‘it is necessary to evaluate the relationship between the purpose of the law and the deprivation caused by that law.’[[45]](#footnote-45) It seems that the question the Court is asking here is whether the reasons for which a right is limited – that is, the purposes sought to be achieved by a law that limits rights – are sufficient or good enough to justify the extent of this particular rights limitation.

In the very next paragraph, however, after noting that the purpose of section 89(5) of the National Credit Act is to protect consumers from predatory lenders, the Court then falls back on the inquiry into whether there are less restrictive means to achieve that purpose.[[46]](#footnote-46) And on the recognition that giving the discretion to courts to make an order that is just and equitable in the circumstances is less restrictive than section 89(5)(b)’s peremptory injunction to order the full refund of all monies paid to an unregistered credit provider, the Court concluded that the limitation of unregistered credit providers’ property rights was not justifiable.

The judgment in *Chevron v Wilson* does not engage in any reasoning about or balancing of the moral value of protecting consumers from predatory lenders on one hand, and the moral value of preserving property from arbitrary deprivation on the other. I think there is an argument to be made that there is necessarily some moral reasoning at work in assessing whether the less restrictive alternative – in this case a judicial discretion whether to order refund or not – is itself a justifiable limitation of property rights. But the point for present purposes is that whether or not the less restrictive alternative imposed a justifiable limitation, the Court held that section 89(5)(b) imposed an unjustifiable limitation entirely because, factually, there was a less restrictive alternative available.

Unlike *Lawyers for Human Rights* where the inquiry into strict proportionality did all the work in finding the limitation unjustifiable, or *Gaertner* where the inquiry into less restrictive means was tied up with an inquiry into proportionality in the strict sense, the Court here does not even reach the stage of strict proportionality balancing. There are numerous examples in the Court’s record where this is the case. I mention only one by way of example – the earliest I could find, illustrating just how far back this second path of proportionality analysis goes. In 1995, the Court considered in *S v Ntuli* whether statutory restrictions on self-represented appeals against criminal convictions by persons already serving prison sentences for those convictions unjustifiably limited rights to fair trial and equality before the law.[[47]](#footnote-47) Section 305 of the Criminal Procedure Act 51 of 1977 provided that self-represented appeals could proceed only if a high court judge certified that there were reasonable grounds for appeal.[[48]](#footnote-48)

Having found that the provisions did indeed limit fair trial and equality rights, the Court then considered if the limitations were justifiable. Identifying the purpose of the provision as avoiding the crowding of courts rolls with frivolous appeals at the expense of meritorious ones, the Court concluded that the requirement for a judge’s certificate is more restrictive than it needs to be because it presumes, without evidence, that only the frivolous appeals will get stopped. The possibility that meritorious appeals will get stopped or discouraged by the need for a judge’s certificate was enough for the Court to conclude that ‘the means used to achieve the end therefore go beyond it’.[[49]](#footnote-49) The Court also noted that a variety of alternative mechanisms existed for controlling frivolous appeals.[[50]](#footnote-50)

At no point, however, did the Court did not consider whether the objective of reducing the number of frivolous applications for appeal was proportional, in the strict sense, to the limitation on rights that the requirement for a judge’s certificate imposed. That is, the Court did not ask whether the extent of the limitation on the right to appeal imposed by the requirement of a judge’s certificate was justified by the benefits of a less crowded court roll.

## De-moralising proportionality analysis

One way of looking at cases like *Ntuli* and *Chevron v Wilson* is that, sometimes, a court need not reach in inquiry into proportionality in the strict sense to find that the limitation is unjustifiable. If a rights-limiting measure is unlikely even to achieve its purpose, then surely there can be no justification at all for the limitation. Similarly, if the same objectives that a rights-limiting measure aims at can be achieved in a manner that is less restrictive of rights, then surely the less restrictive approach is preferable and the more extensive limitation is not justified.

Aharon Barak argues that this is a dangerous approach to take because it commits us to a conclusion contrary to *In re Walters.* If shooting dead a fleeing criminal is indeed the only, and thus least restrictive way to apprehend a criminal, then the reliance on the less restrictive means test alone compels us to accept it as a justifiable rights limitation.[[51]](#footnote-51) There is something morally icky about the conclusion that such a serious limitation of rights – to life, dignity and due process, for example – is justified by the need to apprehend criminals. The mechanical and value-free inquiry into less restrictive alternatives does not allow us to respond to or explore this moral ickiness at all, whatever the outcome of that exploration might turn out to be. The Constitutional Court has itself indicated that it is not bound the outcomes of the less restrictive means test, by finding in at least one case that a rights-limiting measure was proportional in the strict sense and thus justifiable even though less restrictive alternatives were available.[[52]](#footnote-52)

But whatever its drawbacks, ending the limitations analysis before the inquiry into strict proportionality has the advantage that it may avoid the rule-of-law objection levelled against strict proportionality balancing. The hypothesis is that if hard cases about rights limitations can be solved without the impressionistic, subjective, ad hoc and unprincipled moral reasoning that strict proportionality balancing requires judges to engage in, and according to rules that are more transparent and comprehensible, then the commitment to the rule of law and the principles of legality will be better upheld.[[53]](#footnote-53)

The core of the rule-of-law objection to proportionality in the strict sense is that its reasoning suffers from the same lack of transparency that Jeremy Bentham believed ran through the common law as a whole. The moral intuitions of judges are not accessible to or comprehensible to the subjects of legal decisions – and in many cases not necessarily reflective of or shared by the members of a society subject to the court’s decisions. Allowing judges to make decisions on the basis of these inaccessible intuitions makes law the preserve of a moral elite, because the logic on which those decisions runs has no persuasive force to those who don’t share the same moral intuitions. Judicial decisions can be more easily justified to those they affect, the argument goes, if their logic runs on evidence, facts, and empirical conclusions that are objectively verifiable.[[54]](#footnote-54)

The outcome of this more accessible judicial reasoning, from a rule of law perspective, is that the operation of the law is rendered more predictable. As legal officials, judges have less discretion in applying the law to people. And whatever discretion judges do have to make new law in the hard cases at the penumbra of the legal system is constrained and directed by rules that are transparent and accessible to everyone. The decisions of judges whose conduct is more constrained are thus more predictable, less open to the influence of whatever moral commitments or predilections each judge happens to have. The rule-of-law value of predictability is thus better served by the kind of decisionkaking in *Chevron v Wilson* than in *Lawyers for Human Rights*.

# IV The service conception of the Constitution

Whether decisions driven by moral reasoning or factualistic inquiries into less restrictive alternative are actually more predictable is an empirical matter on which I have no data. But empirical data on decisional predictability is not my concern here. Rather, what I want to consider is how each of these pathways of proportionality analysis runs alongside a particular conception of law, and what a preference for one path over the other might tell us about the conception of law in a legal community.

Each of these paths emphasizes a certain quality in the law at the expense of another. Reliance on the less restrictive means analysis favours predictability and algorithmic, rule-based reasoning, eliminating value judgments from limitations analysis. The value-neutral formalism of this approach allows it to sidestep the incommensurability objection, because judges need never compare or weigh up the good that a rights limitation produces against the harm it causes. The price of this approach, however, is precisely that courts are deprived of the opportunity to affirm the normative value of rights or rights limitations.

Strict proportionality balancing, for its part, asks judges to consider whether upholding a right and striking down a limitation or allowing the limitation of a right better advances fundamental constitutional values of openness, democracy, dignity, equality and freedom. But without a set of clear rules that lend formulaic predictability to this inquiry, balancing as reasoning offends the rule-of-law requirement of predictability.

How a legal community chooses between these two options is not just about whether it prefers legal reasoning oriented toward maximum predictability or legal reasoning that foregrounds the consideration of basic constitutional values in every case. Each approach is connected to an underlying conception of the nature of law, and the preference for one approach over the other is indicative of the conception of law that drives legal reasoning in a community.

## The Razian lens: a service conception of the constitution

Consider again how less restrictive means analysis meets the rule of law objection by replacing substantive moral reasoning about rights with the application of a formulaic and mechanical calculus. In doing so, less restrictive means analysis fits the mold of what Joseph Raz calls the ‘service conception of authority’. Raz sees the service function of the law as providing authoritative rules for conduct. We defer to legal authorities for guidance on how we should behave – courts in cases of disputes, legislatures in the case of our everyday behaviour – in order to avoid having to engage for ourselves in complicated moral reasoning about how we ought to act. ‘The whole point and purpose of authorities’, Raz says, ‘is to preempt individual judgment on the merits, and this will not be achieved if in order to establish whether the authoritative determination is binding individuals have to rely on their own judgment of the merits.’[[55]](#footnote-55)

The service conception of authority is a combination of two important elements of legal positivism: the ‘dependence thesis’ and the ‘normal justification thesis’. The dependence thesis captures the idea that there are already reasons for people to act in particular ways, which exist independently of the legal system. The directives the law gives to people are authoritative only because they are based on and dependent on those already existing reasons. The ‘normal justification thesis’ maintains that the best way to work out whether directives are authoritative is to inquire if ordinary people are likely to better comply with the already existing reasons for action if we follow these directives, than if we were to try to work out for ourselves what those reasons or norms of conduct are and act on our own understanding of them.[[56]](#footnote-56) The service of law is to absolve ordinary people from having to deduce from first principles how we should behave. Instead of engaging in any primary moral reasoning, we can rely on legal authorities to tell us what to do because all the moral calculations have already been done, by the legislature in formulating the law or by the court in applying the law.

Questions about rights limitation, however, elevate the consideration of authority to the constitutional level. While Raz is concerned with how ordinary statutes and court decisions mediate between people and reasons for acting, a challenge to the constitutionality of a statute on the grounds that it infringes a right concerns how the constitution mediates between constitutional principles and the legislature. And while authoritative ordinary law mediates disputes between ordinary people, the constitution mediates disputes between legal institutions whose authority has already been established: the legislature on one hand and constitutional rights on the other.

 In the same way that normally justified law provides clear and mechanical answers to questions about how we ought to behave without us having to do any primary moral reasoning, a proportionality analysis that goes only so far as to inquire into the availability of less restrictive means to achieve an important objective absolves courts from having to do any moral reasoning in working out whether upholding a right or allowing its limitation better furthers the normative commitments of the constitution. Instead of performing complicated moral calculations, courts need only apply clear and mechanical rules to the facts of the case and report the results.

Less restrictive means analysis is the best kind of sausage-making: you simply feed the ingredients into a mechanical box and collect the sausage at the other end, without ever having to see what goes on inside the box or get your hands dirty with whatever sausages are made of. This is a service conception of the constitution, in which the constitution provides a predictable, algorithmic proxy for the primary moral reasoning on which questions of rights limitation ultimately depend.

The effect of this service conception of the constitution its worth spelling out. For Raz, authority guides us to do the things we have reasons to do anyway, without us having to do any work of our own in determining how best we can comply with those underlying reasons. The service of the constitution, from this Razian perspective, is that it guides judges toward decisions that best uphold underlying constitutional commitments without them having to do any moral reasoning. From the perspective of the rule of law objection, proportionality analysis adheres better to the rule-of-law requirement of predictability when unavoidably subjective and impressionistic moral reasoning is eliminated altogether from the analysis. The clear and mechanical decision rules that constitute less restrictive means analysis overcome the rule of law objection because they bring to life this service conception of the constitution.

The veracity of the Razian claim that judges who rely on less restrictive means analysis instead of primary moral reasoning will better realize the constitution’s normative commitments seems to depend on empirical data. But this claim is no more or less dependent on empirical data than Raz’s original claim that our compliance with the law is likely to generate better compliance with underlying reasons for action than if we had tried by ourselves, without a mediating authority, to work out how those reasons compel us to act. Raz may be right or wrong on this point, empirically, but that isn’t my concern. I only want to illustrate that the service conception of the constitution, on which less restrictive means analysis rests, maps onto Raz’s more general conception of the law as a set of authoritative rules that obviate moral reasoning.

## Legal positivism and less restrictive means analysis

Both the service conception of authority and the service conception of the constitution can trace a connection to a central theme in the tradition of legal positivism. The ‘sources thesis’ posits that the only determinant of a legal rule’s validity is its source. A particular rule is valid and authoritative, demanding our obedience, if it has been promulgated by an institution recognized as justified in making laws. There is no room for consideration of a rule’s moral merits or for moral reasoning in determining its validity.[[57]](#footnote-57) In this way the sources thesis subsumes the claim of the ‘separation thesis’ that law has no necessary connection to morality.[[58]](#footnote-58) The validity of a law, and thus our obligation to obey it, depends only on its source and not on arguments about whether it is good or bad, morally speaking. By eliminating primary moral reasoning from assessments of a rule’s legal validity, the legal system gains certainty and stability: as subjects of the law, we need do no more than follow the rules promulgated by recognized sources of law, and we have no business calling into question on moral grounds the authority of law promulgated by recognized sources. Legal positivism strives for a legal system that is a ‘settled, public and dependable set of standards for private and official conduct’.[[59]](#footnote-59)

This highlights the affinity between the rule-of-law requirement of predictability and legal positivism’s sources thesis as it applies to legal subjects; but I am more concerned to highlight the affinity between less restrictive means analysis and the sources thesis as it applies to judges in making decisions. Less restrictive means analysis eliminates primary moral reasoning from the judicial scrutiny of rights limitations, ensuring that the authority of judgments upholding or striking down rights limitations cannot depend on their moral content. Raz, like other legal positivists whose conception of the rule of law has predictability and stability at its heart, argues that when judges find themselves adjudicating ‘hard cases’ in the penumbra of uncertainty surrounding law’s settled meaning, the judgment resolving the dispute effectively makes new law.[[60]](#footnote-60) Judges may have to engage in moral reasoning in many of these hard cases in order to make law, but the positivist position remains that the authority of this new law stems from its source as judge-made law, and not from its moral content.

Less restrictive means analysis, and the service conception of the constitution on which it rests, allows judges to make new law in hard cases concerning the constitutionality of rights limitations without doing any moral reasoning either. Although a judge may indeed make new law in these penumbral cases, she can rely entirely on the heuristic tools less restrictive means analysis provides and need place no reliance on her own moral intuitions in doing so. Less restrictive means analysis is a more perfect union of legal positivism’s sources thesis and separation thesis, since it eliminates subjective moral reasoning from the adjudication of even penumbral hard cases – or at least those involving the constitutionality of rights limitations.

Of course, less restrictive means analysis depends on already existing moral commitments, encoded in the constitution as rights or as fundamental values, in the same way that for Raz the authority of ordinary law depends on ensuring social behaviour is coherent with already existing norms. The point is that both Raz’s service conception of authority and less restrictive means analysis do away with the need for primary moral reasoning, on the part of legal subjects in working out how we ought to behave, and on the part of judges in working out the constitutionality of rights limitations.

Meeting the rule of law objection by relying on the less restrictive means analysis to limitations analysis rests on a conception of the law that is closely connected to the distinctly Razian version of legal positivism in which operating the machinery of the legal system requires no primary moral reasoning.

## The Fullerian lens: justification against constitutional commitments

As a method of adjudicating limitations inquiries, strict proportionality balancing is a target of the rule of law objection because there is no way to reliably predict how a court will balance the value of a right against the value limiting it will serve. A preference for strict proportionality balancing seems to be a rejection of predictability in favour of promoting or at least retaining a role for moral reasoning and value judgment in the resolution of limitations inquiries. But I think the view that strict proportionality balancing is unpredictable, and inconsistent with the rule of law for that reason, rests on a particular conception of law, and of the rule of law more specifically, that is not the only game in town.

Strict proportionality balancing, in my view, runs on a conception of law that is closely connected to Fuller’s ideas about the rule of law, rather than the Razian conception of law on which less restrictive means analysis rests. The key to distinguishing between the different conceptions of law on which each approach to proportionality analysis rests is the way each approach understands the rule of law. I start with the question of why we care about the rule of law in the first place. As subjects of the law, we value predictability in the operation of law not simply because predictable law is a good in itself, but because predictability allows us to make meaningful decisions about our lives. An unpredictable legal system negates the value of people’s choices because it makes it more likely that our choices will be frustrated by some legal rule or decision we could not have anticipated. The instrumental value of a stable and predictable legal system is that it guarantees that the law will respect our choices.

But if we find predictability in the legal system valuable because of its service to individual choices and the moral autonomy and capacity for reason in which those choices are rooted, then it must be the case that autonomy and the capacity to reason are the primary goods to which predictability is secondary. A predictable legal system is valuable only to the extent that it tends to promote moral autonomy. And further, if the rule of law is to be upheld – if authority is to be exercised only through law and the law is to continue to guide social conduct – then the law must accept that people are capable of understanding rules and shaping their behaviour to.[[61]](#footnote-61)

Accordingly, law must meet the demands that morally autonomous, rational, and free-thinking people put on it. For Fuller, this requires that legal rules display the characteristics he articulates in his eight principles of legality. Our capacity to act as morally autonomous agents, laying and pursuing life plans, is seriously undermined when the law changes from day to day, is impossible to understand or to comply with, applies retroactively or is kept secret, or if official behaviour is incongruent with previously declared rules.

The eighth of these principles, the principle of congruence, encompasses both the highly specific and formal rules of law that make up statutes and regulations and the fundamental normative commitments on which a legal system rests. Where a constitution happens to make a commitment to a set of fundamental normative values (openness, democracy, dignity, equality and freedom, for example), the principle of congruence demands that official conduct remain congruent with these values as well as with formal rules. Every failure of congruence, whether a departure from the formalities of duly promulgated statutes and regulations or from fundamental constitutional values, is an affront to legal subjects’ moral autonomy because it undermines the settled order within which we make decisions about what to make of our lives.

To meet the rule-of-law demand for normative congruence, a government must, in the first place, act in ways that tend to uphold constitutional values. But more than this, the principle of normative congruence and the understanding of moral autonomy that supports it requires that government must demonstrate to the legal community as a whole, through a process of persuasion and argumentation, that its actions – rights-limiting legislation, for example – are congruent with constitutional values. Strict proportionality balancing is a mode of argumentation tailored to demonstrating whether limiting a right in pursuit of some objective or striking down the limitation and upholding the right better advances the values set out in the constitution.

The value of the rule of law is not only the predictability that it may generate, as a matter of fact. We value the rule of law and demand normative congruence because, beyond predictability, it requires the legal system’s authorities to demonstrate to us on the basis of rational explanation and argument that laws are oriented toward the fulfilment of the most basic normative commitments of the legal community of which we form part. The view of human beings as morally autonomous rational agents who demand justification for the rules that bind us informs a conception of law which, unlike the service conception of the constitution and the legal positivist tradition in which it is steeped, emphasizes its moral and normative content.

Strict proportionality balancing responds to the rule-of-law demand that power be exercised according to law, where ‘law’ as such is understood as having to be justifiable against a legal community’s most deeply held moral convictions. ‘Legality can produce legitimacy’, Habermas suggests, ‘only to the extent that the legal order reflexively responds to the need for justification that originates from the positivization of law and responds in such a manner that legal discourses are institutionalized in ways made pervious to moral argumentation.’[[62]](#footnote-62) Strict proportionality balancing is a tool that allows courts and policy makers to make arguments explaining decisions with reference to the values that a constitution entrenches at the foundation of the legal order.

# V Conclusion

The rule of law objection to strict proportionality balancing is rooted in claims that the good that protecting constitutional rights serves on one hand, and the good that achieving broader, rights-limiting social objectives serves on the other hand, are incommensurable. Reasoning that revolves around comparing or weighing up these two goods can offer no meaningful or comprehensible argument for preferring one or the other, this argument goes, and is therefore inconsistent with rule-of-law commitments to the predictable operation of legal rules. When something as important as our constitutional rights are concerned, the rule of law must surely demand that the judicial reasoning that allows the limitation of those rights is predictable.

The algorithmic and value-free approach to adjudicating rights limitations cases promises a path of legal reasoning that avoids this objection. The cost involved in taking this path of proportionality analysis is high, though: less restrictive means analysis sacrifices meaningful reasoning about the normative foundations of the constitution or the moral basis of rights. The service conception of the constitution eliminates the room for reasoning about what it is that the values at the heart of the constitution actually mean or require in any particular hard case. Strict proportionality balancing, by contrast, emphasises precisely this kind of reasoning at the expense of formulaic predictability.

Which of these two responses a legal community chooses corresponds to that community’s belief about the nature of law and the role of law in society. Less restrictive means analysis reflects a Razian view of the law as a proxy for primary moral reasoning, allowing courts to respect the authority of the constitution through the application of mechanical, decision-generating algorithms without having to engage at all in moral arguments about whether a right or its limitation ought to be upheld. This approach indicates a commitment to the positivist detachment of the operation of law from morality and processes of moral reasoning.

Strict proportionality balancing reflects the Fullerian commitment to preserving normative congruence in the legal system by demanding that laws and legal decisions remain justifiable against the basic normative commitments set out in the constitution. It upholds the view that the subjects of a legal system are rational and autonomous moral agents to whom justification for the operation of the law must be made if law is to remain authoritative.

I see the choice a legal community makes between these models of proportionality analysis as a window onto the way each community conceives the nature of law and understands legal reasoning. Some legal communities conceive of the law as legal positivists do, and aspire to legal reasoning as a mechanical and value-neutral exercise. Others understand the law to guarantee a commitment to moral autonomy and see legal reasoning as having to meet the demand that government justify its decisions against that community’s fundamental normative commitments.

I end by noting that moral reasoning remains important to many of the jurisdictions where the constitution provides explicitly for the limitation of constitutional rights. In South Africa, Canada, Germany, Israel, India and Poland, for example, moral reasoning continues to play a part in decisions about whether to allow or strike down rights limitations.[[63]](#footnote-63) Even where courts rely formally on the less restrictive means analysis and make no overt attempt to balance the value of rights and the objectives of rights-limiting measures, the reasoning is difficult to make sense of without tracing the implicit moral evaluation going in behind the scenes of the judgment.[[64]](#footnote-64)

There may be no actually existing legal community fully committed to the Razian version of legal positivism in rights adjudication, which would eradicate moral reasoning entirely from proportionality analysis. If South Africa’s legal system is to continue to promote a culture of justification and to move away from a culture of authority,[[65]](#footnote-65) it may be that an approach to proportionality analysis that emphasises the justification of legal decision and the operation of legal rules against the fundamental values at the heart of the Constitution is better suited than one that relies on mechanical, evidentiary, and value-neutral reasoning.

1. Section 36(1) of South Africa’s 1996 Constitution provides that any of the rights set out in sections 9-35 can 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:

the nature of the right;

the importance of the purpose of the limitation;

the nature and extent of the limitation;

the relation between the limitation and its purpose; and

less restrictive means to achieve the purpose.’

For similar provisions in other countries’ constitutional documents, see, e.g., article 19 of Germany’s 1949 Basic Law, section 1 of the Canadian Charter of Rights and Freedoms, (1982), article 8 of Israel’s 1992 Basic Law: Human Dignity and Liberty and article 4 of Israel’s 1992 Basic Law: Freedom of Occupation, article 31(3) of Poland’s 1997 Constitution, section 24 of Kenya’s 2010 Constitution, and article 49 of Tunisia’s 2014 Constitution. [↑](#footnote-ref-1)
2. *S v Makwanyane & Another* 1995 (3) SA 391 (CC), at para 104. [↑](#footnote-ref-2)
3. *S v Manamela & Another* 2000 (3) SA 1 (CC), at para 32. See also *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC) at para 18: ‘The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification for the infringing legislation must be.’ [↑](#footnote-ref-3)
4. See, generally, Alec Stone Sweet & Jud Mathews, ‘Proportionality Balancing and Global Constitutionalism’, (2008) 47 *Columbia Journal of Transnational Law* 72. [↑](#footnote-ref-4)
5. *Lawyers for Human Rights v Minister of Home Affairs and Others* 2017 (5) SA 480 (CC). [↑](#footnote-ref-5)
6. *Chevron SA (PTY) Ltd v Wilson t/a Wilson’s Transport* 2015 (10) BCLR 1158 (CC). [↑](#footnote-ref-6)
7. For approving accounts of this understanding of the principle of proportionality in its strict sense, see, e.g., Robert Alexy, *A Theory of Constitutional Rights* (Oxford: Oxford University Press, 2002), at 402-11; Aharon Barak, *Proportionality: Constitutional Rights and Their Limitation* (Cambridge: Cambridge University Press, 2012); and Kai Möller, ‘Proportionality: Challenging the Critics’ (2012) 10 *International Journal of Constitutional Law* 709. [↑](#footnote-ref-7)
8. See, e.g., Stavros Tsakyrakis, Proportionality: An Assault on Human Rights? (2009) 7 *International Journal of Constitutional Law* 468; Grégoire N Webber, ‘Proportionality, Balancing and the Cult of Constitutional Rights Scholarship’ (2010) 23 *Canadian Journal of Law and Jurisprudence* 179; Francisco J Urbina, ‘Is it Really that Easy? A Critique of Proportionality and “Balancing and Reasoning”’ (2014) 27 *Canadian Journal of Law and Jurisprudence*167; and Francisco J Urbina, *A Critique of Proportionality and Balancing* (New York: Cambridge University Press, 2018). [↑](#footnote-ref-8)
9. Justice Scalia, in *Bendix Autolite Corp v Midwesco Enter Inc* 486 US 888, 897 (1988). See also Niels Petersen, ‘How to Compare the Length of Lines to the Weight of Stones: Balancing and the Resolution of Value Conflicts in Constitutional Law’ (2013) 14 *German Law Journal* 1387 (2013), and Stuart Woolman, ‘Limitation’ in Stuart Woolman and Michael Bishop (eds), *Constitutional Law of South Africa* 2 ed (Cape Town: Juta, 2005). [↑](#footnote-ref-9)
10. Möller, ‘Proportionality: Challenging the Critics’ (n 7). Note that this is the description of proportionality in the strict sense that one of its proponents provides! [↑](#footnote-ref-10)
11. Friedrich Hayek, *Law, Legislation and Liberty: Volume 1: Rules and Order* (Chicago: University of Chicago Press, 1973), at 72-73; Ronald Dworkin characterises the objection to this form of discretionary judicial reasoning in hard cases as rooted in the sense that it ‘seems unfair, contrary to democracy, and offensive to the rule of law’: *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978), at 123. [↑](#footnote-ref-11)
12. Tsakyrakis. ‘Proportionality’ (n 8), at 482. [↑](#footnote-ref-12)
13. The Court set out these elements of the inquiry in *Makwanyane* (n 2) at para 104. They were in turn codified in section 36 of the 1996 Constitution more or less verbatim. [↑](#footnote-ref-13)
14. Richard Stacey, ‘The Magnetism of Moral Reasoning and the Principle of Proportionality in Comparative Constitutional Adjudication (2018) \_\_\_ *American Journal of Comparative Law* \_\_\_ (forthcoming). [↑](#footnote-ref-14)
15. Joseph Raz, ‘Authority and Justification’(1985) 14 *Philosophy and Public Affairs* 3, at 15. [↑](#footnote-ref-15)
16. Lon Fuller, *The Morality of Law* rev ed (New Haven and London: Yale University Press, 1969), at 39-41; Jeremy Waldron, ‘Why Law – Efficacy, Freedom or Fidelity?’ I1994) 13 *Law and Philosophy* 259, at 275-80; Richard Stacey, ‘Popular Sovereignty and Revolutionary Constitution-Making’ in David Dyzenhaus and Malcolm Thorburn (eds), *Philosophical Foundations of Constitutional Law* (Oxford: Oxford University Press, 2016) 161, at 170-72. [↑](#footnote-ref-16)
17. *R v Oakes* [1986] 1 SCR 103, at paras 69-70; *R v Big M Drug Mart Ltd* [1985] 1 SCR 295 at para. 139; and *Canada (Attorney General) v JTI-Macdonald Corp* [2007] 2 SCR 610, at para. 36. [↑](#footnote-ref-17)
18. *Nudism Education*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1958, 7 Entscheidungen Des Bundesverfassungsgericht [Bverfge] 320; Pharmacy, BVerfG 1958, 7 BVerfGE 377; *Own Account Transport Tax*, BVerfG 1963, 16 BVerfGE 147; *Shop Closing Act II*, BVerfG 1961, 13 BVerfGE 237. [↑](#footnote-ref-18)
19. See generally, Niels Peterson, *Proportionality and Judicial Activism: Fundamental Rights Adjudication in Canada, Germany and South Africa* (Cambridge and New York: Cambridge University Press, 2017). [↑](#footnote-ref-19)
20. *Coetzee v Government of the Republic of South Africa, Matiso & Others v Commanding Officer Port Elizabeth Prison & Others* 1995 (4) SA 631 (CC), at para 46 (footnotes omitted). [↑](#footnote-ref-20)
21. *Manamela* (n 3), at para 32. [↑](#footnote-ref-21)
22. Petersen, *Proportionality and Judicial Activism* (n 19), at 82-86, 106-116, 208-09. The cases Peterson sees as relying on proportionality in the strict sense are Peterson sees as decided on proportionality in the strict sense are *Makwanyane* (n 2)*, S v Niemand* 2002 (1) SA 21 (CC), *Ex parte Minister of Safety and Security: In re S v Walters* 2002 (4) SA 613 (CC)*,* and *De Vos NO and Others v Minister of Justice And Constitutional Development and Others* 2015 (2) SACR 217 (CC). See also Petersen, ‘Proportionality and the Incommensurability Challenge in the Jurisprudence of the South African Constitutional Court’ (2014) 30 *South African Journal on Human Rights* 405. [↑](#footnote-ref-22)
23. Section 12(1) of the Constitution provides:

Everyone has the right to freedom and security of the person, which includes the right—

(a) not to be deprived of freedom arbitrarily or without just cause;

(b) not to be detained without trial;

(c) to be free from all forms of violence from either public or private sources;

(d) not to be tortured in any way; and

(e) not to be treated or punished in a cruel, inhuman or degrading way. [↑](#footnote-ref-23)
24. The full text of section 29 provides:

**Prohibited persons**

(1) The following foreigners do not qualify for a temporary or a permanent residence permit:

those infected with infectious diseases as prescribed from time to time;

anyone against whom a warrant is outstanding or a conviction has been secured in the Republic or a foreign country with which the Republic has regular diplomatic relations in respect of genocide. terrorism, murder, torture, drug trafficking, money laundering or kidnapping;

anyone previously deported and not rehabilitated by the Department in the prescribed manner;

a member of or adherent to an association or organisation advocating the practice of racial hatred or social violence; and

anyone who is or has been a member of or adherent to an organisation or association utilising crime or terrorism to pursue its ends. [↑](#footnote-ref-24)
25. *Lawyers for Human Rights* (n 5), at paras 52-58. [↑](#footnote-ref-25)
26. *Lawyers for Human Rights* (n 5) at para 39, quoting from *De Lange v Smuts NO* 1998 (3) SA 785 (CC) at para 27. [↑](#footnote-ref-26)
27. Ibid, at para 59. [↑](#footnote-ref-27)
28. In *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others* 2005 (3) SA 280 (CC), at paras 47-50, the Court accepted that avoiding administrative burdens could be a legitimate objective for the state to pursue. In *Prince* *v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC) a majority of the Court held that a religious exemption to the criminal prohibition on cannabis use, while a less restrictive alternative than a blanket prohibition, would impose additional costs and administrative burdens on the police that would undermine their ability to achieve the main objectives of reducing the harmful effects of narcotic drug use. [↑](#footnote-ref-28)
29. *Lawyers for Human Rights* (n 5) at paras 63 and 61. [↑](#footnote-ref-29)
30. *In re S v Walters* (n 22), at paras 41-46. [↑](#footnote-ref-30)
31. *Niemand* (n 22), at paras 19. 24-25. [↑](#footnote-ref-31)
32. *DE v RH* 2015 (5) SA 83 (CC), at paras 62-63. [↑](#footnote-ref-32)
33. *Gaertner and Others v Minister of Finance and Others* 2014 (1) SA 442 (CC). [↑](#footnote-ref-33)
34. Ibid, at paras 68-73. [↑](#footnote-ref-34)
35. Ibid, at paras 62-63. [↑](#footnote-ref-35)
36. Ibid, at para 65. [↑](#footnote-ref-36)
37. The Supreme Court of Israel has described the proportionality analysis involved in the justification of rights limitations as in inquiry into whether upholding a right or allowing its limitation is more ‘socially important’ (HCJ 14/86 *Laor v Israel Film and Theatre Council* [1987] IsrSC 41(1) 421. Former Chief Justice of Israel Aharaon Barak notes in his extra-curial writing that what is social yimportnat, in turn, depends on ‘political and economic ideologies, from the unique history of each country, from the structure of the political system and from different social values’. The social importance of protecting a right against limitation or allowing the limitation of a right in a particular case, Barak goes on, is derived from the constitution’s purposes and the degree to which upholding either option ‘advance[s] the legal system’s most fundamental values’ (Barak. *Proportionality* (n 7), at 349 and 361). [↑](#footnote-ref-37)
38. Fuller, *The Morality of Law* (n 16). For other laundry lists of principles of legality, with minor variations, see Tom Bingham, *The Rule of Law* (2010); Joseph Raz, ‘The Rule of Law and its Virtue’ in *The Authority of Law* (Oxford: Oxford University Press, 1979) 211, at 214-218; Lawrence B Solum, ‘Equity and the Rule of Law’ in *The Rule of Law – Nomos* XXXVI (1994). [↑](#footnote-ref-38)
39. Just how much discretion judges have is the subject of the dispute between HLA Hart and Ronald Dworkin: see XXX. [↑](#footnote-ref-39)
40. HLA Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71 *Harvard Law Review* 593, at 607-615. [↑](#footnote-ref-40)
41. For William Blackstone, the slow, evolutionary, case-by-case development of the common law ensures systemic justice in the law, allowing judges to fine-tune the rules of law by their application in the penumbra of legal uncertainty, as law works itself pure (*Commentaries on the Laws of England* 19ed (Philadelphia: JB Lippincott and Co, 1867[1769]). For Jeremy Bentham, however, the common law is confusing, conflicting, mystifying and unintelligible to everyone bar an elite and educated few (*A Fragment on Government*, in *A Comment on the Commentaries and a Fragment on Government* (JH Burns and HLA Hart (eds), London: Athlone Press, 1977) Preface’, 410-12). On the requirement that judges aim to fashion clear rules that can be applied in future cases, see Antonin Scalia ‘The Rule of Law as the Law of Rules’ (1989) 56 *University of* *Chicago Law Review* 1175. [↑](#footnote-ref-41)
42. Na’ama Carmi, ‘The Nationality and Entry into Israel Case before the Supreme Court of Israel’ (2007) 22 *Israel Studies Forum* 26, at 33. [↑](#footnote-ref-42)
43. David Beatty, *The Ultimate Rule of Law* (New York: Oxford University Press, 2004) at 171. [↑](#footnote-ref-43)
44. *Chevron v Wilson* (n 6), at paras 17-24. [↑](#footnote-ref-44)
45. Ibid, at para 32. [↑](#footnote-ref-45)
46. Ibid, at para 33. [↑](#footnote-ref-46)
47. *S v Ntuli* 1996 (1) SA 1207 (CC). [↑](#footnote-ref-47)
48. Ibid, para 4. [↑](#footnote-ref-48)
49. Ibid, at para 24. [↑](#footnote-ref-49)
50. Ibid, at para 28. [↑](#footnote-ref-50)
51. Aharon Barak, ‘Proportional Effect: The Israeli Experience’ (2007) 57 *University of Toronto Law Journal* 369, at 373; Barak, *Proportionality* (n 7), at 342-43. [↑](#footnote-ref-51)
52. *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC). The case concerned limitations to due process rights in order to provide magistrates with information on which to determine bail conditions. The Court looked to foreign jurisdictions for examples of similar provisions that restrict due process rights less, but nevertheless concluded that limitations in question were proportionate in South Africa. [↑](#footnote-ref-52)
53. Beatty, *The Ultimate Rule of Law* (n 43), at 74. [↑](#footnote-ref-53)
54. Moshe Cohen-Eliya, ‘The Formal and Substantive Meanings of Proportionality in the Supreme Court’s Decision Regarding the Security Fence’ (2005) 38 *Israel Law* Review 262, at 263. [↑](#footnote-ref-54)
55. Raz, ‘Authority and Justification’(n 15), at 15. [↑](#footnote-ref-55)
56. Raz, ‘Authority, Law and Morality’ (1985) 68 *The Monist* 295, at 299. [↑](#footnote-ref-56)
57. Hart, ‘Positivism and the Separation of Law and Morals’ (n 40), at 596. [↑](#footnote-ref-57)
58. Richard Stacey, ‘Democratic Jurisprudence and Judicial Review: Waldron’s Contribution to Political Positivism’ (2010) 30 *Oxford Journal of Legal Studies* 749, at 755; John Gardner, ‘Legal Positivism: 5½ Myths’*,* (2001) 46 *American Journal of Jurisprudence* 199. [↑](#footnote-ref-58)
59. Ronald Dworkin, *Taking Rights Seriously* (n 11), at 347. While it looks like something of a straw man to rely on one of legal postivism’s greatest critics for a description of it, Raz admits that Dworkin’s description of this central element of legal positivism applies to his account of the service conception of authority (Raz, *Authority, Law and Morality* (n 11), at 320. [↑](#footnote-ref-59)
60. Raz, *The Authority of Law* (n 38) at 49-50; Hart, ‘Positivism and the Separation of Law and Morals’ (n 57), at 607. [↑](#footnote-ref-60)
61. Fuller, *The Morality of Law* (n 16), at 162; Stacey ‘Popular Sovereignty’(n 16) at xxx. [↑](#footnote-ref-61)
62. Jürgen Habermas, ‘Law and Morality’ in Sterling M. McMurrin (ed), *The Tanner Lectures on Human Values* (Salt Lake City: University of Utah Press, 1990), at 243-44. [↑](#footnote-ref-62)
63. Stacey, ‘The Magnetism of Moral Reasoning’ (n 14). [↑](#footnote-ref-63)
64. Tom Hickman, ‘Proportionality: Comparative Law Lessons’ (2007) 12 *Judicial Review* 31, at 47; Mark Zion, ‘Effecting Balance: *Oakes* Analysis Restaged’ (2013) 43 *Ottawa Law Review* 431; Denise Réaume, ‘Limitations on Constitutional Rights: The Logic of Proportionality’ (2009), University of Oxford Legal Research Paper Series, Paper No. 26/2009, August 2009, [http://ssrn.com/abstract=1463853](http://ssrn.com/abstract%3D1463853) (accessed 29 July 2018), 8. [↑](#footnote-ref-64)
65. Etienne Mureinik ‘A Bridge to Where?” Introducing the Interim Bill of Rights’ (1994) 10 *South African Journal on Human Rights* 31, at 32; Moshe Cohen-Eliya and Iddo Porat, ‘Proportionality and the Culture of Justificaiton’ (2011) 59 *American Journal of Comparative Law* 463. [↑](#footnote-ref-65)