
**PROPORTIONALITY AND THE LIMITATION CLAUSES OF THE SOUTH
AFRICAN BILL OF RIGHTS**

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SUMMARY

"Proportionality" is a contemporary heavy-weight concept which has been described as an element of a globalised international grammar and as a foundational element of global constitutionalism. The article firstly describes the elements of proportionality as they are generally understood in foreign systems, namely whether the limitation pursues a legitimate aim, whether the limitation is capable of achieving this aim, whether the act impairs the right as little as possible and the so-called balancing stage when it must be determined whether the achievement of the aim outweighs the limitation imposed. The German academic Alexy (*Theorie der Grundrechte* (1986)) developed what he called a mathematical weight formula to deal with the balancing stage. An overview is provided of how the elements of proportionality were dealt with in the text of the South African interim *Constitution* of 1994, the early jurisprudence of the Constitutional Court, and in the text of the final *Constitution* of 1996. Contemporary South African academic criticism of the use of the concept is also analysed. The article then endeavours to relate the elements of Alexy's weight formula to both the elements of the South African general limitation clause in section 36 of the *Constitution* and to the appearance of such elements in the formulation of specific rights in the Bill of Rights. Although the levels of abstraction reached in the debates on the Alexy formula are so daunting that it is most unlikely that South African courts and practitioners will ever use it, certain valuable insights can be gained from it for the purposes of dealing with proportionality within the context of the limitation of rights in South Africa. Despite opposition from certain academics, proportionality is a prominent feature of the application of the limitation clauses in the South African *Constitution*. The elements of proportionality provides a useful tool for the application, within the context of the

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limitation of rights, of general and wide concepts such as "fairness", "reasonableness", "rationality", "public interest" and, somewhat surprisingly, also of the general concept "proportionality" as such. South Africa's participation in the global recognition and application of this way of dealing with the limitation of rights is worthwhile.

KEYWORDS: Limitation of rights; bills of rights; proportionality; elements of proportionality; history of proportionality in the South African *Constitution*; balancing; weight-formula.