

1 *Oakes and the German model*

The Canadian Charter of Rights and Freedoms¹ had been in force for not more than four years when the Supreme Court of Canada ultimately found the answer to the question of how to interpret the limitation clause in s. 1. The answer given in *R. v. Oakes*² was in short: legality and proportionality.³ The first component, legality, had a clear basis in the text of s. 1 ('prescribed by law'), whereas the second, proportionality, appears to be a genuine interpretation of the words 'reasonable limits [...] as can be demonstrably justified in a free and democratic society.' In his opinion, Chief Justice Dickson offered a full conceptual framework for the requirement of proportionality, even though most doctrinal innovations develop over time until they find their ultimate shape. This framework, the so-called *Oakes* test, has been applied by the Supreme Court for two decades, although its components were clarified or modified later on, and its original rigour mitigated in certain types of cases.⁴ Justice Iacobucci had an important part in this development.⁵

The question of whether Chief Justice Dickson, in writing the *Oakes* opinion, was aided by foreign examples or developed the test completely on his own appears open. It is true that some of the language in *Oakes* resembles the us Supreme Court opinion in *Central Hudson Gas &*

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

2 [1986] 1 S.C.R.103 [*Oakes*].

3 See Lorraine Weinrib, 'Canada's *Charter of Rights*: Paradigm Lost?' (2002) 6 *Rev.Const.Stud.* 119.

4 *Ibid.* See also Sujit Choudhry, 'So What Is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian *Charter's* Section 1' (2006) 34 *Sup.Ct.L.Rev.* (2d) 501 [Choudhry, 'Real Legacy'].

5 See, e.g., *RJR MacDonald Inc. v. Canada*, [1995] 3 S.C.R. 199 at paras. 179–92; *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at paras. 108 *et seq.*; *M. v. H.*, [1999] 2 S.C.R. 3 at paras. 75 *et seq.*; *Delisle v. Canada*, [1999] 2 S.C.R. 989; *Figueroa v. Canada* (A.G.), [2003] 1 S.C.R. 912.

Electric Corp. v. Public Service Commission of New York,⁶ a commercial speech case decided in 1980. But *Central Hudson* was not a trend-setting decision that gained much influence outside commercial speech problems, nor is its proportionality test as elaborated and complete as the one suggested by Chief Justice Dickson. Although the us Supreme Court often resorts to balancing, it has not developed a concept of proportionality, let alone turned it into a doctrinal test comparable to the *Oakes* test. In a number of recent decisions Justice Breyer has shown an interest in introducing proportionality analysis into us constitutional law,⁷ but without convincing the majority of his fellow justices.

There is, however, one jurisdiction that could have served as a model, namely Germany.⁸ Here the proportionality test has been applied since the late 1950s, whenever the Constitutional Court has had to review laws limiting fundamental rights, or administrative and judicial decisions applying such laws. From Germany the principle of proportionality spread to most other European countries with a system of judicial review, and to a number of jurisdictions outside Europe. Likewise, it is in use in the European Court of Human Rights and in the European Court of Justice. The German and Canadian proportionality tests differ slightly in their terminology but look more or less alike in substance. However, a closer comparison reveals some significant differences in how the tests are applied. Perhaps the most conspicuous difference is that in Canada, most laws that fail to meet the test do so in the second step, so that not much work is left for the third step to do, whereas in Germany, the third step has become the most decisive part of the proportionality test. An examination of the difference can shed some light on the strengths and weaknesses of the two approaches.

II *The development of proportionality in Germany*

The proportionality test is older than the German Constitution. It was first developed by German administrative courts, mainly the Prussian Oberverwaltungsgericht, in the late nineteenth century and applied to police measures that encroached upon an individual's liberty or property in cases where the law gave discretion to the police or regulated police

6 447 U.S. 557 (1980) [*Central Hudson*].

7 See, e.g., *Turner Broadcasting System. v. Federal Communication Commission*, 520 U.S. 180 (1997); *Nixon v. Shrink Missouri Government*, 528 U.S. 377 (2000); *United States v. Playboy Entertainment Group*, 529 U.S. 803 (2000); *Bartnicki v. Vopper*, 532 U.S. 514 (2001); Paul Gewirtz, 'Privacy and Speech' [2001] Sup.Ct.Rev. 139.

8 See generally David M. Beatty, *The Ultimate Rule of Law* (Oxford: Oxford University Press, 2005) at 162 [Beatty, *Ultimate Rule*]; Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2d ed. (Durham, NC: Duke University Press, 1997) at 46 [Kommers, *Constitutional Jurisprudence*].

activities in a rather vague manner.⁹ Here the principle of proportionality served as an additional constraint on police action. The action required a lawful purpose. The means adopted by the police *vis-à-vis* the citizen had to be suitable to reach the purpose of the law. If a less intrusive means to achieve the end of a law was available, this means had to be applied. In some cases, the courts asked, in addition, whether a proper balance had been struck between the intrusiveness of the means and the importance of the goal pursued. A failure to comply with these requirements rendered police actions unlawful.

Under the Basic Law adopted in 1949, the Constitutional Court, which was established in 1951, soon began to transfer this test into constitutional law and applied it to laws limiting fundamental rights. But, in contrast to the Canadian context, the Court in its early decisions neither explained why the Basic Law required limitation of rights to be proportional nor specified how the principle of proportionality operated. The principle was introduced as if it could be taken for granted.¹⁰ The first detailed explanation of what the principle requires and how it operates was given in a landmark case concerning freedom of profession (art. 12).¹¹ Here the principle of proportionality appeared as a tool that helped to cope with some difficulties caused by the unusual language of art. 12. In a later decision, also concerning art. 12, the test developed in the *Pharmacy Case* is described as 'the result of a strict application of the [general] principle of proportionality when the common weal requires infringements of the freedom of profession.' The way in which the principle operates is then explained in detail.¹²

It took until 1963 for the Court, in a case concerning the right to physical integrity (art. 2(2)), to recognize the applicability of the principle in all cases where fundamental freedoms are infringed.¹³ Another two years passed before the Court explained where it finds the textual basis for the principle: '[i]t follows from the principle of the rule of law [guaranteed

9 Lothar Hirschberg, *Der Grundsatz der Verhältnismäßigkeit* (Göttingen: Schwarz, 1981) at 6; Barbara Remmert, *Verfassungs- und verwaltungsgeschichtliche Grundlagen des Übermaßverbots* (Heidelberg: Müller, 1995).

10 The first decision that mentions the principle of proportionality concerns an election law of the state of North Rhine Westphalia, see BVerfGE 3, 383 at 399 (1954). In a later case the Court quotes an earlier decision to support the application of the principle of proportionality: see BVerfGE 1, 167 at 178 (1952). However, this decision simply states that, even in times of emergency, limitations of rights may not go further than absolutely necessary.

11 BVerfGE 7, 377 (1958) [*Pharmacy Case*]. Excerpts in English translation cited to Kommers, *Constitutional Jurisprudence*, supra note 8 at 274, and Norman Dorsen *et al.*, eds., *Comparative Constitutionalism: Cases and Materials* (St. Paul, MN: Thomson West, 2003) at 1204 [Dorsen *et al.*, *Comparative Constitutionalism*].

12 BVerfGE 13, 97 at 104 (1961). The test is explained at 108.

13 BVerfGE 16, 194 at 201 (1963).

in art. 20], even more from the very essence of fundamental rights, which are an expression of the citizens' general claim to freedom vis-à-vis the state and which may be limited by public power only insofar as it is absolutely necessary in order to protect public interests.¹⁴ In recent years, proportionality has often been called a principle of constitutional law.¹⁵ No elaboration of what precisely the source of proportionality is has ever been given. Nor has the Court elaborated how this principle flows from the rule of law or the essence of fundamental rights.¹⁶ The reason for this taciturnity may have been that in Germany, as opposed to Canada, in the early years the Court was not aware of the prominent role proportionality would play in the future. When this became apparent, the principle had already been established, so that further reasoning seemed unnecessary.

Without such an attempt to elaborate, the proportionality principle seems more remote from the text of the constitution in Germany than in Canada. What appears to be an interpretation of s. 1 of the Charter in Canada looks like an additional check on limitations, which supplements the textual provisions in Germany. The German Basic Law contains only a few safeguards applying to any limitation of a fundamental right, the most important ones being that every law limiting a fundamental right must be a general law (art. 19(1)) and that no limitation may affect the very essence of the fundamental right (art. 19(2)). The Basic Law then attaches special limitation clauses to most rights and freedoms in the Bill of Rights. Some of these clauses content themselves with a statement that limitations are only allowed 'by law or pursuant to law,' without adding further constraints. This is true, for instance, for rights as important as the right to life and physical integrity (art. 2(2)). Other limitation clauses contain further checks on purpose, conditions, or means of limitation. But not many laws are found to be unconstitutional because they violate the written limitation clauses. Instead, it is the unwritten principle of proportionality that carries the main burden of fundamental rights protection in Germany.

This is not to say that the principle of proportionality is an illegitimate invention of the Constitutional Court. Had the Court felt a necessity to argue that proportionality flows from the Bill of Rights in the

14 BVerfGE 19, 342 at 348 (1965).

15 See, e.g., BVerfGE 95, 48 at 58 (1996).

16 The path-breaking book is Peter Lerche, *Übermaß und Verfassungsrecht. Zur Bindung des Gesetzgebers an die Grundsätze der Verhältnismäßigkeit und Erforderlichkeit*, 2d ed. (Cologne: Heymanns, 1999). (The first edition of this work appeared in 1961.) See also Bernhard Schlink, *Abwägung im Verfassungsrecht* (Berlin: Duncker & Humblot, 1976) [Schlink, *Abwägung*]; Klaus Stern, 'Zur Entstehung und Ableitung des Übermaßverbots' in Peter Badura & Rupert Scholz, eds., *Festschrift für Peter Lerche* (Munich: Beck, 1993) 165.

Basic Law, it would not have encountered great difficulties. As Chief Justice Dickson did in his purposive approach in *Oakes*,¹⁷ the Constitutional Court could have started from the enhanced importance that was attributed to fundamental rights after the Nazi regime and World War II. According to art. 1, all fundamental rights are rooted in the principle of human dignity. Unlike previous German constitutions, the Basic Law places these rights above the law and endows them with binding force for the legislature. In the *Lüth* case, a landmark decision that revolutionized the understanding of fundamental rights in Germany,¹⁸ the Court elevated them to the rank of highest values of the legal system, which are not only individual rights, but also objective principles. The conclusion drawn from this assumption was that they permeate the whole legal order; they are not limited to vertical application but also influence private law relations and function as guidelines for the interpretation of ordinary law. The same line of argument could have led to the conclusion that it would be incompatible with the importance attributed to individual freedom that the legislature be entitled to limit fundamental rights until it reaches the ultimate borderline of its very essence.

III *Different approaches: The objective*

In essence, both jurisdictions follow the same path when they apply the proportionality test. Since the test requires a means–ends comparison, both courts start by ascertaining the purpose of the law under review. Only a legitimate purpose can justify a limitation of a fundamental right. The three-step proportionality test follows. While the Canadian Court requires a rational connection between the purpose of the law and the means employed by the legislature to achieve its objective in the first step, the German Court asks whether the law is suitable to reach its end. In the second step, the Canadian Court asks whether, in pursuing its end, the law minimally impairs the fundamental right, whereas the German Court asks whether the law is necessary to reach its end or whether a less intrusive means exists that will likewise reach the end. The third step in both countries is a cost–benefit analysis, which requires a balancing between the fundamental rights interests and the good in whose interest the right is limited. In Germany it is

17 *Supra* note 2 at para. 28.

18 BVerfGE 7, 198 (1958). English translations appear in *Decisions of the Bundesverfassungsgericht*, vol. 2, part I (Baden-Baden: Nomos, 1998) at 1; Kommers, *Constitutional Jurisprudence*, *supra* note 8 at 361 (excerpts); Vicki C. Jackson & Mark Tushnet (eds.), *Comparative Constitutional Law* (New York: Foundation, 1999) at 1403 (excerpts); Dorsen, *Comparative Constitutionalism*, *supra* note 11 at 824.

mostly called 'proportionality,' in the narrower sense, but is also called 'appropriateness,' 'reasonable demand' (*Zumutbarkeit*), and so on.¹⁹

Where do the two jurisdictions differ? The first difference appears when the preliminary question is asked: What is the objective of the law that limits a fundamental right? While the Supreme Court of Canada in *Oakes* requires an objective 'of sufficient importance to warrant overriding a constitutionally protected right of freedom,' or a 'pressing and substantial' concern,²⁰ the German Constitutional Court requires a 'legitimate purpose.' By *legitimate* the Court understands a purpose not prohibited by the Constitution. No additional element, such as a 'sufficient importance' or 'pressing need,' is required. Certainty about the purpose of the law is indispensable in carrying out the means-ends analysis during the succeeding steps of the proportionality test. But ascertaining the purpose is not part of the proportionality test; rather, it serves as the test's basis and starting point. The question of whether the objective chosen by the legislature is important enough to justify a certain infringement of a fundamental right is, of course, crucial for the German Court as well. But it appears at a later stage of the test, namely in the third step, where the Court asks whether a fair balance between competing interests has been struck. As a result, hardly any law fails at this preliminary step. Cases in which the legislature pursues a constitutionally prohibited purpose (*e.g.*, racial discrimination) are extremely rare.

The German Court does not offer an explanation for the narrow understanding of purpose within the framework of the proportionality test. But one can infer two considerations from the reasoning. First, the Court holds that in a democracy the legislature is entitled to pursue any purpose, provided it is not excluded by the constitution. The importance of the purpose is not a condition for legislative action. What is important enough to become an object of legislation is a political question and has to be determined *via* the democratic process. Second, importance is regarded as a correlational notion that cannot be determined in abstract terms. Hence, the question of whether a goal is sufficiently important to justify certain limitations of a right can be answered only by following the steps of the proportionality test. Raising this question in connection with the purpose would be regarded as a premature anticipation of the final balance. Yet the difference seems to disappear in practice. It is quite instructive to see that almost no Canadian law fails because of an insufficient purpose. As in Germany, a law is deemed unconstitutional in Canada if its purpose is incompatible with

19 Good examples of the operation of the test are, *e.g.*, BVerfGE 81, 156 at 188 (1990); BVerfGE 90, 145 (1994) [*Cannabis case*]; BVerfGE 91, 207 at 222 (1994).

20 *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 352.

the Constitution.²¹ But any lawful purpose is regarded as a sufficient purpose.

Determining the purpose of a law has not been a particularly difficult part of applying the proportionality principle in Germany. Usually the legislative history contains sufficient information about the purpose. Difficulties may arise with last-minute compromises in the legislature, particularly in the Mediation Committee of the two Houses of Parliament, when such compromises are adopted in the plenum without debate. But the impossibility of finding out what the legislature had in mind when it enacted a certain law is a rare exception.²² This is not to say that this stage is of little importance. The distinction between ends and means can be quite difficult. From a broader perspective, a narrowly defined end may appear as a means for a more abstract purpose. Yet this will rarely affect the legitimacy of the purpose. It plays a prominent role, however, when it comes to determining the competing values or interests in the process of balancing in the third step.

In the first step, the difference between the two countries seems to be merely semantic, and not many laws fail at this level.²³ Its function is to eliminate the small number of runaway cases. Likewise, the second step seems to differ only in terms of terminology between the two jurisdictions. That a particular means is 'necessary' to reach the goal of the law indicates, in German constitutional jurisprudence, that less intrusive means are not available, which is simply a different formulation for 'minimal impairment.' By the same token, in describing 'minimal impairment,' Canadian authors often use the term 'necessary.'²⁴ The information about less intrusive means is usually provided by the party who challenges a law on this ground. However, it is interesting to observe that in Canada most laws that are found to be unconstitutional fail at this step. In Germany, the proportion of laws failing at the second step is considerably larger than the number of laws failing at the first step, but far smaller than in Canada. The vast majority of laws that failed to pass the proportionality test in Germany do so at the third step.

21 See Joel Bakan *et al.*, eds., *Canadian Constitutional Law*, 3d ed. (Toronto: Emond Montgomery, 2003) at 759.

22 For an example see BVerfGE 9, 291 (1959). Likewise, the problem of shifting purposes has not arisen in Germany.

23 A nice example of an unsuitable means was a hunting law that required a gun-shooting test for falconers: falconry is not hunting falcons with a gun but hunting other animals with a falcon. See, BVerfGE 55, 159 (1980).

24 See, *e.g.*, Bakan *et al.*, *Canadian Constitutional Law*, *supra* note 21 at 760.

IV *More differences: The second step*

Several factors may explain why the second step has gained less prominence in Germany than in Canada. First, the importance of the law's objective does not play a role at this stage. The objective is accepted as lawful, and the only question is whether the objective could have been reached as effectively by milder means. Second, the Constitutional Court does not require that the means chosen by the legislature fully reach the objective of the law. A contribution, even a slight one, is sufficient, provided that the same contribution cannot be reached by a means that impairs the fundamental right less. The comparison of the deleterious and the salutary effects of the impugned law required by the refined *Oakes* test is not made in the second step in Germany but, rather, is reserved for the third step. Third, if the infringement consists in a financial burden imposed on the citizen (which is very often the case with laws regulating the economy and affecting freedom of profession or property), a less intrusive means can always be found: someone else pays, or the state allocates money from the budget. Hence, in these cases the test does not exclude anything. The question therefore becomes one of the appropriateness of the measure, to be decided in the third step.²⁵

Moreover, the German Court has never imposed as high a burden of proof on the government as the Canadian Supreme Court did in *Oakes* when it asked for 'cogent and persuasive' evidence in connection with the 'constituent elements of a s. 1 inquiry.'²⁶ If it is true that *Oakes* created an 'enormous institutional dilemma' for the Court by neglecting the reality of policy making under conditions of uncertainty,²⁷ the German Court avoided this dilemma, since it has always emphasized that the legislature enjoys a certain degree of political discretion in choosing the means to reach a legislative objective.²⁸ This reflects the reality of political decision making. Usually it is not difficult to ascertain whether there are less intrusive means; it is much more difficult, however, to find out whether they would have the same or an equivalent effect.

This is particularly true when, in deciding the question of whether the means will contribute to reaching the objective, the answer depends on prognostication. The leading case is *Kalkar*, which involved the risks of atomic energy plants.²⁹ In the absence of evidence about new atomic

25 See BVerfGE 77, 308 at 334 (1987).

26 *Oakes*, supra note 2 at para. 68.

27 Choudhry, 'Real Legacy,' supra note 4 at 503, 524.

28 See, e.g., BVerfGE 30, 250 at 263 (1971).

29 BVerfGE 49, 89 at 130 (1978). Excerpts in English translation cited to Kommers, *Constitutional Jurisprudence*, supra note 8 at 139; Dorsen, *Comparative Constitutionalism*, supra note 11 at 239.

technology, the Court refused to substitute judicial opinions for political ones; but it combined this deference with a constitutional duty on the legislature to observe the development of this technology and, if necessary, to amend the law. In the *Codetermination Case*, the Court clarified its position.³⁰ On the one hand, uncertainty about future developments, even in matters of great import, cannot justify a prohibition to legislate. On the other hand, uncertainty alone cannot justify exempting a political realm from judicial control. The Court then developed a scale of scrutiny that ranges from whether the legislature's prognostications are evidently wrong (*Evidenzkontrolle*) to a reasonableness test (*Vertretbarkeitskontrolle*) to strict scrutiny (*intensivierte inhaltliche Kontrolle*), depending on the nature of the policy area, the possibility of basing the decision on reliable facts, and the importance of the constitutionally protected goods or interests at stake. The Court does not hesitate to collect the facts on its own behalf if necessary.³¹

The strictness of *Oakes* can perhaps be explained by Chief Justice Dickson's assumption that the rights and freedoms guaranteed by the Charter are not absolute, but that limits on them are 'exceptions' and can be justified only by 'exceptional criteria.'³² It would be difficult to find similar language in the jurisprudence of the German Court. From the beginning, limitations of fundamental rights were regarded as normal, because all rights and freedoms can collide or can be misused. Harmonization of colliding rights and prevention of abuses of liberty are normal tasks of the legislature. The function of constitutional guarantees of rights is not to make limitations as difficult as possible but to require special justifications for limitations that make them compatible with the general principles of individual autonomy and dignity. Some later modifications of the *Oakes* test seem to take this into account.³³

30 BVerfGE 50, 290 at 331 (1979) [*Codetermination Case*]. Excerpts in English translation cited to Kommers, *Constitutional Jurisprudence*, supra note 8 at 267. For equality cases cf. BVerfGE 88, 87 at 96 (1993) [*Transsexual Case*].

31 See Klaus Jürgen Philipp, *Tatsachensfeststellungen des Bundesverfassungsgerichts* (Cologne: Heymanns, 1971); Brun-Otto Bryde, 'Tatsachensfeststellungen und soziale Wirklichkeit in der Rechtsprechung des Bundesverfassungsgerichts' in Peter Badura & Horst Dreier, eds., *Festschrift 50 Jahre Bundesverfassungsgericht*, vol. 1 (Tübingen: Mohr Siebeck, 2001) 533. In cases of judicial review of legislation, the Court usually invites statements from agencies or offices such as the Statistical Bureau and from interested or informed institutions or societal groups. Parties to a lawsuit are given the opportunity to express their opinion on these statements. In some cases the Court hears experts whom it selects independently from the parties to the lawsuit.

32 *Oakes*, supra note 2 at para. 65.

33 Compare *Edwards Books and Art Ltd. v. The Queen*, [1986] 2 S.C.R. 713 [*Edwards Books*]; *Irwin Toy Ltd. v. Quebec*, [1989] 1 S.C.R. 927; *RJR MacDonald Inc. v. Canada (A.G.)*, [1995] 3 S.C.R. 199.

In *Edwards Books* the Canadian Court mentions for the first time that protecting a 'vulnerable' or 'not . . . powerful group in society' may justify a limitation *vis-à-vis* those who profit from this vulnerability. The Court adds, however, that the legislature is not constitutionally obliged to furnish protection, 'only that it may do so if it wishes.'³⁴ The German Constitutional Court went further in this direction. Starting in 1975, it recognized a constitutional duty to protect fundamental rights not only *vis-à-vis* the state but also *vis-à-vis* threats stemming from private parties or societal forces.³⁵ Since threats of this sort are themselves a result of the exercise of fundamental rights, this duty can be fulfilled only by limiting one group's rights in order to protect the rights of another. Consequently, a law can violate the Constitution not only when it goes too far in limiting a fundamental right (*Übermaßverbot*) but also when it does too little to protect a fundamental right (*Untermaßverbot*).³⁶

A special case is private law legislation. Unlike its public law counterpart, such legislation concerns relationships between individuals as opposed to the relationship between the individual and the state. With respect to fundamental rights, public law relationships are asymmetrical: only individuals have fundamental rights, whereas the state is bound by these rights. Private law relationships, on the other hand, are symmetrical: both individuals have fundamental rights. Private law legislation, therefore, will often require a reconciliation of two competing private interests, both of which are protected by fundamental rights. This means that the protection of the endangered right can be ensured only by a limitation of other constitutionally protected rights. In such a situation, the question posed in the second step – whether or not a limitation of a fundamental right went too far – cannot be answered without asking whether the protection given to the endangered right was sufficient. The Canadian Court apparently solves this problem by lowering the standards of scrutiny for minimal impairment. The German Court

34 *Edwards Books*, *ibid.*

35 BVerfGE 39, 1 at 42 (1975) [*Abortion I*]. Excerpts in English translation appear in Kommers, *Constitutional Jurisprudence*, *supra* note 8 at 336; Jackson & Tushnet, *Comparative Constitutional Law*, *supra* note 18 at 115; Dorsen, *Comparative Constitutionalism*, *supra* note 11 at 542. See Dieter Grimm, 'The Protective Function of the State' in Georg Nolte, ed., *European and US Constitutionalism* (Cambridge: Cambridge University Press, 2005) 137; Dieter Grimm, 'Human Rights and Judicial Review in Germany' in David M. Beatty, ed., *Human Rights and Judicial Review* (Dordrecht: Martinus Nijhoff, 1994) 267 at 279; Beatty, *Ultimate Rule*, *supra* note 8 at 145.

36 BVerfGE 88, 203 at 254 (1993) [*Abortion II*]. Excerpts in English translation appear in Kommers, *Constitutional Jurisprudence*, *supra* note 8 at 349; Jackson & Tushnet, *Comparative Constitutional Law*, *supra* note 18 at 134.

has found that here, the means-ends relation is no longer at stake; hence, the second step furnishes no answer. The Court solves this problem in the third step.

V A wide gap: Balancing

The most striking difference between the two jurisdictions is the high relevance of the third step of the proportionality test in Germany and its more residual function in Canada. Here the German Court argues at length, whereas the Canadian Court mostly presents a 'résumé of previous analysis.'³⁷ How can this difference be explained? The analysis to be made in the third step is described differently in the two jurisdictions. As Chief Justice Dickson put it in *Oakes*, the final step requires 'proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance."³⁸ In its refined form in *Dagenais*, the test requires 'both that the underlying objective of a measure and the salutary effects that actually result from its implementation be proportional to the deleterious effects the measure has on fundamental rights and freedoms.'³⁹ The German Court weighs the seriousness of the infringement against the importance and urgency of the factors that justify it. In other words, the Court compares the loss on the side of the infringed right if the law is upheld with the loss on the side of the value protected by the law if the fundamental right prevails.

This comparison differs from the assessment made in the first two steps of the proportionality test. These steps are confined to a strict means-ends examination. The idea is that those legislative means that are not necessary to reach the objective of the law cannot justify a limitation of fundamental rights. In the third step, the Court leaves the means-ends analysis of the first two steps behind. Here the objects of the comparison change and the scope of analysis broadens. The comparison is now between the loss for the fundamental right, on the one hand, and the gain for the good protected by the law, on the other, which will itself very often enjoy constitutional recognition. This balance is not an

37 Frank Iacobucci, 'Judicial Review by the Supreme Court of Canada under the *Canadian Charter of Rights and Freedoms*: The First Ten Years' in David M. Beatty, ed., *Human Rights and Judicial Review* (Dordrecht: Martinus Nijhoff, 1994) 121.

38 *Oakes*, supra note 2 at para. 70.

39 *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835 at 887. For a similar case in Germany see BVerfGE 35, 202 (1973) [*Lebach*]. Excerpts in English translation appear in Kommers, *Constitutional Jurisprudence*, supra note 8 at 416; Basil S. Markesinis, *The German Law of Torts: A Comparative Introduction*, 3d ed. (Oxford: Clarendon Press, 1997) at 390.

abstract one. The Constitutional Court does not recognize a hierarchy among the various fundamental rights. The balance, therefore, must be concrete or, in the Canadian terminology, contextual. One question is how deeply the right is infringed. Another question is how serious the danger for the good protected by the law is, and how likely it is that the danger will materialize. Furthermore, the degree to which the impugned law will protect the good against the danger must be measured against the degree of intrusion.

Yet this concept is by no means alien to the Canadian Court. Already in *Oakes*, Chief Justice Dickson admitted that a full protection of fundamental rights is impossible without the third step. '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.'⁴⁰ The similarity to the German approach becomes even clearer in *Thomson Newspapers v. Canada (A.G.)*,⁴¹ where the Court states that the third step of the proportionality test performs a role fundamentally distinct from the previous steps:

The focus of the first and second steps of the proportionality analysis is not the relationship between the measures and the *Charter* right in question, but rather the relationship between the ends of the legislation and the means employed. . . . The third stage of the proportionality analysis provides an opportunity to assess . . . whether the benefits which accrue from the limitation are proportional to its deleterious effects as measured by the values underlying the *Charter*.⁴²

The explanation for this gap between the Court's reasoning and its practice must be sought in the fact that the elements relevant to the third step have already been dealt with in previous stages. The importance of the objective has generally been determined in the preliminary step, where the Court not only ascertains the purpose of the law but asks, in addition, whether it is sufficiently 'pressing and substantial' to justify a limitation of *Charter* rights. The effects of the infringement on the beneficiaries of the protection are considered in connection with the existence of an infringement in the two prior steps of the test, so that not much remains to be said when the Court reaches the third step. Consequently, the source of unconstitutional limitations always has been found in earlier stages.

The outside observer gets the impression that the Canadian Supreme Court avoids the third step out of fear that a court might make policy decisions at this stage rather than legal decisions. Constitutional scholars

40 *Oakes*, supra note 2 at para.71.

41 [1998] 1 S.C.R. 877 [*Thomson*].

42 *Ibid.* at para. 125.

support the Court in this attitude.⁴³ Yet, in practice, the Court's dealing with the second step looks much more value laden than that of the German Court. Take as an example the lengthy considerations of Chief Justice Dickson in *Keegstra*, or the comments of then Justice McLachlin in her dissenting opinion.⁴⁴ They contain much more than what would have been necessary in order to answer the question posed in the second step, to wit, whether there are alternative means that would reach the objective of the law as effectively as the means chosen by the legislature while imposing a lesser burden on the right limited by the law. The same is true for the kind and dimension of the danger that the law wants to cure. It is revealing that sometimes the Court uses the expression that, in view of a given danger, a law 'does not unduly restrict' a guarantee, a kind of language that is typical of the balancing process reserved for the third step in Germany.

If indeed the attempt to avoid policy considerations and value judgments is responsible for the reluctance to enter the third step, the Court risks self-deception when all the value-oriented considerations have been made under the guise of a seemingly value-neutral category. The interesting question, therefore, is whether the third step, properly understood, really forces the Court to leave the legal realm and turn to political considerations. Fears like this do not exist only in Canada; there are critics in Germany as well. Bernhard Schlink is perhaps the most prominent one.⁴⁵ He accepts balancing at the third stage, when the Constitutional Court reviews acts of the executive and decisions of lower courts, but he wants to exclude it when legislative acts are at stake. He argues that balancing conflicting interests, setting priorities, and allocating resources is a genuine political function. In his view, courts leave the legal realm and usurp this function when they do the balancing themselves. Critics, however, are a small minority in Germany, and balancing is constantly practised by the judiciary.

VI *Justified concerns?*

My answer to the criticism that the third step is policy laden is twofold. First, I am of the opinion that without the third step the proportionality test, properly understood, would be unable to fulfil its purpose, namely,

43 See, e.g., Peter W. Hogg, 'Section 1 Revisited' (1991) 1N.J.C.L. 1 at 22.

44 *R. v. Keegstra*, [1990] 3 S.C.R. 697.

45 Bernhard Schlink, *Abwägung*, supra note 16; Bernhard Schlink, 'Der Grundsatz der Verhältnismäßigkeit' in Peter Badura & Horst Dreier, eds., *Festschrift 50 Jahre Bundesverfassungsgericht*, vol. 2 (Tübingen: Mohr Siebeck, 2001) 445. For a recent, slightly different warning see Frank Raue, 'Müssen Grundrechtsbeschränkungen wirklich verhältnismäßig sein' (2006) 131 ArchÖffR 79.

to give full effect to fundamental rights. This is so because the impact of an infringement of a fundamental right can be fully assessed only in the third step. The two previous steps can only reveal the failure of a law to reach its objective; they cannot evaluate the relative weight of the objective of the law, on the one hand, and the fundamental right, on the other, in the context of the legislation under review. Take the hypothetical case of a law that allows the police to shoot a person to death if this is the only means of preventing a perpetrator from destroying property. In Germany, property is itself constitutionally guaranteed; protection of property certainly is a lawful, even an important, purpose. Shooting a perpetrator to death is a suitable means of preventing him from destroying property. Since the shooting is allowed only if no other means are available, the necessity test of the second step is also passed. If one had to stop here, the balance between life and property could not be made. The law would be regarded as constitutional, and life would not get the protection it deserves.

Second, in my view, the danger of political decisions can be avoided by a careful determination of what is put into each side of the scales when it comes to balancing. It is rarely the case that a legal measure affects a fundamental right altogether. Usually, only a certain aspect of a right is affected. For instance, a law may regulate not all speech but, rather, commercial speech regarding certain products and in certain media. The weight of the aspect of the right that has been regulated in relation to the right at large must be determined carefully. The same is true for the good in whose interest the right is restricted. Rarely is one measure apt to give full protection to a certain good. Only certain aspects of this good will be affected in a salutary way. The importance of these aspects in view of the good at large must be carefully determined, as well as the degree of protection that the measure will render.⁴⁶ If this is done accurately, the balancing process remains sufficiently linked to law and leaves enough room for legislative choice.

So a final question remains to be asked. Does it matter that the Supreme Court of Canada, provided that my analysis of its jurisprudence is correct, does less than it promises in the preliminary step of the proportionality principle, does more than it promises in the second step, and has little use for the third step? Does it indicate an inaccuracy when one step of a three-step test (with one preliminary stage) consists in a repetition of the results of the prior steps? In other words, is it sufficient that the relevant questions are asked somewhere, or is there a legal value

46 See similarly *Edmonton Journal v. Alberta*, [1989] 2 S.C.R. 1326 ('One thing seems clear and that is that one should not balance one value at large and the conflicting value in its context. To do so could well be to pre-judge the issue'). The German Constitutional Court has not always avoided this danger.

in raising them in a certain order? A definitive answer would require a more intimate knowledge of the Court's jurisprudence than I have. What I can conclude is that the disciplining and rationalizing effect, which is a significant advantage of the proportionality test over a mere test of reasonableness or a more or less free balancing, as in many US cases, is reduced when the four stages are not clearly separated. Each step requires a certain assessment. The next step can be taken only if the law that is challenged has not failed on the previous step. A confusion of the steps creates the danger that elements enter the operation in an uncontrolled manner and render the result more arbitrary and less predictable.