THE CONSTITUTIONAL REQUIREMENT OF LEGALITY IN LIMITATION OF HUMAN RIGHTS

by

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Abstract

The constitutional requirement of legality
in limitation of human rights

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A striking feature of the post-WWII model of rights-protection is the separation of rights and limitations. This thesis concerns the preliminary step in the limitations enquiry, that of legality. It briefly examines aspects of the drafting histories of the relevant constitutional documents. Then, with reference principally to the jurisprudence of the European Court of Human Rights, the Canadian Supreme Court and the South African Constitutional Court, it assesses the coherence of judicial representations of the role of legality within the two-stage process of rights adjudication. It goes on to identify categories of public power in relation to which the legality question arises, and to analyse judicial treatment thereof, with particular attention to whether the rule of law and democracy principles underlying the requirement are promoted by the courts. In so doing, it suggests that consistent and principled adherence to the demands of legality can intensify democracy and foster rights-protection.
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CHAPTER ONE

POST-WAR CONSTITUTIONALISM

1.1 INTRODUCTION

Since the end of the Second World War, a distinctive model of constitutional rights-protecting instrument has developed, permeating both international and domestic human rights regimes. This model differs significantly from both the United States prototype bill of rights, and from the British system of parliamentary sovereignty and unwritten constitutionalism which forms the legal background of many of the jurisdictions in which the post-war model has been adopted.

Arguably the defining structural feature of the post-war constitutional rights model, is the separate articulation of human rights and permissible limitations on those rights, ordinarily by governmental bodies. The criteria for valid limitations on rights are expressed either in a single, general limitations provision which applies to all entrenched rights, or in specific provisions which operate in respect of particular rights.

The general limitations provision model is exemplified in the Universal Declaration of Human Rights¹ (1948) and is a feature of the International Covenant on Economic, Social and Cultural Rights² (1966). It was included by Canada in the Canadian Charter of Rights and Freedoms³


(1982), and when the transitional, negotiated Constitution of the Republic of South Africa\(^4\) (1993) was drafted, it followed the Canadian model. This general limitations provision model was retained in the "final" South African Constitution\(^5\) (1996). The *European Convention for the Protection of Human Rights and Fundamental Freedoms*\(^6\) (1953) is the archetype of the specific limitation provision model, which was used also in the *International Covenant on Civil and Political Rights*\(^7\) (1966). The German *Basic Law* (1949) contains a generally applicable requirement that limitations on rights apply generally rather than to an individual case, but also has specific provisions setting out permissible internal limitations on particular rights.

The post-war rights and limitations model has given rise to a distinct method of constitutional analysis, often referred to as the "two-stage process," consisting of initial definition of the right and identification of an infringement, and thereafter determination of the justifiability of the limitation of, or interference with, that right. Justification for limitation of a right can consist of several enquiries or stages of analysis. The preliminary step in justification of a limitation on a fundamental right involves satisfaction of the requirement of "legality" - the demand that a limitation be prescribed by law or be in accordance with law of general application. It is this principle of legality, as it relates to limitation of human rights, which is the subject of this dissertation.

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\(^5\) Constitution of the Republic of South Africa, 1996 [hereinafter the *1996 Constitution*]. Chapter Two of the 1996 Constitution is the *Bill of Rights*.


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The principles underlying the requirement of legality, such as the rule of law and the separation of governmental functions, are foundational to many democratic states which have not adopted the post-war constitutional model, such as Great Britain, the United States and Australia. Some form of the legality requirement, such as that vague laws are invalid, or that the exercise of public power must be authorised by law, is a feature of these systems, but I will concentrate on jurisdictions that do fall into the post-war constitutional category. By doing so, it is possible to examine the legality principle in the context of a particular model of rights protection and method of constitutional analysis, and with reference to similarly structured institutional roles for the branches of government.

In looking at the origins of the provision, which will constitute the balance of the first chapter, I will attempt not to be comprehensive, but to reveal the principles underlying the requirement and thus the problem that the legality requirement tries to solve. Thereafter, and with reference principally to the case law of the European Court of Human Rights, the Supreme Court of Canada and the Constitutional Court of South Africa, I will assess the role of legality within the post-war two-stage method of constitutional analysis, and evaluate its treatment in relation to other elements of limitations jurisprudence. Moving on to a more detailed analysis of the legality principle in application, I identify three areas in which interpretation of the provision has proved particularly tricky, and explore them in more detail. In doing so, I examine judicial attempts to articulate the meaning of underlying values such as the rule of law and democracy, both generally and in relation to the legality requirement specifically. My aim is to assess

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These are legislative vagueness, at 3.6; delegation of statutory duty or discretionary authority, at 3.7; and departmental directives and administrative guidelines, at 3.8.
whether the values promoted by the provision are respected and upheld by courts, both practically in relation to the outcome of particular claims, and conceptually in relation to the jurisprudence which has developed around the provision and the two-stage process of constitutional rights analysis.

I try to show that while courts have consistently maintained a distinction between the rights and limitations stages of analysis, and have nominally at least divided the limitations enquiry into several elements, the place of legality within this method has not been coherently developed. The purposes of the provision have been identified, in a gradual way, by courts applying the requirement in various contexts, but the coexistence of the principles underlying legality - notably the rule of law, democracy and the separation of powers - has not invariably been acknowledged or developed to make the most of the provision. It appears from the case law that a primary reason for this jurisprudential deficiency is an anxiety about blurring the divide between legislative and judicial functions through the process of constitutional review. But there is a paradox in this. Many of the cases in which the judiciary is “deferential” to actions of the state, in relation to the demands of the legality requirement, involve executive action or delegated law-making capacity, where no or very little legislative deliberation has taken place.

The ultimate object of this dissertation is to attempt to articulate interpretive principles which may be appropriate in judicial application of the legality requirement in the emerging South African rights jurisprudence. I do this indirectly by drawing out the values inherent in the constitutional state and which underlie the requirement of legality in limitation of rights, and trying to show where they have been ignored or undermined by relevant courts, and where
misplaced deference to a notion of legislative function damages the constitutional rights enterprise.

1.2 TERMINOLOGY

I have already, and will, refer to the “legality principle in the limitation of rights” or variations of that term, to describe the constitutional provision which is the subject of my dissertation. The term is generally not used by judges, who tend to refer to the terms of the particular constitutional provision engaged. In academic commentary, the term is used to refer generally to the principle that the exercise of public power should be authorised by law. But views differ as to the extent that the principle has only formal meaning, or constitutes a substantive standard with which law must comply, in order for it to be constitutionally valid. At one end of the spectrum, as it were, one could situate the legality principle’s characterisation by T.R.S. Allan, who, referring to F.A. Hayek, describes it as the “sallow offspring” of the ideal of the rule of law, refers to its “barren confines” and says that it “…seems only to require a formal authorisation of the powers of government without imposing limits on the nature of those powers.” A more substantial understanding of the legality principle’s potential in constitutional jurisprudence is provided by Oscar M. Garibaldi, who uses the term to

...refer to the demand that an individual prescription be authorized by a higher norm of the legal system, with respect not only to the competence of the issuing authority, but also to its normative content. In other words, the principle of legality is the requirement that an individual command (such as a court judgment or an administrative act) be so related to a higher law in the same system that the former would not be considered valid as to both origin and content were it not for

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the existence of the latter.\textsuperscript{10}

I will use the term loosely at this stage, to refer to the constitutional provision which is the subject of this dissertation. My understanding of the legality requirement is as a necessary element of the limitations stage of constitutional rights analysis, involving a determination of the legal status of a particular act of government, challenged on the basis of its rights-infringing effect. The requirement of legality is a particular manifestation of principles of the rule of law, democracy and the separation of powers, fundamental to the constitutional state. Interpretation of the provision is a complex exercise, because of the ubiquitousness of these principles and the breadth of their scope, also because it is not obvious in every case that they are mutually reinforcing and compatible. Potential conflicts between, for instance, the precision element of the rule of law, and the democratically perceived necessity for broad or imprecise legislation, complicate the task of the adjudicative bodies.

Constitutional formulations of the legality principle differ somewhat from each other, but unless I say otherwise, I will use the formulations interchangeably, whether they describe the provision in the \textit{Canadian Charter},\textsuperscript{11} \textit{European Convention, Universal Declaration}\textsuperscript{12} or South African \textit{Bill

\begin{itemize}
\item \textsuperscript{11} Section 1 of the \textit{Charter} provides as follows:
"The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."
\item \textsuperscript{12} Section 29(2) of the \textit{Declaration} provides as follows:
"In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."
\end{itemize}
of Rights. This is not to say that the differences in their formulations do not have semantic
csequences, but only that there is a certain amount that can be said about the principle
generally. It is thus only when I specifically examine the differences between the formulations
that I use them to refer to their particular jurisdictional contexts only. Also, I use the term
“constitutional” to refer not only to the systems of Canada and South Africa, but also to the
operation of the European Convention, even though technically it “lies in the realm of
international not constitutional law.”

When discussing the constitutional criteria for limitations on rights, I use the terms “formal” and
“substantive” justifiability somewhat crudely, to refer respectively to the legality requirement,
and the requirement that limitations on rights be “reasonable . . . [and] demonstrably justified in
a free and democratic society”, or its equivalent. I do not, by this usage, wish to give the
impression that the legality requirement is comprised of purely formal elements. In fact, courts
have, inconsistently, interpreted the legality principle as being constituted by both substantive
and formal elements. Nor are the terms “formal” and “substantive” used hierarchically to
undermine the significance of the legality requirement. I shall on occasion use the discourse of
form and substance merely to distinguish the various stages of limitations analysis, or to analyse

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13 Section 36(1) of the 1996 Constitution provides as follows:
“The rights in the Bill of Rights may be limited only in terms of law of general application to the extent
that the limitation is reasonable and justifiable in an open and democratic society based on human dignity,
equality and freedom, taking into account all relevant factors, including -
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.”

14 M. Shapiro, “The Success of Judicial Review” in Constitutional Dialogues in Comparative Perspective
(New York: St. Martin’s Press, 1999) at 201.
what I perceive to be the basis of particular judicial interpretations of the limitations provisions.

Lastly, when discussing the parties to a constitutional challenge based on the alleged infringement of a fundamental right, I generally refer to the claimant as the rights-holder, and to the respondent as the government. I do this for the sake of convenience and consistency, fully aware that the claimant or applicant in a constitutional rights matter is not always the rights-holder, and also that the respondent is not always an organ of government, especially in systems in which the constitution operates between private parties as well as vertically.

1.3 HISTORICAL BACKGROUND

The principle of legality as a prerequisite for the limitation of human rights is not a post-war legal development. A considerable number of older domestic constitutional instruments provided for a requirement that limits on rights be authorised by law,¹⁵ and the principles underlying the provision, such as the rule of law, have ancient origins¹⁶ and are foundational to most democratic states, whether human rights are explicitly protected within the constitutional structure or not. The content and meaning of the rule of law have been debated ever since the phrase was coined. The objective of minimising arbitrariness and executive discretion animates the rule of law, according to A.V. Dicey, frequently cited on the meaning of the principle as it

¹⁵ See Garibaldi, supra note 10 at 511 note 12. Notable amongst the constitutional items on his list is the French Declaration of the Rights of Man and of the Citizen, art. 4: "... [T]he exercise of the natural rights of every man has no other limit than those which are necessary to secure to every other man the free exercise of the same rights; and these limits are determinable only by the law" (1789).

¹⁶ Allen, supra note 9, cites Aristotle, Politics III: "The rule of law is preferable to that of any individual."
stood at the time of his writing, in the 1870s, and even today though not without criticism. That objective, as will be seen, is widely acknowledged to be captured in the notion of a requirement of legality in the limitation of rights. It is beyond the scope of this project to attempt even to summarise debates over the meaning of the rule of law, and I will limit myself to analysis of judicial interpretation of the principle in the relevant jurisdictions. That the rule of law underlies the notion of legality emerges both from the concerns identified by delegates to the post-war convention-making process, and from judicial pronouncements on the meaning of legality in limitation of rights.

The French Declaration of the Rights of Man and of the Citizen refers to “the natural rights of every man,” and goes on to prescribe that these may be limited only by law, and only on certain grounds, thus implying that the rights were not created by law but existed independently of its vagaries. The notion of rights as pre-legal was shared by Sir William Blackstone, writing twenty years earlier in England. Blackstone characterised rights as natural in the sense of God-given, but went on to say that on entering society, people give up a part of their natural liberty in the form of obedience to legal limits thereon, which are necessary restraints in the ordering of communal life for the general advantage and have the consequence of maximising civil liberty. These limits should be supplied by human laws devised by parliament, and not be at the whim or even, it appears, the reasoned calculation of executive officials, who may be arbitrary or


discriminatory in their formulation or application of such limitations. The benefits of restraints formulated by parliament rather than the executive include publicity and thus accessibility; permanence and thus unchangeability of legal rules except by parliamentary amendment, which would entail the consent of the people; and general applicability of these laws, affording similar protection of civil liberties to all subjects and judicial review of their administration.

It appears thus that the rules, of law and, consequently, of legality, were attempting initially to solve or minimise the problem of arbitrary executive law-making by asserting the supremacy of parliament and subjecting the exercise of executive authority to its processes. As a corollary, however, they were also attempting to constrain the possibility of a tyrannical parliament which may ride roughshod over individual rights.¹⁹ The tension between these twin objectives in relation to the legislature - empowerment and constraint - are perceptible to this day in the judicial treatment of the requirement of legality.

The idea that rights, whether their source be divine, natural or political, may be limited for certain specified causes only, and in a specific manner, has thus a rich history, though the details of its application and the concerns which motivate its gradual refinement, have shifted over time. I will go on to examine more closely the factors animating the inclusion of an express legality requirement in the limitations provision of rights-protecting instruments during the post-war era. I do this, where feasible, through brief examination of concerns which were articulated during the process of drafting these documents, and under no illusions that the reports of

¹⁹ See L.C. Blaau, "The Rechtsstaat idea compared with the rule of law as a paradigm for protecting rights" (1990) 107 S.A.L.J. 76 at 90.
drafting proceedings, and commentary thereon, give a complete or even adequate picture of the circumstances surrounding the creation thereof. Rather, I do this in order to try to identify the principal concerns or perceived problems which the legality provision was designed to address, to get some sense of the forces influencing the drafters' choices, and in order to be able to compare, with hindsight, their objectives and the actual application of the provision by courts. This is not an appeal for adherence to original intent, but an acknowledgement that the drafting history may be a revealing element of a contextual, purposive approach to constitutional discussion and interpretation.

1.3.1 The *Universal Declaration of Human Rights*

Although many pre-WWII constitutional rights documents contained a requirement that limitations on rights be authorised by law,\(^\text{20}\) that requirement was not included in the early drafts of the general limitations provision of the *Universal Declaration*. The suggestion that all restrictions on rights should be subject to a principle of legality was first raised in December 1947 by the Uruguayan delegation to the Commission on Human Rights, but it was rejected and then dropped, and raised again by the same delegation almost a year later before the General Assembly's Third Committee.\(^\text{21}\) The reasons given by the Uruguayan delegate, Mr. Jiménez de

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\(^{20}\) *Supra* note 15. Apart from the French Declaration, Garibaldi, *supra* note 10, refers to the Constitution of China (1946), Turkey (1924), Albania (1946), Argentina (1853), Belgium (1831), Bolivia (1938), Brazil (1946), Chile (1925), Costa Rica (1871), Cuba (1940), Czechoslovakia (1920), Denmark (1915), Dominican Republic (1942), Ecuador (1946), Guatemala (1945), Haiti (1946), Honduras (1936), Mexico (1917), Nicaragua (1939), Panama (1946), Paraguay (1940), Peru (1933), El Salvador (1886), Uruguay (1934), Venezuela (1936); all of these were in force at 1947.

\(^{21}\) At that stage the draft Article read as follows: "In the exercise of his rights everyone shall be subject only to such limitations as are necessary to secure due recognition and respect for the rights of others and the requirements of morality, public order and general welfare in a democratic society." U.N. Doc. E/800, at 1 (1948).
Aréchaga, for the proposed amendment which would have subjected the provision to a requirement that limitations on rights be prescribed by law, can be summarised as follows:

(1) fundamental rights can only be curtailed by law, and such laws can only be passed when required on the grounds of morality, public order and general welfare in a democratic society;

(2) the proposed legality requirement will protect personal liberty, insofar as the support of public opinion would be needed to limit human rights; it would always be easier for a government to close down one newspaper than to have a general law censoring the press, and the latter, which would be required by the legality principle, would arouse a much greater reaction among the people of the country concerned;

(3) the unamended text is not sufficiently strong; it should clarify that human rights can only be restricted for certain specific reasons, and that while it is necessary to have a police force to maintain public order, police powers can only be exercised in conformity with the laws of the country;

(4) if faithful application of the declaration of human rights is to be guaranteed, limitations to be set by public authorities can only be set in accordance with pre-established standards; people would then have the guarantee that they would be governed according to rules, and not according to the whim of their rulers.

(5) the principle of legality is deeply rooted in the traditions of French and United States law and is incorporated in all the constitutions of the Latin American countries.\(^{22}\)

\(^{22}\) Garibaldi, supra note 10 at 513-5, drawing from the Summary Records of the Third Committee.
Drawing from Mr. de Aréchaga’s reasons, the Uruguayan proposal is that limitations on rights ought to be (1) on specified substantive grounds only; (2) general in their application; (3) formally legally structured; and (4) constrained by legal standards if effected by means of discretionary authority. The Uruguayan proposal was not met with unqualified praise. Critics thereof claimed firstly that it would not prevent the enactment of tyrannical laws that could annihilate human rights, and secondly that it would exclude from the provision the concept of limitations on the exercise of individual rights through moral force, in that it would subject the concepts of morality and the rights of others to the prescriptions of the law and thereby bar society from imposing justifiable limitations by means other than laws.  

But these criticisms were insufficient to outweigh the perceived merits of the amendment, and it was adopted by the Third Committee by twenty-one votes to fifteen, with seven abstentions, the nays cast notably by common law countries out of concern that the requirement would be violated by common law restrictions on rights. This has turned out to be a needless reservation, as all the relevant jurisdictions have decided unequivocally that the provision covers common law as well as statute law.

This brief summary of some aspects of a legality requirement in limitation of rights, which were raised in relation to the draft *Universal Declaration*, reveals tensions inherent in the possibilities

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23 *Ibid.* at 516-519. Garibaldi suggests that the purpose of this criticism was to set up some objective standards for restrictions, which would be removed from the domain of legislative caprice. But, as he points out, this would undoubtedly result in additional limitations on human rights, not stricter qualifications on the restricting power of states.

offered by the inclusion of such a principle. Delegates expected too much of the provision: that it could, if properly drafted, capture the idea that tyrannical or oppressive law was unacceptable; and they expected too little: that it demanded only formal compliance with a prescribed procedure for legislative enactment and thus failed to assess the legislative performance on a qualitative scale. It appears that certain critics of the provision were cynical about the capacity of the law to be morally forceful, and hoped that some sense of public morality could be adopted as a counter-balance to individual rights. To constrain the executive would mean to intensify the legislative role, but the legislature could not be trusted to decide for itself how and why it would restrict rights; the public - as voters and as rights-holders - should be involved in or capable of challenging those decisions.

1.3.2 The International Convention for Civil and Political Rights and the International Convention for Economic, Social and Cultural Rights

The drafting histories of the ICCPR, and the ICESCR, are somewhat different from that of the Universal Declaration. The general limitations provision that was finally adopted for the ICESCR emerged late in the process, while the ICCPR retained its specific limitations provisions throughout. The drafting process spanned almost twenty years, thus there was a multiplicity of limitations clauses proposed, and formulations of the legality principle within them. Formulations and substantive content of the legality principle were incidental to the definitions of the rights themselves, and subsumed within the debates about those rights.\(^{25}\) However, early discussions about a general limitations clause, which were prompted by the

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\(^{25}\) Garibaldi, supra note 10 at 529-39.
United States delegation but not decided on by the Drafting Committee, "... provided a common core of understanding [that references to the law in particular limitations clauses were forms of the principle of legality] from which the delegates proceeded into subtler distinctions."26 The draft approved at the sixth session of the Commission on Human Rights contained eleven references to the principle of legality, within definitions of particular rights, articulated in almost as many different formulations.

It appears that the drafters of the Covenants did not believe that the variations in formulation of the legality principle were irrelevant to their meaning. There seems to have been general agreement that the term "prescribed by law" had a narrower meaning than "pursuant to law".27 The Lebanese delegate, Mr. Malik, was concerned that the latter "might prove unduly broad", and added: "... the limitations to the exercise of the right of assembly should be prescribed by the law; authorities should not be free to impose restrictions arbitrarily". The United Kingdom delegate, Mr. Hoare, said that the French "pursuant to law" was "... wider than, and therefore preferable to, the original text. It would cover cases that should be dealt with through administrative or executive action which was lawfully taken under the general powers vested in the competent authority." The French delegate, Mr. Rene Cassin, on the other hand, criticised the "prescribed by law" formulation as being too narrow, and said that "... the French proposal to substitute 'in pursuance of the law' took discretionary powers into consideration, involved less restriction on the literal provisions of written law and allowed for such important factors as customs, accepted usage and tradition." Ultimately the French formulation, "in pursuance of the

26 Ibid. at 533.
27 Ibid. at 534-39.
law," was adopted in respect of the freedom of assembly, though "prescribed by law" was retained, despite criticism, in respect of the freedom of association. It appears from these discussions that the delegates' principal concern was to strike an appropriate balance between the need for executive efficiency, flexibility and discretion in the exercise of its powers, and the need to constrain the executive and minimise arbitrariness and discrimination in the application of laws.

A proposed requirement that laws limiting rights be "general," caused considerable consternation and debate too. Garibaldi summarises the concerns, which were expressed in relation to the draft article 12 defining freedom of movement, as follows: that the requirement that the right be limited only by general law would prevent the delegation by parliament to the executive of restricting powers by mere "norms of competence" (empowering legislation which permits more or less unfettered discretion in decision-making); that it would force restrictions to affect a larger number of individuals than would otherwise be the case; that its meaning was unclear; and that it would preclude the enactment of legislation applicable only to certain categories of people, such as minors. The principal fear about generality seems to have been that expressed by Mrs. Ross of Denmark, who believed it would prevent the executive branch from being empowered by a law or under the Constitution to restrict the exercise of rights. She said measures taken in such circumstances should be lawful, even if not provided for specifically in a law. Mr. Fayat of Belgium disagreed that this should be permissible, and supported the proposed generality requirement, saying,

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28  Ibid. at 540-541.
A democratic system rested on the separation and balance of powers. The legislative power was derived from the people, which expressed its will through its representatives. The rights recognized in article 12 were fundamental rights of the individual. Therefore, the individuals themselves and, consequently the legislative power, should apply reasonable restrictions to those rights. Such restrictions should not be left to the discretion of the executive.

It seems thus that a requirement of generality was perceived as a requirement that the legislature rather than the executive limit rights, though the important issue of whether executive restrictions on rights were acceptable if authorised by legislation, or were wholly unacceptable, is not clarified by the Belgian position. There were other less crucial objections to the generality element, and the word "general" was eventually dropped from the draft, in favour of the formulation "restrictions ... which are provided by law". Mr. Fayat remarked at the time that "[t]here appeared to be general agreement that the restrictions should be based on legislative acts." Garibaldi asks whether the drafting change signals a change in the idea conveyed by the expression, but concludes that no change in meaning was intended, and that confusion over the meaning of the term, and a desire for uniformity, were the overriding factors in its deletion.29 He concludes, on a textual interpretation of the provisions, that the principle of legality expressed in the various limitations clauses in the ICCPR, means that restrictions on rights must emanate from something more general than individual orders (such as court orders), but something more determinative of the content of a decision than mere norms of competence, which are legislative provisions conferring unfettered discretion on the executive.

The exclusion of the express criterion of generality from the ICCPR has not prevented the

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29 Ibid. at 544-545.
articulation of an interpretive principle of generality of laws. Principle 15 of the “Siracusa Principles on the Limitation and Derogation provisions in the ICCPR”, agreed in 1984 by a group of 31 distinguished experts in international law convened by the International Commission of Jurists and other bodies, provides as follows in relation to the term “prescribed by law”: “No limitation on the exercise of human rights shall be made unless provided for by national law of general application which is consistent with the Covenant and is in force at the time the limitation is applied.”

Also, despite the focus in the debates held during the drafting process on the differences in meaning between the various phrases signifying the legality requirement, it is now generally acknowledged that they are all to be interpreted in the same way.

1.3.3 The European Convention for the Protection of Human Rights and Freedoms

The “Travaux Préparatoires” of the ECHR reveal little discussion on the specific question of the most appropriate formulation for the principle of legality, let alone on whether it should be included in the first place. The preliminary draft Convention, adopted unanimously in May 1948 by the legal committee set up by the so-called European Movement and which has been


31 A.C. Kiss, “Commentary by the Rapporteur on the Limitations Provisions” (1985) 7 Hum. Rts. Q. 15 at 18, explains as follows: “Although different terms are used in the different provisions of the Covenant (“prescribed by law,” “provided by law,” “established by law,” and “in conformity with law”), it was accepted that they have the same meaning. This is particularly supported by the French text of the Covenant as no such differences exist therein.”


33 Its full name was the International Committee of Movements for European Unity. It initiated plans for a congress which was held at The Hague from 7-10 May 1948, and which ended with the unanimous adoption of the famous Hague Resolution, from which emerged the Council of Europe. See P.-H. Teitgen, “Introduction to the European Convention on Human Rights” in R. St. J. MacDonald, F.
described as the document which "must be regarded as the actual origin of the European
guarantee of those rights," contains a general limitations provision which sets out the criteria for
restriction of rights and includes a requirement of legality.\textsuperscript{34} So does the Council of Europe's
Consultative Assembly's Recommendations to the Committee of Ministers, agreed 8 September
1949, upon which subsequent detailed drafts of the Convention were based.\textsuperscript{35} The drafters' model was the Universal Declaration, but there was a keen awareness of the intended difference in status (the ECHR would create binding obligations). The eventual use of specific rather than general limitations provisions in the ECHR has been attributed to this difference.\textsuperscript{36} The requirement of legality appears to have been taken for granted as an essential element of limitations on rights, and little confusion or dispute about its purpose or meaning arose during the ECHR deliberations, though at the same time little explicit consideration of its significance or implications seems to have been made. Ultimately the formulation "as is in accordance with the law" was adopted to qualify article 8 of the Convention, the right to respect for private and family life, and the formulation "prescribed by law" was used to qualify articles 9, 10 and 11,

\begin{itemize}
\item "Article 3. The rights specified in Articles 1 and 2 shall be subject only to such limitations as are in conformity with the general principles of law recognized by civilized nations and as are prescribed by law for:
\begin{enumerate}
\item Protecting the legal rights of others;
\item Meeting the just requirements of morality, public order (including the safety of the community), and the general welfare."
\item "Article 6. In the exercise of these rights, and in the enjoyment of the freedoms guaranteed by the Convention, no limitations shall be imposed except those established by the law, with the sole object of ensuring the recognition and respect for the rights and freedoms of others, or with the purpose of satisfying the just requirements of public morality, order and security in a democratic society."
\item W.A. Schabas, International Human Rights Law and the Canadian Charter (Toronto: Carswell, 1996) at 111. For discussion of the intended differences in effect between the Universal Declaration and the European Convention, see for example the statements of delegates to the First Session of the Consultative Assembly, Travaux Préparatoires, supra note 32, Vol. 1 at 38-84.
\end{itemize}
respectively freedom of thought, conscience and religion, freedom of expression and freedom of assembly and association. Subsequent protocols to the Convention include further formulations of a principle of legality, within the definitions of the new rights. It is not clear from the preparatory materials that any nuances of meaning were intended by the different formulations, and the French “prévue par la loi” was used for both the original expressions of the principle. Not surprisingly, the Court has interpreted them to have identical purposes.

1.3.4 The German Basic Law

The “general application” aspect of the legality principle is entrenched in article 19(1) of the German Basic Law, along with a requirement that rights be limited expressly, but that article does not purport to comprehensively govern restrictions on rights. Most of the fundamental rights listed have their own specific limitation provisions, setting out certain other criteria for permissible restrictions. Many of these use the language of legality, in that they limit restrictions on rights to those which operate “pursuant to law” (article 2(2)), “by the provisions of the general laws” (article 5(2)), “by or pursuant to a law” (article 8(2), 11(2), 12(1)),

37 See the right to peaceful enjoyment of possessions in article 1, protocol 1, the right to liberty of movement and freedom to choose one’s residence in article 2, protocol 4, procedural safeguards relating to expulsion of aliens in article 1, protocol 7, the right of appeal in criminal matters in article 2 protocol 7, and death penalty in time of war in article 2, protocol 6.


39 I have unfortunately had access only to a rather limited range of secondary materials relating to the German drafting history, and thus focus my comments on the structure of the Basic Law and the concerns said to be addressed thereby, and even those only insofar as they may impact on the meaning of the provisions entrenching a principle of legality.

40 Article 19(1) provides as follows:

“Insofar as a basic right may, under this Basic Law, be restricted by or pursuant to a law, such law must apply generally and not solely to an individual case. Furthermore, such law must name the basic right, indicating the article concerned.”
"prescribed by law" (article 13(2)). These internal legality requirements, insofar as they are not further qualified by substantive requirements such as necessity in a democratic society, or are qualified by certain specified public goals, appear to operate differently from s. 1 of the Charter or other general limitations provisions. They constitute part of the definition of the right itself, and appear to clear the way for legislative restriction on the specified substantive grounds, or on other grounds if none are specified, as long as that restriction is contained in a law, and does not conflict impermissibly with other rights. In other words, they expressly permit the rights to be defined further by the legislature, subject to formal limits on delegability. 

Despite the seemingly permissive authorisation to restrict rights, commentators note that the Basic Law, expressly and through judicial interpretation of its underlying premises, in fact provides considerable protection of rights. Article 19 requires that laws limiting rights be general, expressly specify a right that is limited thereby, and not impinge upon the essential content of the right. Also, the Constitutional Court has given substance to article 20 of the

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41 See Garibaldi, supra note 10 at 507 note 8 for a similar statement of this semantic difference, in relation to the International Bill of Rights.

42 See note 50 infra.

43 The obligation to "cite" the right which is being limited has been interpreted fairly restrictively by the Federal Constitutional Court. Pre-constitutional statutes need not satisfy the requirement, nor need post-constitutional statutes that incorporate limitations on fundamental rights in substantially the same terms as existing limitations. In this regard see BVerfG, 1956-05-25, case no. 1 BvR 190/55, BVerfGE 5, 13 at 16 and BVerfG, 1973-05-30, case no. 2 BvL 4/73, BVerfGE 35, 185 at 192. Also, constitutional jurisprudence has limited the ambit of the "citation" requirement by differentiating between legislative acts that define the scope of a fundamental right, for example by making express its inherent limits, and legislative acts that limit the scope of application as defined in the Basic Law itself. It is only in relation to the latter that the legislature is required to "cite" the right it restricts. Thus the requirement has been held inapplicable to articles 2(1), 5(1), 12(1) and 14(1) of the Basic Law.

44 "Article 20 (Basic Principles of state order; right to resist)
(1) The Federal Republic of Germany is a democratic and social federal state.
(2) All state authority emanates from the people. It shall be exercised by the people through
Basic Law by means of its use of the Rechtsstaat concept, which has

... been held to embrace a pervasive principle of proportionality... The basic idea behind the proportionality principle is that, even when the legislature is specifically authorized to restrict basic rights, the restriction must be reasonable... The upshot is intensive scrutiny of the reasonableness of measures impinging upon the interests protected by the Bill of Rights, even when the legislature is expressly authorized to enact them.\textsuperscript{45}

The Basic Law was drafted under supervision of the Allied Powers as part of the process of rebuilding the country after the war. In January 1948 the Allies laid down conditions for approval of a German federal state, framed in general terms in the so-called Frankfurt Documents to include democracy, federalism and fundamental rights.\textsuperscript{46} A Parliamentary Council elected by the newly reestablished state parliaments worked from a draft which had been produced by constitutional experts from the Land, to finalise the Basic Law, which was ratified by the parliaments of over two-thirds of the Land and entered into force on 23 May 1949. It was intended to govern the Federal Republic of Germany for a transitional period, until national reunification, at which point a German constitution would be democratically adopted.\textsuperscript{47}

\begin{itemize}
  \item \textbf{3)} Legislation is subject to the constitutional order; the executive and the judiciary are bound by law and justice.
  \item \textbf{4)} All Germans have the right to resist any person or persons seeking to abolish this constitutional order, should no other remedy be possible.\textsuperscript{46}
\end{itemize}

\textsuperscript{45} D.P. Currie, \textit{The Constitution of the Federal Republic of Germany} (Chicago: University of Chicago Press, 1994) at 19-20. At 122, he describes the proportionality principle in more detail as follows: “No limitation of a basic right is valid unless it is calculated to promote a legitimate governmental purpose, is the least restrictive means of attaining that goal, and imposes a reasonable burden.” In other words, an Oakes-type test for proportionality has been extracted by the Court, setting boundaries for permissible restrictions on rights.

\textsuperscript{46} \textit{Ibid.} at 8-9.

There is no doubt that the weaknesses of the Weimar Constitution\(^48\) and the abuses of executive authority that were perpetrated during the Nazi regime\(^49\) served to focus the minds of the drafters, and were the primary motivators for many structural features of the Basic Law. Article 79(3), for example, prohibits the amendment of the foundational principles of the Basic Law, and there are various provisions which entrust extensive powers of review to the Constitutional Court. The Basic Law also creates restrictions on parliamentary delegation of law-making authority; article 20(3) provides that the legislature is bound by the constitutional order, while the executive and courts are bound by law, and article 80 permits federal legislation to empower certain specified federal executive officials to promulgate regulations, but requires that the content, purpose and extent of the authorisation be specified by the empowering legislation.\(^50\)

Currie notes that in the draft constitution prepared by experts in anticipation of the Parliamentary Council, article 101 provided explicitly "... that every exercise of public authority

\(^48\) See Currie, supra note 45 at 6-8: "Unable to muster a stable majority, the Reichstag delegated broad powers to the executive to issue regulations having the force of law, while others were issued without statutory authority on the basis of the broad emergency powers granted the Reichspräsident by the constitution itself... [Very troublesome] was the practice that came to be known as breaking through the constitution (Verfassungsdurchbrechung). Simply by passing an unconstitutional law by the requisite two-thirds vote, the legislature could depart from the Constitution - and often did - without explicitly amending it. The result was, among other things, that the Constitution could be altered entirely by accident and that no one could determine what the Constitution provided by reading it - a state of affairs scarcely compatible with the rule of law."

\(^49\) Ibid. at 7, note 52, referring to various “laws” which effectively abrogated the major features of the constitution itself, including that which set aside, for an indefinite period, a number of Bill of Rights provisions, and which authorised legislation by decree and without regard to most constitutional limitations.

\(^50\) Ibid. at 130-1 where Currie explains how the principle underlying this restriction on delegability has been applied more generally, to the Lander as well as to federal legislation, and to delegations other than regulations alone, by reference to the foundational principles of democracy, separation of powers and the rule of law. See also J. de Ville, "Interpretation of the general limitations clause in the chapter on fundamental rights" (1994) S.A. Public Law 287 at 293-298, in which he compares the obligations on the German legislature to specify the content, purpose and extent of an authorisation to the executive to make regulations or to exercise discretionary powers, with the approach taken in Canada and under the European Convention.
required a basis in law." The final version includes an implicit statement of the separation of powers in article 20(2), though the obligations of the legislature in relation to the empowerment of executive officials are less obvious than in the discarded draft, and Currie points out that the Constitutional Court has emphasised that there are many areas in which the Basic Law itself vests important policymaking authority in the executive. What is reserved to the legislature is basically the formulation of law.

Ultimately on reunification, certain amendments were made to the Basic Law, but these did not modify the essential features of the Basic Law or affect the fundamental structure of the political system.

The provision in article 19 of the Basic Law that limitations on rights must apply generally and not solely to an individual case has been credited with being the model for the South African requirement that limitations be made in terms of law of general application. Despite this, the South African Constitutional Court has not, as yet, looked to the German jurisprudence in its minimal exploration of the meaning of the provision, and one of the reasons for this may be the diffuseness of the German requirements for permissible limitations, arising as they do from the definitions of the rights themselves, and being supplemented by the criteria set out in article 19,

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51 Ibid. at 125 note 117. The word “law” is a translation of the term “Gesetz,” which, Currie says, is generally understood to require other branches of government to respect statutes constitutionally enacted (at 116).

52 Ibid. at 125 note 121.

53 Kommers, supra note 47 at 31.

and underlaid by the principles set out in article 20. Also, the requirement of general application in law-making, though not explicit in other comparable jurisdictions, has been interpreted by courts to be inherent in their systems, usually manifesting itself as a prohibition on so-called bills of attainder.\textsuperscript{55} It appears thus that the German generality requirement, although serving as a more direct model for South Africa than perhaps the legality formulations in the international rights-protection instruments referred to above, or the Canadian \textit{Charter}, fulfills partly at least the same purpose as their legality principles and may play a less influential role in interpretation of the South African provision than do the others.

1.3.5 \textbf{The Canadian Charter of Rights and Freedoms}

Unlike the limitations provisions of the \textit{ECHR}, the draft \textit{Charter} provisions designed to identify the criteria for restrictions on rights went through considerable changes during the long drafting process. The requirement that limitations on rights be “prescribed by law” appeared first in the initial drafts which formed part of the reports of the Constitutional Conference of the Prime Minister of Canada and the Premiers and Prime Ministers of the Provinces, which undertook a comprehensive review of the Constitution of Canada, commencing during 1968.\textsuperscript{56} It reappeared after the hearings of the Special Joint Committee on the Constitution, 1980-81, in the Proposed Resolution for a Joint Address to Her Majesty the Queen Respecting the Constitution of Canada,

\textsuperscript{55} \textit{Ibid.} at 12-28 and 12-29 and citations referred to therein.

as amended by the Committee,\textsuperscript{57} but was notably absent from intervening drafts.\textsuperscript{58} The limitations provision itself remained throughout, but the Government diluted its impact dramatically to obtain provincial support for the Charter project,\textsuperscript{59} and proposed the following formulation to the Joint Committee in October 1980: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government."\textsuperscript{60}

The above formulation was heavily criticised at the hearings of the Joint Committee, at which an enormous range and number of interest groups, rights organisations and constitutional experts testified as to the wishes of their constituencies. The deficiencies of the draft limitations clause were articulated possibly most influentially by R. Gordon L. Fairweather, Chief Commissioner of the Canadian Human Rights Commission, and Walter Tarnopolsky, representing the Canadian Civil Liberties Association.\textsuperscript{61} Mr. Fairweather based his critique on the failure of the

\textsuperscript{57} Moved in the House of Commons, February 17, 1981, by the Honourable Jean Chrétien, Minister of Justice; as reported in Bayefsky, \textit{ibid.} at 788.

\textsuperscript{58} For instance, the Final Report of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, 1972, (tabled in the House of Commons on March 16, 1972), contained a recommendation regarding the \textit{Victoria Charter} limitations formulation, which did not explicitly require that limitations be prescribed by law, but only that they be "reasonably justifiable in a democratic society in the interests of public safety, order, health or morals, or national security or of the rights and freedoms of others", that, "[i]n order to focus the principle of judicial interpretation more clearly, we would prefer to state any such qualification more rather than less generally." Bayefsky, \textit{ibid.} at 242.

\textsuperscript{59} L.E. Weinrib, "Canada's Rights Revolution: Paradigm Lost" (forthcoming) at 13 [hereinafter "Paradigm Lost"].

\textsuperscript{60} Proposed Resolution for Joint Address to Her Majesty the Queen Respecting the Constitution of Canada, Tabled in the House of Commons and the Senate, October 6, 1980; as reported in Bayefsky, \textit{supra} note 56 at 745-6.

\textsuperscript{61} Weinrib, "Paradigm Lost" \textit{supra} note 59 at 17-20.
government draft to live up to international norms, on its reluctance to signal a firm commitment to rights protection, and on the potential for discrimination which the draft created. Mr. Tarnopolsky was equally condemnatory, saying that the draft would permit virtually any limitation on a right, and would render meaningless the Charter’s claim to effect a constitutional democracy with judicial review of government action, by attempting to preserve the sovereignty of parliament. Also, the draft left out important elements of post-war limitations models, the requirement that such limits be “prescribed by law” and be “necessary for the purposes of a free and democratic society.” These criticisms appear to have greatly influenced the government’s revision of its draft, and ultimately the final version of s. 1 of the Charter, which includes an express legality requirement and substantive restrictions on the legislature’s authority to limit rights.

1.3.6 The South African Bill of Rights

The afterword to the transitional 1993 Constitution proclaims, in part, that it provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.

The denial of political rights to the majority of South Africans during the apartheid era, the discriminatory legislation promulgated by the sovereign, unrepresentative Parliament, the delegation by that Parliament of (sometimes) unfettered authority to executive officials to make decisions affecting fundamental rights, the ouster of judicial supervision of executive conduct, the deliberate and brutal suppression of political dissent, and implementation of oppressive laws
whose principal objective was to maintain a system of white supremacy,62 were all characteristics of the legal system which was to be reformed under the 1993, and thereafter the 1996, Constitution. That the apartheid regime constituted a fine example of the rule of law in breach is not contested by commentators, and although this legacy does not appear explicitly from all the materials documenting the drafting history, it was undoubtedly at the heart of the reasoning which underlies the texts that were ultimately adopted. As stated above, this appears from the constitutional documents themselves.63

In relation to the legality requirement if nothing else, the drafting of the limitations provision for the South African Bill of Rights was much less fraught than the Canadian experience, and it could even be said uncontested. The draft bills of rights of the major players in the constitutional negotiating process contained general limitations provisions64 which on the whole were similar to the provision that became s. 33(1) of the 1993 Constitution, which in turn served as the basis for s. 36 of the 1996 Constitution. The Technical Committee on Fundamental Rights, consisting of five constitutional experts appointed by the delegates to the Multi-Party Negotiating Process65 to advise on and prepare a draft Bill of Rights which would form part of

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63 See for example the preambles to the 1993 and 1996 Constitutions, s. 1 of the 1996 Constitution entrenching foundational values of the Republic of South Africa, and the afterword to the 1993 Constitution, titled “National Unity and Reconciliation.”

64 L. Du Plessis and H. Corder, Understanding South Africa’s Transitional Bill of Rights (Kenwyn: Juta, 1994) at 123.

the transitional 1993 Constitution, submitted various progress reports summarising their deliberations, from which it is possible to glean in very general terms the tenor of their drafting concerns.

The Technical Committee’s Third Progress Report, dated 28 May 1993, discusses limitations on rights in more detail than the other Reports. The Report notes the general acceptance of the non-absoluteness of (most) rights, which may be restricted at least in the cause of respect for the rights of others. The Committee’s view was that formulations of rights should include the terms of permissible restrictions thereon, so as not to “run the risk of irrelevance through lack of enforceability.”\(^6\) The Committee regarded the legislature as the appropriate body to lay down the circumstances (in law) in which limitation may occur, but the judiciary as fit to test the legislative measure against the constitutional statement of permissible limitation, ensuring “close supervision” of the power to restrict rights. The Committee considered the relative merits of a general limitation provision applicable to all rights and freedoms, a series of specific limitation provisions qualifying each right, and a combination of those two. It stated its preference for the third option, which would permit a common standard, an understanding of which could be rapidly developed by legislature and judiciary alike, with specific limitations to allow the flexibility necessary for proper curtailment of certain rights. Finally, the Committee asserted that limitations on rights, being justiciable by the courts, should be elaborated expressly so as to provide fairly precise guidelines which would bind the judges, in order to alleviate the dangers arising from the independence and relative lack of democratic accountability of the

\(^6\) Technical Committee on Fundamental Rights Third Progress Report, 28 May 1993, at para 5.1.2.
judiciary. The Committee suggested that such guidelines may be even more appropriate in a system where judicial review was a novelty.

The post-war constitutions and rights-protecting instruments which served as models for the South African *Bill of Rights* all contain limitations provisions, with some form of the legality principle as a standard element. These include the *Universal Declaration*, the *ICCPR* and the *ICESCR*, the German *Basic Law*, the *Canadian Charter* and the Constitution of the Republic of Namibia. The final South African formulation, "in terms of law of general application," is not to be found in exactly those terms in any of the influential precedential documents, but its sense was certainly drawn from them. Earlier drafts of s. 36 of the 1996 Constitution used the formulation "by or pursuant to (a) law of general application", but this was changed during March 1996 to the final version. The expert advisors to the Constitutional Assembly were of the view that the phrase "in terms of" law, was appropriate because its meaning covered the ground of both (the less expansive) "by" law and (the wider) "under/pursuant to" law. Whether any of these formulations would have resulted in a narrower or broader judicial interpretation of the requirement is debatable, especially given the courts' purposive and comparative approaches to constitutional interpretation, but at least we have some indication of the objective of the ultimate choice.

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1.4 CONCLUDING OBSERVATIONS

It is illuminating to look at the drafting history of particular provisions, firstly as an aid to understanding what the intended purpose of the provision was at the time of its inclusion in a constitutional document, in other words as a window on the problem the provision was designed to address, and secondly in relation to the judicial pronouncements which are consequent on its enactment into law. What strikes me about the post-war drafting evidence, to the extent that I have been able to ascertain its general quality, is the virtual absence of any invocation of the mantra of "the rule of law" in those precise terms, in contrast to courts which have subsequently almost invariably linked the legality requirement to that principle. Despite this absence, which is surprising because it seems both the most incontroversial and the most fundamental objective of the requirement, many of the more specific concerns addressed by the drafters are familiar elements of the rule of law principle. Noticeable too is the fairly abstract and general nature of the debate, which rarely engages with particular possible applications of legality. Where they are discussed, it is usually in relation to disagreement about the nuances of meaning evoked by particular textual formulations of the legality principle. It is interesting therefore that judicial interpretations of the provisions have expressly de-emphasised the textual implications of particular versions, and ignored disputes about the intended consequences of subtle drafting changes which were made at the time of constitutional negotiation and enactment.

Having said that the debates at the drafting stage appear somewhat indeterminate, I think that the issues addressed by the provision do emerge, in a general way, from the discussions around their inclusion in the constitutional documents. The question of where lies law-making authority and to what extent the legislature is free to delegate or allocate that power to the executive, the
judiciary or to administrative officials; the role of judge-made common law in the limitation of rights; the formal requirements for enactment and publication of legal rules, if they are to limit rights; the permissible extent of conferral of discretion on administrative or executive officials by the legislature, and the detail required in relation to the criteria for exercise of such discretion; the manner in which arbitrariness and discrimination in executive action and of enforcement discretion may be minimised; the extent of precision and clarity required of legislation in order that people may plan their conduct accordingly yet government operations not be obstructed; the role of popular opinion in the law-making process and the maximisation of legitimacy; all these matters arise directly or indirectly from the drafting history, though the debates about formulation of the requirement do not suggest the precise terms for resolution of the questions posed. It is, of course, not the function of the drafting delegates to solve potential application problems in the absence of the forced discipline of a particular case; that is left for those whose job it is to interpret the rights-protecting instruments.
CHAPTER TWO

RIGHTS AND LIMITATIONS: THE TWO-STAGE PROCESS

2.1 RIGHTS

The entrenchment of human rights, with the status of supreme law, has the effect of transforming a political system of parliamentary supremacy, to a constitutional democracy. It is not that the civil liberties explicitly protected by a bill of rights or equivalent did not form part of the politico-legal system which existed before their entrenchment, or that the legislature in such a system possessed unlimited power to restrict or abolish those rights, or that the courts were powerless to protect individuals from encroachment on their civil liberties. But constitutional entrenchment of particular rights and freedoms has the consequence of putting them beyond the ordinary reach of representative government, and limiting the authority of parliament to restrict such rights to the exclusive, constitutionally entrenched grounds for and manner of restriction provided in the constitutional instrument. Constitutional entrenchment ordinarily provides also for independent judicial scrutiny of legislative and executive activity, and for invalidation of conduct which impermissibly encroaches on human rights, no matter how deliberately and explicitly this has been done.

The entrenchment of constitutional rights signals their primacy in the politico-legal system. It constitutes an acknowledgement of the inadequacies of majoritarian government, even if these are potential rather than actual. It tries to address the possibility that the interests of marginalised groups will need protection beyond that offered by the democratic process, and
signifies commitment to the chosen constitutional values above a commitment to the authority of representative government to decide what is best for all people. Professor Lorraine Weinrib says in relation to this “supremacy of rights” model of constitution-making, that,

Underlying this model is respect for the equal dignity and autonomy of each member of the community. The individual must be able to espouse, follow, and modify his or her own conception of the good. Whatever the sources and trajectories of these commitments, the aim of collective political life is to create and preserve a structure in which each of us, to an equal extent, may pursue and act upon these commitments, either alone or in a given or chosen community. In interactions with the state, each individual is autonomous, equal to all others, an end and not a means to others’ ends.

This sense of the community as the framework for social organisation, rather than as a force opposing the individual, sets the tone for the constitutional articulation of government’s role in policy-making and implementation, within the bounds set by the limitations formulae. The criteria for restriction of rights are explicit and exclusive. They serve to ground the recognition that rights are not absolute in the values underlying the rights guarantees, permitting limitations on rights only when they are emanations of the deeper principles upon which the constitutional state is based.

The European Court of Human Rights, and both the Canadian and South African courts, make a clear analytical distinction between rights and limitations analysis. This two-stage method of

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69 The ECHR, as pointed out above in the text accompanying note 37, does not contain a single limitations provision applicable to all the entrenched rights. However, many of the rights are specifically qualified, some of which in terms which include a formulation of the legality principle. The jurisprudence of the European Court of Human Rights is relevant for my purposes, because of its interpretation of those provisions to require a two-stage method of analysis, and because the other relevant jurisdictions inevitably refer to its pronouncements on the meaning of the “prescribed by law” requirement.
evaluation of a rights claim is a consequence, they say, of the structure of the rights-protecting instrument, the *Convention, Charter or Bill of Rights* as the case may be.\(^{70}\) The first stage of the enquiry relates to the entrenched right, alleged to have been breached by (in most cases) an organ of government. The purpose of this stage of the enquiry is to determine whether the impugned rule or conduct constitutes an interference with the right such that the onus shifts to the government to justify its action. The enquiry thus involves definition of the scope of the rights guarantee, at least insofar as necessary, and scrutiny of the purpose and/or effect of the rule or conduct which is challenged and its impact on the rights-holder, in relation to the right. If the court finds that the protection offered by the right or freedom has been impaired by the measure, it proceeds to the second stage of the enquiry.

Because rights-protecting instruments with discrete rights and limitations provisions permit the determination of the validity of governmental rules or conduct to proceed in distinct stages, the finding that a particular measure interferes with a right is a preliminary determination only. The interpretation of rights-protecting instruments is of course a very different exercise from the interpretation of ordinary legislation, and even differs in some important ways from interpretation of constitutions which require a "single stage approach" to rights adjudication, such as the United States Constitution and the Hong Kong Bill of Rights. In jurisdictions applying a two-stage method, the implication of the distinction between rights and limitations, acknowledged by the courts, is that because the limitations provision constitutes the exclusive

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manner in and grounds upon which the fundamental rights may be restricted by the government, the rights themselves should be interpreted broadly and generously so as to permit the individual the full benefit of the constitutional guarantees, and to minimise the imposition of unguided judicial constraints thereon.\textsuperscript{71} This is feasible because the government will have its chance to demonstrate the justifiability of the restriction at the second stage. The breadth and generosity of the definition of a right must be tempered by the complementary and, in fact, overriding principle of purposive interpretation of rights.\textsuperscript{72} The Canadian, European and South African courts have all endorsed a purposive approach to constitutional interpretation, on the basis that the protection of rights is an obligation that will be continually developing, a “living tree” that should be nurtured by the courts if its objects are to be capable of realisation.\textsuperscript{73}

A conceptual consequence of the two-stage process should be that the judicial definition of the scope of the right alleged to have been breached, will be unaffected by the (subsequent) ultimate

\textsuperscript{71} The European Court of Human Rights rejected the notion of “implied limitations” which, it was argued by the respondent government, should be read into the definition of a right, and which went beyond those specified by the express limitations provisions, in the case of Golder, \textit{ibid.} at para 44. In Canada, a generous rather than a legalistic interpretation of entrenched rights was embraced in \textit{Hunter v. Southam}, \textit{ibid.} at 155-157, and confirmed in \textit{Big M Drug Mart}, \textit{ibid.} at 344. For South Africa, see \textit{Zuma, ibid.}; \textit{Makwanyane, ibid.} at paras 100-101; the logic of the two-stage approach was expanded upon in \textit{Ferreira v. Levin NO and Others}, 1996 (1) S.A. 984 (CC) by Ackermann J at para 82, but see Chaskalson P at paras 181-4 [hereinafter \textit{Ferreira}].

\textsuperscript{72} See the reasons of O’Regan J in \textit{Makwanyane, ibid.} at para 325: “In giving meaning to [the right to life], we must seek the purpose for which it was included in the Constitution. This purposive or teleological approach to the interpretation of rights may at times require a generous meaning to be given to provision of [the Bill of Rights], and at other times a narrower or specific meaning.”


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outcome of the claim, in other words by the importance and appropriateness of the objectives and means of the impugned measure. The focus at the first stage should be on the rights-holder’s claim and the effect of the measure on his or her ability to exercise the right at issue, which of course involves definition of the extent of the right. The idea is that the judge should define the scope of the right to the extent necessary, in order to decide whether the measure constitutes an interference with the right, without having in mind and without reference to the factors which constitute the second stage of the enquiry, and thus the eventual outcome. In other words, the question of whether the court will ultimately uphold or invalidate the impugned rule or conduct, and questions about the source, form and content of legislation or conduct, should not influence the definitional aspect of the initial enquiry.74

This means that the first stage of analysis - definition of the scope of a right - should be consistent over time. Judicial interpretation of the scope and content of rights should have persisting value and be meaningfully sustained by the courts. This is in contrast to the second - limitations - stage of the enquiry, where the onus is on government to argue, and support its argument with evidence and “legislative facts”,75 that the specific limitation is justified in the circumstances. The persuasiveness and content of the state’s argument is dependent on the particular case it makes for justification, though the criteria with which it must comply remain the same and thus its mode of argument should be sustained from case to case. A right should

74 Depending on the way a right is framed, questions about form and source may affect the assessment of whether a right has been infringed; for instance, whether a measure interfering with a person’s liberty is regulated “in accordance with the principles of fundamental justice” (s. 7 of the Canadian Charter) or “in accordance with a procedure prescribed by law” (article 5 of the ECHR).

not be interpreted narrowly, or restrictively, because a restriction on it is compelling, or progressive, or emanates from prerogative power. I emphasise this seemingly obvious point about the two-stage method of analysis, because I think that although the linguistic structure of the post-war charter or bill of rights makes the two stages analytically easily distinguishable, it is difficult for real judges to practise the distinction, as it were, in all cases. Whether the remarkably clear distinction identified in the language and structure of the reasons given in constitutional cases, between the first and second stages of analysis, is sustained in their substance, is a matter provoking comment from commentators and occasionally judges. The fear that a strict or onerous interpretation of the requirement of legality may result in judges narrowing the scope of a right so as not to reach the limitations stage is not an absurd one.

2.2 LIMITATIONS

In the post-war rights-protecting instruments, the articulation of many of the rights is in absolute terms. Other rights are internally qualified, so as to exclude a particular possible application, or range of applications, of the right. Whether stated in absolute terms or internally qualified, rights which are entrenched in constitutional documents that include a general limitations provision may be restricted by the government in compliance with the requirements of such

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76 But see President of the Republic of South Africa and Another v. Hugo, 1997 (4) S.A. 1 (CC) at para 43 [hereinafter Hugo] in which the Court decided that the "nature of the power" is relevant to a determination of the unfairness of discrimination under s. 8 of the 1993 Constitution, the right to equality. The Court has interpreted the unfairness aspect of the guarantee against unfair discrimination as a qualification or internal limitation on the right, and the source of the restrictive conduct as affecting the finding of interference with a right. In other words, the scope of the right itself is such that it could provide a stronger or weaker protection depending on the source of the restriction.

77 See Woolman, supra note 54 at 12-29 note 3; Mokgoro J in Hugo, ibid. at para 104.
limitations provision. Assuming a preliminary finding that a government measure interferes with an entrenched right, the adjudicator must advance to the second stage of the enquiry, to assess whether the interference is nevertheless justified because it constitutes a permissible restriction of the right; if not, the rights claim will be upheld. At the second stage, and in the event that a prima facie infringement of a fundamental right has been found, the focus of the court's investigation shifts to the government, which bears an onus to establish the justifiability of its conduct.

The requirements of the limitations provision are cumulative. The respondent government has an obligation to demonstrate that the measure it has taken complies with every aspect of the provision. Failure to establish a single element should result in invalidation of the measure (or other remedy) by the court. The legality principle, enshrined in limitations provisions in terms such as “prescribed by law,” “by or pursuant to law of general application” or “in terms of law of general application,” is one of the requirements for a constitutionally permissible restriction on a fundamental right. It is sometimes referred to as a “threshold requirement,” or a “gatekeeper” to an investigation of substantive justifiability. Weinrib describes the legality principle as a “necessary precondition to the state’s effort to justify a policy that infringes a

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78 Where applicable, rights may also be restricted by requirements prescribed elsewhere in the constitution. The question also arises on occasion what the relationship between internal restrictions and those enacted in a general limitation provision are, and whether the terms of an internal limitation ever serve to exclude the applicability of a general limitation provision. I will not address these questions here.


80 See for example Sopinka J in Osborne v. Canada (Treasury Board), [1991] 2 S.C.R. 69 at 94 [hereinafter Osborne].

81 L.E. Weinrib, “The Supreme Court of Canada and Section One of the Charter” (1988) 10 Supreme Court L.R. 469 at 472.
She characterises the requirement as symbolic of the constitutional changes wrought by the Charter, because legality now represents a starting point for validity of governmental action, rather than its defining element. The possible reasons for and implications of judicial treatment of legality as the preliminary element of limitations analysis will be discussed further below.

In constitutional systems where the determination of a rights claim is a two-stage process, the characterisation of the legality requirement as a precondition to substantive limitations analysis signifies that the second stage can be further broken down, into two or more stages, the first of which is obviously the enquiry into legality. The subsequent enquiries differ from jurisdiction to jurisdiction, depending on judicial interpretation of the purpose and text of the provision at issue. The “tests” devised by courts to assist in application of the limitations provision to particular cases frequently draw on the principles underlying the explicit permissibility of limitation of rights, such as non-absoluteness of rights, respect for rights of others, institutional roles in the context of separation of powers, democracy and the rule of law. Because the onus is on government to establish the justifiability of its restrictive measures, courts focus on its objectives in enacting a particular measure, in relation to the means chosen by it to do so, thus assessing the “proportionality” of the action. I will briefly summarise the prevailing judicial characterisation of the limitations enquiry in each of the European, Canadian and South African jurisdictions.

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82 Ibid. at 473.
2.2.1 European Court of Human Rights

The European Court of Human Rights begins its determination of the validity of restrictions on the article 8-11 rights that have their own limitation provisions, with a statement of the "margin of appreciation" which it allows the contracting states in its interpretation of the requirements for limitation. The margin of appreciation does not, however, amount to an unlimited power of appreciation. Subject to the (limited) margin of appreciation, the Court asks first whether the restriction on or interference with the right is prescribed by law or in accordance with the law, which formulations are interpreted identically. If the restriction is found to have a basis in domestic law and comply with the other criteria for legality (which it sums up in the phrase, "the quality of the law"\textsuperscript{84}), the Court proceeds to the other justification requirements. It asks first whether the impugned governmental rule or conduct aims at the protection of one or more of the interests referred to as grounds for permissible restriction on the right at issue, such as national security, public safety or the prevention of disorder or crime. Thereafter, and if the respondent clears that hurdle, the Court asks whether the measure is necessary in a democratic society, considering the public interest which it identified as the objective. The Court's emphasis in this part of the limitations enquiry is on the criterion of democratic necessity so it happens frequently that the question of the legitimacy of the interest intended to be protected is examined in terms

\textsuperscript{83} Handyside Case (1976), Eur. Ct. H.R. Ser. A, No. 24 at para 48: "... [i]t is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals... By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them... Consequently, Article 10§2 leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ('prescribed by law') and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force."

\textsuperscript{84} Malone, supra note 38 at para 67.
of whether it is considered necessary in a democracy.85

2.2.2 Canada

The seminal case in Canada, in relation to which all subsequent limitations analysis has been framed, is Oakes. In that case the Supreme Court set out a test which has been followed, more or less closely at different stages of the Court’s jurisprudence, ever since. In that case, the question of whether the impugned measure - a statutory enactment - was prescribed by law, was not disputed. That part of the enquiry was dealt with in a sentence.86 The Court then moved on to the substantive issues, which it divided into two, in relation to which the burden of proof on the respondent would be a preponderance of probabilities, a standard to be rigorously applied.87 The first standard which the respondent must meet, in order to establish the validity of the impugned measure, is that the objective served thereby should be sufficiently important to warrant overriding a constitutionally protected right or freedom. At least, the objective must relate to societal concerns which are pressing and substantial in a free and democratic society.88 Secondly, the respondent must demonstrate that the measure is reasonable and justified, by means of a proportionality test involving three components: the measure must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective; the means should impair the right as little as possible; and there must be a


86 Supra note 79 at 135e: “The question whether the limit is ‘prescribed by law’ is not contentious in the present case since s. 8 of the Narcotic Control Act is a duly enacted legislative provision.”

87 Ibid. at 137d-f.

88 Ibid. at 138h-139a.
proportionality between the effects of the limiting measure and its objective.\textsuperscript{89}

Aside from the test designed by the Court to assist in the evaluation of governmental conduct restricting rights against the demands of the \textit{Charter}, it identified two important contextual considerations which, it said, are crucial to an understanding of the purpose and to the proper application of limitations analysis. The first relates to the dual function of s. 1 of the \textit{Charter}: it guarantees rights and freedoms, as well as defining the boundaries of permissible limitations. The rights are part of the supreme law of Canada, and the enquiry into the constitutional validity of restrictions thereon must be made in the context of the commitment to uphold those rights.

Secondly, the ultimate standard by which limitations on rights are to be assessed, that of a "free and democratic society," rests on the same foundations as does the \textit{Charter} project as a whole.

The values and principles necessarily constitutive of that notion, include

\begin{quote}
respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.\textsuperscript{90}
\end{quote}

Weinrib describes the role of the principles embodied in the substantive portion of the limitations provision as follows:

\begin{quote}
By the application of these principles encroachments on rights may become permitted exceptions to the rights to the extent that they encroach merely on the right but not on the underlying value-structure of the rights-protecting polity. This result follows from the understanding that limits share the same normative
\end{quote}

\textsuperscript{89} \emph{Ibid.} at 139b-f. For a recent restatement of the \textit{Oakes} test and the contextual factors to which the Court pays attention in application thereof, see the majority judgment of Bastarache J in \textit{Thomson Newspapers v. Canada (Attorney General)}, [1998] 1 S.C.R. 877 at 939ff.

\textsuperscript{90} \emph{Ibid.} at 136b-f.
foundation as the rights themselves.\textsuperscript{91}

Since the requirement that limits be “prescribed by law” is qualified by the same values, these can be said to underlie that initial element of the limitations stage as well as those relating to objective and proportionality. Judicial interpretation of the legality principle should engage with and be wary of undermining those qualities of the democratic Canadian state.

2.2.3 South Africa

The Constitutional Court of South Africa delivered its first judgment on 5 April 1995 and, four years later, is still in the process of developing a limitations jurisprudence. The task has been complicated by the repeal of the 1993 Constitution from 4 February 1997, at which point the operation of the 1996 Constitution commenced. Although the limitations provision of the South African \textit{Bill of Rights} does not expressly serve the dual function of s. 1 of the \textit{Charte}, both guaranteeing the rights and identifying the exclusive grounds of their permissible limitation, it is clear even from a simple textual analysis of the \textit{Bill of Rights} that the normative foundations of both rights and limitations are identical. The values that constitute the substantive framework for permissible limitations under s. 36 of the 1996 Constitution - openness, democracy, human dignity, equality and freedom - are the values the courts are instructed to promote in their interpretation of the \textit{Bill of Rights}.\textsuperscript{92} The Court has made it clear that the two-stage method of constitutional analysis is appropriate, and necessarily makes a finding that an impugned legislative or executive act is inconsistent with a fundamental right, before it proceeds to the limitations stage of the enquiry.

\textsuperscript{91} Weinrib, “Paradigm Lost” \textit{supra} note 59 at 7.

\textsuperscript{92} Section 39(1) of the 1996 Constitution, titled “Interpretation of Bill of Rights.”
In cases where the legality question has been explicitly at issue, and the Court has found that that requirement in the limitations provision has not been fulfilled, it has stopped its enquiries immediately, signalling that the principle will operate as a threshold question. But unlike the European Court, it has not developed a standard sequenced test for limitations of which legality is a necessary element. And unlike the Canadian Supreme Court, it has resisted the adoption of a focussed, prescriptive Oakes-type test to cover the balance of the limitations enquiry.

Despite this, the Court has characterised the substantive requirement for valid limitations on rights as one of proportionality, and has interpreted the elements of proportionality in similar ways to the Canadians, though it has opted for a more or less open-ended list of factors to be taken into account in its determination of the validity of a restriction on a fundamental right. These include

- the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.

The Court in Makwanyane gave several reasons why it declined to lay down a generally applicable test for permissible limitations on rights: because different rights have different implications for our democratic society and it is thus impossible to lay down an absolute standard for determining reasonableness and necessity, and because the proportionality principle

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93 See the decisions cited at note 129 infra.

94 In Makwanyane, supra note 70 at paras 105-107, Chaskalson P goes through the Oakes test and expresses doubts about the appropriateness of a standard of "minimal impairment," on the basis that its application may involve unelected courts in legislative-type choices.

95 Ibid. at para 104.
calls for the balancing of different interests, which can only be done on a case by case basis. Underlying limitations analysis, however, would be the values of the Constitution, and an awareness of the Court’s institutional role - that """"the role of the Court is not to second-guess the wisdom of policy choices made by the legislator.""""96 One has to wonder, though, about the appropriateness of this reference to institutional roles, and the Court’s invocation of the notion of judicial deference. If the constitutional principles underlying the grounds for permissible limitations, and those underlying fundamental rights and the constitutional state as a whole, are the same principles, and the Court’s task is to promote those values while evaluating the congruence of governmental activity therewith, it is unclear why it should be deferential, and in exactly what way. Since the task of legislators is also to embody those policy choices in laws, does that mean that the Court would apply a rule of deference to the interpretation of """"law of general application"""" as well?

The factors considered to be relevant by the Court in the Makwanyane judgment, which was decided in terms of the 1993 Constitution, were incorporated in very similar terms into the limitations provision of the 1996 Constitution, thus the Court’s limitations jurisprudence in relation to the 1993 Constitution, to the extent that it amounts to such, can be used and developed under s. 36 of the 1996 version.

2.3 CONCLUDING OBSERVATIONS: RIGHTS AND LIMITATIONS

Political transformation from a system of parliamentary sovereignty to a constitutional democracy, as occurred in Canada and South Africa, involves profound shifts in the institutional roles of the branches of government. The notion of rights as primary, as supreme commitments at the heart of the constitutional state, means that the legislature is constrained by its obligation to respect and promote those rights, and its duty not only to limit them only in compliance with explicitly identified constitutional criteria, but to justify its choices when challenged to do so. The judicial role, previously one of mainly interpretation and individual decision-making, is altered and arguably enlarged by the authority to invalidate legislation which unjustifiably infringes human rights, in doing so binding the community at large and frequently obligating the government to act.

In the post-war rights protection model, rights and limitations are cut from the same cloth - both are underlaid by the normative framework of the values of openness, democracy, equality, the rule of law: the foundational constitutional principles which guide all state action. The variable focus of the constitutional adjudicator - at the rights stage on the rights-holder and the impact of governmental action on his or her freedom, and at the limitations stage on the governmental objectives and possibly the conflicting interests of other individuals - must ultimately coalesce so as for the court to make an order which affects both (or all) parties. The need for consistent principles of constitutional interpretation is self-evident in this context. In relation to rights there is frequent reiteration of the necessity for robust interpretation of the fundamental guarantees, but in relation to the sequenced elements of the limitations analysis, some hesitance about the role of the court in carefully assessing legislative conduct. The enormity of the
remedy of invalidation of legislative or executive rules or conduct, and the innumerable possible consequences thereof, sits uneasily with the unrepresentative and sometimes un-participatory nature of judicial appointment.

2.4 LEGALITY AS AN ELEMENT OF THE LIMITATIONS ENQUIRY

2.4.1 Introduction

From a purely textual perspective, it is obvious that the requirement of legality is an element of limitations analysis. The constitutional provision is situated alongside the other elements - that limitations should be reasonable, or necessary, or demonstrably justified, in a particular kind of society. But one can see, even from a superficial description of the tests developed by the courts to apply the criteria for limitation, that some at least perceive legality as a different kind of requirement than reasonableness, necessity or demonstrable justifiability. The notion of formal as opposed to substantive requirements has been used to characterise the difference, as has the terminology of matters “in limine” as opposed to the merits of a claim.

The demands of the limitations provisions are sequential, cumulative, and separable, so that a respondent government must comply with each one for its acts to be upheld. As mentioned above, the legality principle is generally characterised as an initial or threshold element of limitations analysis. Textually, most of the relevant limitations clauses position the legality requirement before the other criteria for justification, though s. 1 of the Charter is somewhat exceptional in this regard, permitting rights to be restricted by “...such reasonable limits prescribed by law as can be demonstrably justified...” (My emphasis.) There are good conceptual reasons why legality should be an initial enquiry. Questions about the source and
form of legal rules or actions - about whether they constitute “law” for the purpose of restriction on rights - are logically prior to questions about their content or impact. Legality does not generally involve a weighing up of competing interests or concerns, nor examination of substantive reasons for limitation, and will frequently be satisfied by evidence of formal enactment or procedural propriety rather than evidence of harms, risks and effects.  

Weinrib’s notion of legality as a “necessary precondition” or a starting point for permissible limitations, captures these ideas.

The self-evident first implication of legality as a threshold must be that if a governmental measure fails the legality test, it fails the limitation enquiry altogether, and there is no need to proceed to the subsequent, substantive questions about reasonability and proportionality. This means that a limitation which is not prescribed by law cannot be justified as a reasonable limitation, no matter how compelling the purpose, how appropriate the method and how minimally the right is impaired. The principles underlying the constitutional state - democracy and the rule of law - demand this: they demand that it is the representative legislative body which makes the rules, or confers subordinate rule-making authority, and that these rules be accessible and applicable to all. Whether a court should proceed anyway through the limitations analysis, if there is a failure of legality, is a matter for debate, but it is clear that it is not necessary to do so for the purpose of decision-making and arguable that it helps to build legitimacy for a court to restrict itself to necessary findings.

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97 This is not consistently the case. In vagueness challenges, for instance, or challenges to the conferral of discretionary authority, there may well be argument on the part of government as to the need for flexibility and breadth, which would involve an assessment of the benefits or necessity thereof in relation to demands for precision and foreseeability.
While the analytical distinctions made by courts between the various sequential elements of the limitations stage of the rights enquiry are easily articulated as doctrinal tests developed for assessing limits on rights, an examination of the case law suggests that in the application of these tests, the details of the limitations enquiry become more awkward. Challenges to the legality of a particular government rule or act have arisen in several quite different regulatory contexts which will be discussed in detail in the next chapter. Judicial responses to these claims differ from one context to another, depending on the nature of the legislative or executive action challenged on legality grounds. This is unsurprising and appropriate to the extent that vague legislation in the freedom of expression context, for example, raises different questions from challenges to administrative guidelines in the prison context. On the other hand, it is possible to observe trends in a particular court's treatment of legality, and to assess the extent to which the fundamental constitutional principles underlying the provision in all its applications are promoted in the jurisprudence.

I will briefly review the treatment of legality by the European, Canadian and South African courts, in terms of its function within the two-stage method of constitutional analysis. Examination of the case law reveals, in my view, that the European Court with a three-part test for limits on rights that includes legality as a standard element, has most consistently and coherently integrated this requirement into its evaluation of governmental restrictions on rights. The Canadian Supreme Court, on the other hand, has manifested a certain reluctance to decide a constitutional rights claim on its failure to comply with the legality requirement, at least in relation to those legality challenges based on the vagueness of legislative provisions. The Court has not yet gone so far as to explicitly abandon the notion of the legality principle as a necessary
element of the limitations enquiry, but it has exhibited signs that the early characterisation of legality as a necessary precondition to the balance of the limitations enquiry, is under threat. The South African legality jurisprudence is in a formative phase and the implications of its decisions are matters for speculation and argument rather than detailed study.

2.4.2 European Court of Human Rights

The principle that a court should decide only what is necessary in order to make a finding on the cause of action pleaded or the application made, and in the strict logical sequence suggested by the constitutional text, is not firmly established in the jurisprudence of post-war democracies. However, I think it worthwhile to examine judicial choices whether to proceed with rights or limitations analysis once grounds for invalidation of a government measure have been established, and the reasons for doing so or choosing not to. In the vast majority of European Court decisions in which the legality requirement has been at issue, the Court has terminated the limitations stage of the enquiry on finding that an impugned measure is not “prescribed by law” or “in accordance with law.” This has the advantage of preserving what Delmas-Marty calls “the preliminary nature of the criterion of legality in the logical order of decision-making.” It

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98 The South African Constitutional Court has reiterated several times its view that a question of constitutional law should never be anticipated in advance of the necessity of deciding it, or be formulated in a broader manner than is required by the facts. See Zantsi v. Council of State, Ciskei, and Others, 1995 (4) S.A. 614 (CC) at paras 2-5; S. v. Mhlungu and Others, 1995 (3) S.A. 867 (CC) at para 59; S. v. Vermaas; S. v. Du Plessis, 1995 (3) S.A. 292 (CC) at para 13. This does not answer the question of whether it should decide the elements of every matter in a particular sequence.

99 M. Delmas-Marty, “The Richness of Underlying Legal Reasoning” in M. Delmas-Marty, ed., supra note 73, 319 at 328-9 [hereinafter “Underlying Legal Reasoning”] describes the interpretive process as follows: “It appears to be established that the analysis should be conducted in two phases, with an analysis of whether the criterion of legality (within the meaning defined by the Court as “the quality of the law”) is not respected, the restrictive measure will be judged not to be in conformity with the Convention without any examination of the other criteria.” See for example the majority judgment in Malone, supra note 38 at para 82; Huvig Case (1990), Eur. Ct. H.R. Ser. A, No. 176-B at para 34 [hereinafter Huvig].
also emphasises the separability of the elements of limitations, and the cumulative nature thereof, making it clear that even the most reasonable and justifiable limitation is constitutionally impermissible if its legality is compromised.

Terminating the enquiry at legality has the disadvantage, as pointed out by Judge Pettiti in his concurring opinion in the *Malone Case*, that the Court in such a case does not elaborate on its decision by examining national practice in relation to the other criteria, and thus gives no guidance as to the permissibility of the substance of the restriction. It was his view, in *Malone*, that it should have done so because of the "major importance of the issue at stake." The danger of proceeding, however, is that the Court would be indulging in speculative evaluation - it has to imagine that the restrictive measure has been prescribed by law, when in fact it has not. It has to make assumptions as to what the outcome of legislative deliberation and drafting would be, and assess the reasonableness of such an imaginary law. That is self-evidently not a necessary aspect of the judicial function.

In the few cases where the European Court does proceed with the balance of limitations analysis despite a finding of illegality, to questions about the objective of the measure and necessity in a democratic society, it is not clear that it shows signs of trivialisation of the legality requirement by doing so. The Court in these cases does not explain its reasons for proceeding anyway or even say that it will proceed despite it not being necessary, and it gives no indication that its finding that a restriction is not "prescribed by law" is insufficient to invalidate the measure. As

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100 *Malone, ibid. at 42.*
it happens, in all these cases there are certain impugned actions that have been found not to satisfy the legality requirement and others that do, and the Court has proceeded with limitations analysis in respect of all of them. In Silver, for example, the Court found that interception by prison officials of certain pieces of correspondence was not done “in accordance with the law” as required by article 10(2) of the Convention, and it could have terminated that enquiry there and then. It went on, however, to examine the other elements of permissible limitations, and found that although the aim of the interferences was legitimate, they were not “necessary in a democratic society.” A similar method of analysis was used in the recent Steel Case, in which the Court found that there had been an interference with article 10 which, in relation to three of the applicants, was not prescribed by law, but then went on to find that in any event the measures taken were disproportionate to the objective of preventing disorder.

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101 Supra note 38 at para 99. In Silver there was an enormous number of stopped items of correspondence at issue, the illegality of some of which the respondent state contested and others not. It was clearly not necessary for the Court to have examined every item for democratic necessity as it had done for legality, but may have seemed logically more consistent to go through all the items in similar fashion. See also the Eriksson Case (1989), Eur. Ct. H.R. Ser. A, No. 156 at paras 67, 71 [hereinafter Eriksson]. In that case, there were two acts the validity of which was challenged by the applicant, Mrs Eriksson: the first was an order by the Social Council of prohibition on her removal of her daughter Lisa from foster care for an indefinite period, which the Court decided was in accordance with law, and the second involved restrictions imposed on her access to her daughter, which was declared not to be, on account of there being no legal provisions on which such restrictions could be based in Swedish law. The Court went on, however, to say that “[a]lthough the Court has found that the restrictions on access had no basis in domestic law..., it does not doubt that they were imposed with the legitimate aims of protecting Lisa’s health and rights.” Finally, it decided that neither the prohibition on removal nor the restrictions on access were necessary in a democratic society. In relation to the access restrictions, the finding as to legitimate aim and democratic necessity were strictly speaking unnecessary, but the Court’s examination thereof may have been motivated by factors other than reluctance to base a decision on the legality requirement alone, such as the desire for emphasis of the unacceptability of the access restrictions, and the severity of the combined effect of such restrictions and the prohibition on removal.


103 The narrative of the case was more satisfying this way. The Court needed to complete the analysis in relation to the first and second applicants, and the whole way through had contrasted the actions of the first and second, with those of the third, fourth and fifth which arose from a different incident. Strictly speaking, however, it need not have continued through the limitations analysis for the latter applicants, as the factual circumstances were unrelated to those of the former.
On the whole therefore, the Court proceeds sequentially through the three stages it has identified that constitute the limitations analysis, stopping at legality if the measure fails to comply therewith. In those few in which it proceeds further, the Court has inevitably found that as well as the legality criterion, the state has violated some other aspect of the limitations formula. It appears then that the Court will proceed - superfluously - only in order to point out some other failing in the justification stage of analysis, and never if the rest of the test is satisfied. In this way the Court avoids having to face what seems to be perceived as the hard case - the restriction on a right which is reasonable and necessary in a democratic society, but for some reason has not been "prescribed by law".

2.4.3 Canada

The jurisprudence of the Supreme Court of Canada has arguably been far more erosive of the two-stage method of rights and limitations analysis, and the threshold/substance limitations enquiry. It is difficult to generalise about this trend, however, because the legality requirement has elicited a number of interpretive principles or techniques from the Court, which are applied according to the context in which the criterion arises. However, my submission is that there are four principal ways in which the Court has undermined the coherence and logic of the sequential method of limitations analysis, and in doing so has damaged the potential with which the Charter was invested, by incorporation of the rule of law, separation of powers and democracy principles within the legality requirement. The first two of these arise almost exclusively in the context of challenges based on the impermissible vagueness of legislation. I will identify and then describe below in more detail the four strands of judicial weakening of the legality principle, though they tend toward each other and could perhaps better be seen as matters of
degree:

(1) an explicitly stated reluctance to invalidate a vague legislative provision on the basis that it is not "prescribed by law";

(2) a deliberate choice not to decide the "prescribed by law" question, because a legislative provision or governmental conduct fails anyway, under a different leg of the limitations enquiry;

(3) a failure to engage in the "prescribed by law" enquiry at all, in cases where one may have expected it to be at issue or at least would expect confirmation that a measure has been scrutinised for legality;

(4) a very broad, deferential interpretation of the demands of the "prescribed by law" requirement. 104

I turn first to a chronological examination of the decisions in which reluctance to decide a vagueness challenge on the basis that the imprecise law is thereby not "prescribed by law" was expressed. These cases reveal that the trend commenced as an opinion in the case of Canada (Human Rights Commission) v. Taylor 105 about the extent of vagueness required in order for a measure to fail the "prescribed by law" test on that basis. In that matter, McLachlin J's view was that the legislation did qualify as "law" for s. 1 purposes, as it was sufficiently intelligible, but went on, "I would be reluctant to circumvent the entire balancing analysis of the s. 1 test by finding that the words used were so vague as not to constitute a 'limit prescribed by law', unless

104 This fourth strand in my observations will be dealt with in the following chapter.

105 [1990] 3 S.C.R. 892 at 956 [hereinafter Taylor]. McLachlin J in this matter was dissenting in part, but not as to the intelligibility of the impugned legislative provision.

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the provision could truly be described as failing to offer an intelligible standard. That is not the case here.” The implication of this view is that precision is indeed a requirement for legality, but that the standard required is not exacting, and on failing the threshold test, the rights claimant would have a further chance to argue vagueness at later stages of the limitations analysis (though in the Taylor case, that argument failed at every stage).

The articulation of reluctance to hold the legislature to a high standard of precision in its drafting has since then acquired precedential value. As it stands today, the reluctance initially expressed about a strict standard for precision at the threshold stage, has been reduced to what one may argue is a merely nominal acknowledgement of the place of precision in legality review. This leniency was expressed most recently by Cory J for the majority in R. v. Lucas, as follows:

"Any imprecision that may exist in these sections [of the impugned legislation] is properly addressed under the proportionality test. As Gonthier J. noted in Nova Scotia Pharmaceutical, at p. 627, ‘[t]he Court will be reluctant to find a disposition so vague as not to qualify as ‘law’ under s. 1 in limine, and will rather consider the scope of the disposition under the ‘minimal impairment’ test.”

While retaining the theoretical possibility that a law may be so vague as to fail the legality requirement, my view is that the Court’s attitude amounts to a belief that if legislation is indeed so vague, it will undoubtedly be “unreasonable” (in that it will be more than a minimal

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106 In Osborne, supra note 80 at 95, Sopinka J for the majority said, “This Court has shown a reluctance to disentitle a law to s. 1 scrutiny on the basis of vagueness which results in the granting of wide discretionary powers. Much of the activity of government is carried on under the aegis of law which of necessity leave a broad discretion to government officials... Since it may very well be reasonable in the circumstances to confer a wide discretion, it is preferable in the vast majority of cases to deal with vagueness in the context of a s. 1 analysis rather than disqualifying the law in limine.”

improvement of the right), and the Court will always prefer, for reasons which it has not made clear, to invalidate vague laws under that leg of the test. McLachlin J’s reference to the “balancing” aspect of proportionality review in Osborne indicates that in her view, the legality element of limitations analysis is less a matter of balancing competing interests and thus harder, perhaps, for government to justify its actions.

Closely related to the decisions in which reluctance to use the legality requirement to strike down vague laws is explicitly stated, are those in which the Court deliberately chooses not to decide the legality question, because the impugned provision will fail the rationality or (usually) proportionality element of limitations analysis anyway. On the occasions that the Court has bypassed the legality requirement in this way, it has generally not given reasons for preferring the later stages of the test, except to the extent that it distinguishes between legality and the “merits” of the decision. Thus, for example, McLachlin J for the majority in R. v. Zundel

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108 Not all vague legislation results in overbreadth, however, and it is most obviously overbroad legislation which will fail the minimal impairment test, assuming that test is rigorously applied. One of the reasons one may be wary of the minimal impairment leg of the proportionality enquiry is that the Court has repeatedly expressed a need for deference to the legislature at that stage, because of the perceived danger of judges performing a legislative-type function. See the discussion by P.W. Hogg, Constitutional Law of Canada, Volume 2, 3ed. (Toronto: Carswell, 1992) at 35-32.1 to 35.36 and cases cited therein. For criticism of certain applications of the deference principle, on the grounds that such misapplication retards democracy, see M. Jackman, “Protecting Rights and Promoting Democracy: Judicial Review under Section 1 of the Charter” (1996) 34 Osgoode Hall Law Journal 661.


110 The “merits” of a decision are usually distinguished from issues relating to jurisdiction, standing and other interlocutory matters, which are ordinarily decided before the merits are reached. It is difficult to generalise or speculate about the implications of a choice to decide a matter on its merits rather than on a preliminary point.
The first question is whether s. 181 represents a ‘limit prescribed by law’. It was argued that ... the vagueness of the term ‘injury or mischief to a public interest’, render[s] s. 181 so vague that it cannot be considered a definable legal limit. Preferring as I do to deal with the matter on its merits, I assume without deciding that s. 181 passes this threshold test.\textsuperscript{111}

Although this technique, of assuming that an impugned measure withstands a particular element of a constitutional rights challenge only to make a finding that it fails at a subsequent stage, is not uncommon, and is frequently used without explanation,\textsuperscript{112} the expression of an unmotivated preference for deciding the vagueness question under minimal impairment after having decided that vagueness is an aspect of the legality requirement, means the coherence of the sequenced stage-by-stage limitations enquiry is disrupted. It signals an attitude towards the legality requirement that is not neutral, undermines the significance of the criterion and results in a failure to develop a legal sense of its meaning.

Because of the elliptical way in which the judges circumvent the legality enquiry, it is difficult to work out what is really behind these choices. It is not clear why a judge would think it “better” to decide to strike down a law on “the merits” than on what he or she may perceive as a “form” stipulation, if both are necessary elements of constitutional validity. The unarticulated sense one gets from these cases is that self-consciousness about institutional functions plays a role in judicial reluctance to accord weight to the legality principle. There is a sense that it is

\textsuperscript{111} [1992] 2 S.C.R. 731 at 760e [hereinafter Zundel].

\textsuperscript{112} Presumably, it could be justified on the basis that if the measure will undoubtedly fail a particular stage of the enquiry, it is unnecessary to decide the others. But if a specific sequence has been established for the stages of enquiry, a reasoned basis for disruption thereof ought to be laid.
fairer to government to base an order of invalidity on proportionality than on legality. For the legislature to miscalculate the “balance” required by the constitution between the detrimental impact on the rights-holder of a legislative measure and the importance of the objective, is understandable because it involves an interpretation of constitutional provisions, something that is ordinarily in the legal realm. But questions of legality - whether the legislature has in fact translated policy into law - seem so much the ordinary work of government, that courts appear to find it difficult to point out deficiencies in doing so.

In the cases described above in which reluctance was expressed about deciding the legality question, it was usually in the context of government action that, so the reasoning goes, would either satisfy the legality test and go on to satisfy the minimal impairment and other substantive limitations criteria and thus be upheld, or fail legality and go on to fail minimal impairment too, thus be invalid on more than one ground. These are cases, therefore, in which the courts’ view is that the legality question would not make a difference to the outcome of the case. The problem with this view, apart from the disruption it causes to the sequenced limitation enquiry, is that once a particular act has been assessed for legality and found to be deficient, any examination of its compliance with the subsequent criteria is hypothetical. It is not possible for judges to say how the restriction on a right would have been transformed, had it proceeded through the democratic law-making process in the manner dictated by the constitution.

Altogether more disruptive of the structure/pattern of rights analysis under the Charter, is the practice of finding a measure to be impermissibly violative of the legality requirement, but expressing unwillingness to decide the matter on that point. In the concurring judgment of
L’Heureux-Dubé J in *Committee for the Commonwealth of Canada v. Canada*,¹¹³ she states, “Although in my opinion Regulation 7, which clearly restricts freedom of expression, is too vague to constitute a reasonable limit prescribed by law for the purposes of the s. 1 analysis, I prefer to rest my opinion on the reasonableness analysis as explained in *Oakes.*” She does not elaborate on the reasons for this preference.¹¹⁴ It would be more legitimate that if a court does proceed in such circumstances, it would be for reasons which are compelling and explicit, such as that the matter is of crucial importance to the interests of rights-holders or regulators, or that there are conflicting decisions on the subject which require clarification. As discussed above, the European Court has on occasion proceeded in this way too, but without articulating reservations about basing its decision on the legality question, and thus without suggesting, implicitly, that there is something lightweight or unworthy about the legality requirement, which may make it insufficient on its own to carry the responsibility of invalidation of government rules or conduct.

Another trend which has the effect of undermining the place of legality in limitations analysis, is for the Court to simply ignore the requirement, as if it did not exist.¹¹⁵ Unlike the European Court, which routinely describes the test for permissible limitation of a right in terms which include legality as the first of three enquiries, the Supreme Court of Canada most often

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¹¹⁴ See too the earlier and more confusing statement in *R. v. Mannion*, [1986] 2 S.C.R. 272 at 282, in which McIntyre J for the Court says, “No limit prescribed by law has been shown here... This [common law rule], even if it could be said to be prescribed by law, would not constitute a reasonable limit.”

¹¹⁵ Due to logistical constraints, I have been unable to check whether, in the cases referred to in which “prescribed by law” is not mentioned in the judgments, it was also not argued before the Court.
characterises the requirements of s. 1 as being divisible into two - the importance of the objective, and the proportionality of the measure, derived from Oakes. But besides the cases in which the legality requirement is ignored because it is not specifically at issue, there are several in which one may have expected the criterion to be discussed, because of the nature of the constitutional challenge or the status of the impugned measure, but which ignore it either entirely or in certain of the separate reasons.116

A good example of the former is Weatherall, a gender discrimination challenge based on s. 15 of the Charter, concerning frisk searches of male prisoners by female guards. The Court, in an unanimous judgment by La Forest J, decided that even if the differential treatment of male and female prisoners (female prisoners not being subject to searches by male guards) amounted to a breach of s. 15(1), the “practice” would be saved by s. 1, because the objective is important, and the proportionality of the means used to the importance of the ends would justify the alleged breach.117 The reasons contain no reference to the empowering authority or the legal status of the practice.118 A finding that the practice was not prescribed by law may well have resulted in

116 See for example Weatherall v. Canada, [1993] 2 S.C.R. 872 at 878; Black v. Law Society of Alberta, [1989] 1 S.C.R. 591 at 625-627. See also New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly), [1993] 1 S.C.R. 319 at 397-8, 406-9, 414 in the judgments of Sopinka and Cory JJ. They both find that Parliament is subject to the Charter, but that any breach of the right to freedom of expression arising as a result of the practice of regulation of media monitoring of parliamentary proceedings is justified under s. 1, though without reference to the status or quality of such practice for legality purposes.

117 Compare R. v. Hebert, [1990] 2 S.C.R. 151 [hereinafter Hebert], in which the use by police of undercover officers in a prison cell to trick an accused person into speaking, was found to be a breach of the right to silence, which could not be justified because the practice was not “prescribed by law”. Both McLachlin J (for the majority) and Sopinka J (concurring) examined the source of the conduct and determined that it was a result of unauthorised police action.

118 What makes this absence more surprising is that in the lower court decision, Weatherall v. Canada (Attorney General) [1989] 1 F.C. 18 (C.A.) at 31-36, the question of whether the Commissioner’s Directives which authorised strip-searching were “prescribed by law” was explicitly discussed, and a
an order of invalidity rather than justification. Also, in *R. v. Keegstra*,\textsuperscript{119} in which vagueness was one of the grounds of complaint, both the majority and dissenting judgments fail to refer to the legality requirement at all, despite the vagueness challenge in *Irwin Toy Ltd. v. Quebec (A.G.*)\textsuperscript{120} the previous year having been decided on the basis of whether the provision was “prescribed by law”. Those split decisions in which some members do discuss the requirement, and others fail to, are particularly surprising, because the implication is that the justices were alerted to the enquiry and deliberately chose to exclude consideration thereof.\textsuperscript{121}

As an aside, it is interesting to note that the language used by some judges to describe the legality requirement is revealing of the difficulty they appear to have in finding an appropriate finding was made that they were not.

\textsuperscript{119} [1990] 3 S.C.R 697 at 734-5, 844 [hereinafter *Keegstra*].


\textsuperscript{121} See for example the *Prostitution Reference* decision, supra note 96 in the reasons of Dickson C.J. (for the majority), in which he examines vagueness only in the context of s. 7 principles of fundamental justice, not as relevant to “prescribed by law”, despite Lambe’s reference thereto at 1155. See also the reasons of Dickson C.J. and Beetz J in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 [hereinafter *Slaight Communications*], as opposed to the dissenting reasons of Lambe J; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 [hereinafter *McKinney*], in which the requirement is discussed by Wilson J in her dissenting reasons (at 393-7), but ignored by La Forest (at 280-1) and Cory JJ (at 447).
place and function for it in limitations analysis. Although s. 1 of the Charter has an important dual function, which was emphasised in the Court’s early decisions, on the whole s. 1 of the Charter is associated with limitations analysis rather than with the guarantee of rights and freedoms, and is often used as shorthand for the requirements for permissible limitations on rights. On top of that, the Oakes decision and more particularly the test for limitations which was articulated in Oakes, has become synonymous with such requirements for permissible limitations, and thus with s. 1 of the Charter. Perhaps because “prescribed by law” was not explicitly included in the Oakes formulation, and was ignored in the oft-quoted summaries which followed shortly thereafter,¹²² the legality requirement is not invoked as a standard element of the limitations test, as it is in European Court jurisprudence.

The legality requirement is, on occasion, linguistically excised from s. 1 altogether, for example in the following statements by Sopinka J in Osborne:

In these circumstances [of vagueness], there is no ‘limit prescribed by law’ and no s. 1 analysis is necessary as the threshold requirement for its application is not met. The second way in which vagueness can play a constitutional role is in the analysis of s. 1. A law which passes the threshold test may, nevertheless, by reason of its imprecision, not qualify as a reasonable limit. ... I therefore conclude that s. 33 does constitute a limit prescribed by law and it is necessary to proceed to a s. 1 analysis.¹²³

McLachlin J does the same thing in Taylor: “Before s. 1 can apply, the statute or section in

¹²³ Osborne, supra note 80 at 94, 97; see also at 95, cited supra note 106. These statements are inconsistent: earlier in his reasons he stated, “The general criteria for the application of s. 1 are: a limit, prescribed by law, that is reasonable and can be demonstrably justified in a free and democratic society.”
question must be found to constitute a limit ‘prescribed by law’.\textsuperscript{124} While this linguistic excision of legality from limitations analysis may not signify a deeper threat to its existence, it does reveal that its place within the limitations enquiry is a somewhat inconsistent, and shaky, one.

It is important to note that in amongst the decisions described above, in which there is evidence of judicial slippage in the application of the threshold/substance method of limitations analysis, there are many decisions in which the sequential enquiries follow each other in the order in which they have been interpreted to belong. In these cases the limitations analysis is terminated at the point that it is found that a measure is not prescribed by law, and cannot therefore be demonstrably justified as reasonable in a free and democratic society. Most of the decisions that deviate from the stated doctrinal tests, and in which the legality requirement is ignored or undermined by the Canadian courts, relate to the validity of laws alleged to be unconstitutionally vague. Vagueness doctrine is thus an important sit for examination of judicial treatment of legality.

Canadian vagueness doctrine has been compared to the relevant jurisprudence of the United States Supreme Court, which is not constrained by a text which separates rights and limitations

\textsuperscript{124} Taylor, supra note 105 at 955. See also Lamer C.J. in Committee for Commonwealth, supra note 113 at 164g. The South African Constitutional Court has done the same thing on occasion. See in this regard City Council of Pretoria v. Walker, 1998 (2) SA 363 (CC) at para 72 [hereinafter Walker], though note the inconsistency within that paragraph; August and Another v. The Electoral Commission and Others, CCT 8/99, 1 April 1999, as yet unreported, at para 23 [hereinafter August].
analysis by means of a general provision regulating limitations on all the rights.\textsuperscript{125} Considering this difference, the difficulty of drawing distinctions between vagueness and related doctrines such as overbreadth, and the variety of Charter provisions (or parts of provisions) which could be the appropriate location for a vagueness challenge, it is perhaps unsurprising that the Court should struggle to maintain a clear sense of the meaning of legality in relation to vagueness. However, the Court has not shown why it is inappropriate for the legality principle to involve a certain standard of precision in legislative drafting, nor why vague laws are better challenged at the minimal impairment stage of limitations analysis. It has on occasion overlooked the legality requirement, and has sometimes referred to it but failed to engage its purpose and meaning. All of these instances of relaxation or undervaluation of the legality requirement indicate an approach that is deferential to the activities of legislature and executive.\textsuperscript{126} Also, conflation of elements of the limitations analysis and the trivialisation of legality surely carry the danger that judicial scrutiny of governmental action will be attenuated.

\textbf{2.4.4 South Africa}

This section, on the place of legality in the new South African constitutional scheme, constitutes something of a digression. Unlike the Canadian Charter jurisprudence and that of the European Court of Human Rights, the development of a South African understanding of the legality


\textsuperscript{126} See Weinrib, “Paradigm Lost” \textit{supra} note 59 at 31-44 for an argument that the years since \textit{Oakes} have seen an unprincipled and inappropriate growth in deference to the legislature in limitations analysis generally, exemplified in the judgment of La Forest J in \textit{RJR-MacDonald Inc. v. Canada (Attorney General)}, [1995] 3 S.C.R. 199.
principle is in its very early stages, thus it is difficult to identify trends or tendencies in the judicial approach. Unlike Europe and Canada, the South African legality requirement in limitation of rights has not been expressly linked by the majority of the Constitutional Court to the rule of law, nor to notions of democracy or the separation of powers. For that reason, I will examine what the Court has said about legality in limitation of rights - and what it may have been expected to say but did not - but will also look at the ways in which foundational values such as the rule of law and democracy have been interpreted by the Court in other contexts and have been analysed by commentators.127 What should emerge is a sense of the institutional obligations and arrangements dictated by the new constitutional structure, and the logic of the two-stage process of rights analysis within it. From that, it may be possible to identify the role which could be played by the legality principle in a potentially vibrant rights-protecting system.

The South African Constitutional Court has not yet been faced with a constitutional challenge based on the vagueness of legislation.128 Where the question of compliance with the requirement that limitations on rights be framed "in terms of law of general application" has arisen explicitly, the Court has interpreted such requirement as a preliminary element of justification, which must be fulfilled before the analysis may proceed. If the Court finds that the impugned measure does not satisfy the demands of the legality principle, it has terminated

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127 With respect to Canada and the European Court, I examine judicial approaches to these foundational values in the next chapter, which deals with the legality principle in application.

128 For a lower court discussion of the relationship between law of general application, the rule of law and vagueness, see National Coalition for Gay and Lesbian Equality v. Minister of Justice 1998 (6) B.C.L.R. 726 (W) at 741A-743F.
limitations analysis at that point.129 Most recently, in the August decision, the Electoral Commission’s failure to make arrangements for prisoners to vote in the 1999 general election, despite the absence of a legislative prohibition on them doing so, was held not to comply with the legality requirement in s. 36 of the 1996 Constitution. Sachs J for the Court said simply, “In the absence of a disqualifying legislative provision, it was not possible for respondents to seek to justify the threatened infringement of prisoners’ rights in terms of s. 36 of the Constitution as there was no law of general application upon which they could rely to do so.”

This approach cannot be said to characterise all the lower court decisions, and it is to be hoped that the “strange, but hardly fatal, misstep”130 made by the Cape High Court in the De Lille131 case, of proceeding with the rest of limitations analysis after finding that the parliamentary privilege does not qualify as law for such purposes, will be clarified on appeal. It is not that the court in that case implied that a measure which fails the legality test can be remedied by its compliance with other elements of the provision, but it proceeded unnecessarily, leaving the reader uncertain as to the ratio decidendi.132

There are a few early judgments of the Constitutional Court in which one may have expected the legality criterion to be raised and discussed specifically, where it was not. These decisions

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129 See Walker, supra note 124 at para 72; Premier, Mpumalanga, and Another v. Executive Committee, Association of State-aided Schools, Eastern Transvaal, 1999 (2) S.A. 91 (CC) at para 42 [hereinafter Mpumalanga]; August, supra note 124.

130 Woolman, supra note 54 at 12-31.

131 De Lille and Another v. Speaker of the National Assembly 1998 (3) S.A. 430 (C) at paras 37-8.

132 The appeal in this matter has been heard, but is as yet undecided.
relate to the extent of a common law or statutory discretion granted to administrative or judicial officers to make decisions which may have the effect of restricting fundamental rights. In Ferreira, the question arose as to the justifiability of judicial discretion to admit derivative evidence in later proceedings, and the Constitutional Court decided that such discretion, the existence of which as a common law rule had been disputed in the pre-Bill of Rights era, was reasonable and justifiable in a democratic society. One must assume that the legality requirement is fulfilled by the status of the rule as common law, which includes a "public policy" constraint on the exercise of discretion which would operate to exclude unjustifiable restriction of the witness' rights, though the Court makes no reference to legality.

In Bernstein and Others v. Bester and Others NNO134 and Nel v. Le Roux NO and Others,135 the impugned legislative provisions permitted the compulsion of evidence from examinees in insolvency and other proceedings, subject to the right to refuse to answer on the basis, respectively, of "sufficient cause" or "a just excuse." The Court decided in both cases that the examinees would have sufficient cause to refuse to answer a question put to them if the response would infringe or threaten any of their fundamental rights, unless such right had been limited in a way that passed s. 33 scrutiny. The presiding officer would have to decide what constituted sufficient cause. The implication of these decisions is that the empowering legislation, which confers discretion but without reference to limitation of rights, nonetheless permits the reasonable restriction of rights by the presiding officer and constitutes "law of general

133 Supra note 71 at paras 148-153.

134 1996 (2) S.A. 751 (CC) at paras 60-61 [hereinafter Bernstein].

135 1996 (3) S.A. 562 (CC) at paras 7-9 [hereinafter Nel].
application” for these purposes.

The Court’s basis for this finding is not very clear. It could be that the necessary implication of the words of the statute is that the presiding officer has the authority to limit rights, as long as this is done reasonably.\(^{136}\) Or it could be that the Court’s duty to interpret the words of the statute so that, if possible, they are consistent with the Constitution,\(^ {137}\) necessitates a finding that the impugned provisions which confer broad discretion to the presiding officer, permit the (reasonable) limitation of rights by him or her.\(^ {138}\) Either way, it appears that the question of legality was not raised directly in these matters, so the Court was not faced with a challenge on that basis, and instead interpreted the legislative provision constitutionally.

Despite the Constitutional Court’s clear analytical distinction between legality and the other

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\(^{136}\) See the Therens \(\text{supra} \text{ note 24}\) line of cases in Canada, discussed in chapter 3 below, which appear to have influenced the approach taken by the South African Court in Walker, \(\text{supra} \text{ note 124}\).

\(^{137}\) Section 35(2) of the 1993 South African Constitution provided explicitly that no law limiting rights would be constitutionally invalid solely by reason of the fact that the prima facie wording exceeded the limits imposed by the Bill of Rights, provided such law was reasonably capable of a more restricted interpretation which did not exceed such limits, in which event a court should construe the law as having the restricted, constitutionally valid meaning. This is framed as a canon of interpretation rather than a remedial provision, and arguably implies that a prima facie finding of unconstitutionality is not necessary before application of the interpretive principle. See Coetzee v. Government of the Republic of South Africa and Others, (1995) 4 S.A. 631 (CC) at para 62 for judicial comment on the meaning and role of s. 232(3) of the 1993 Constitution (which is virtually identical), especially in relation to pre-constitutional legislation. Interestingly, the 1996 Constitution contains no such “presumption of constitutionality”, as it has been called by commentators J. Kentridge and D. Spitz, “Interpretation” in Chaskalson et al, \(\text{supra}\) note 54 at 11-8 note 4. The question thus arises whether such a presumption is still an appropriate interpretive rule, either in relation to pre- or post-constitutional legislation. See the reasoning of Wilson J in this regard in R. v. Swain, [1991] 1 S.C.R. 953 at 1024-5 [hereinafter Swain], note 181 \text{infra}. It could be argued that in cases such as Bernstein and Nel, \(\text{supra}\) notes 134 and 135 respectively, where an official has direct authority over an individual in such a proceeding, the terms of compulsion and permissible bases for resistance should be spelt out in more detail, so that the individual can understand what the content of his or her rights is in the circumstances.

\(^{138}\) See the Canadian Supreme Court’s approach in Slaight Communications, \(\text{supra} \text{ note 121}\), discussed in section 3.7 below.
limitations criteria, it appears that at least one of the judges foresees danger in a strict, rigorous application of the legality requirement. In the reasons of Mokgoro J in Hugo, a challenge to the constitutional validity of a so-called Presidential Act which was enacted to effect the pardon of a number of offenders, the meaning of the term “law of general application” was extensively canvassed. After comparing the approaches taken by the European Court and the Canadian Supreme Court to their equivalent provisions, Mokgoro J found that the Act was a limitation “by law of general application.” She concludes her reasons with the following statement:

I consider it undesirable to take a technical approach to the interpretation of ‘law of general application’. As noted by McLachlin J [in Committee for Commonwealth of Canada], a technical approach unduly reduces the types of rules and conduct which can justify limitations. That exclusion from s 33(1) may adversely affect the proper interpretation of the scope of rights in [the Bill of Rights], and when such rights are regarded as breached. In other words, courts which wish to uphold action or rules as justified, but are unable to do so because of a narrow definition of ‘law of general application’, may strain the interpretation of other sections of the Constitution in order to find the conduct did not infringe the right in question. Further, the ‘law of general application’ requirement is merely a precondition to the applicability of s 33(1). If a limitation is in substance ill-advised, that will be caught by the rigours of the limitation test itself. [Footnote omitted.]

Mokgoro J is not saying that a measure that failed even her “non-technical” approach to legality, could be justified substantively on the basis that it was reasonable in a democratic society. But one of her reasons for taking a permissive approach to legality is that a bad limitation will fail somehow anyway, and that view does signal an approach to the requirement which fails to capture what is distinct about it, and which undoes the obligations it intends to place on the

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139 Supra note 76 at paras 96-104. Reference is made in that footnote to the Court’s decision that the “nature of the power” limiting the right is relevant to a determination of infringement. Arguably, Mokgoro J’s fear about the potential interpretation of “law of general application” resulting in a weakening of the rights protection, is borne out in this case, where the majority did not reach the legality question. The nature of the presidential power and the legality questions raised by the exercise thereof are discussed in further detail in chapter 3 below.
Mokgoro J’s frank allusion to the risk that an exacting approach to the demands of the legality principle will adversely affect the judicial interpretation of the scope of fundamental rights is rare in judicial application of this type of provision, and puzzling. Is it an admission that the logical coherence of the two-stage process is illusory, and that judges will come to whatever conclusion they perceive as just or appropriate, adjusting the definition of the scope of a right so as not to reach the limitations provision if it constitutes an insuperable obstacle to a finding of constitutional validity? Or is it a statement of the notion that both rights and limitations are underlaid by the same principles, are aspects of each other, and that a generous, purposive approach to rights definition requires that the courts be cautious not to frustrate the work of government by simultaneously holding the legislature to an unrealistic standard in their limitation? Perhaps her reference to a limitation which is “in substance ill-advised” provides the best evidence of her approach, which seems to be that a limitation which is substantively reasonable and justifiable in a democratic society ought not to be invalidated because of “technical” deficiencies, and that the way to implement this policy of deference is to set a low standard for legality.

While the Constitutional Court has not, in majority opinions, shown signs yet of unratelling the fragile and finely balanced structure of rights and limitations analysis by conflating the various elements of permissible limitations (to the extent that it has conceded that there are separate elements), it has also refrained from discursive analysis of the purpose or meaning of the provision. It has not even tentatively laid down criteria for satisfaction of the legality principle,
though it has made it clear that “law” for these purposes will include statute, regulations and common law at least, and that the requirement of legality will operate as a discrete stage of the limitations enquiry, despite the Court having rejected a strict Oakes-type sequential testing for substantive justification. At this early point in the Court’s jurisprudence, extrapolation of the Court’s reasons in the decisions in which the requirement has been at issue reveals little of the factors that will affect the significance of legality within the two-stage method, or the principles the Court may use to guide its decisions.

The jurisprudence of the Constitutional Court has, generally, been richly comparative, and suggests that its interpretation of legality will be crafted in a context which is sensitive to the deliberations of other democracies. In relation to the comparable Canadian jurisprudence, it may be hoped that the “prescribed by law” analysis will be approached with some caution, and consciousness of its anomalies. But apart from the comparative aspect, the bleak history of the South African politico-legal system, and the explicit determination with which the 1996 Constitution both symbolises and entrenches a dramatic move away from it, provide more than enough material for the development of a rich and principled understanding of legality.

In 1994, the South African academic Professor Etienne Mureinik introduced the notion of a “culture of justification” into the public discourse about the new Bill of Rights, a notion which the Court has enthusiastically embraced in its judgments to date. Mureinik explained the term

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140 Du Plessis, supra note 24.

141 Etienne Mureinik, “A Bridge to Where? Introducing the Interim Bill of Rights” (1994) 10 S.A. Jnl. H.R. 31 at 32, referred to by the Court in Makwanyane, supra note 70 at para 156; Ferreira, supra note 71 at para 51; Prinsloo v. Van der Linde, 1997 (3) S.A. 1012 (CC) at para 25 [hereinafter Prinsloo]; Walker,
to mean "... a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not on coercion." In painting a judicial picture of this new order towards which the Constitution strives, the Court has made reference to Mureinik's ideals of reason, justification and safeguards against arbitrariness. Ackermann J in Makwanyane says the following,

We have moved from a past characterised by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional state where state action must be such that it is capable of being analysed and justified rationally. The idea of the constitutional state presupposes a system whose operation can be rationally tested against or in terms of the law. Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order. Neither arbitrary action nor laws or rules which are inherently arbitrary or must lead to arbitrary application can, in any real sense, be tested against the precepts or principles of the Constitution.¹⁴²

The "constitutional state" which is post-1994 South Africa is underlaid by certain foundational principles such as constitutional supremacy, democracy and the rule of law. Whereas the Canadian courts have had to excavate these unwritten principles from beneath the surface of the written text of the constitution,¹⁴³ the South African Constitution explicitly entrenches the almost identical values, in s. 1 of the 1996 version.¹⁴⁴ The Court has not yet needed to explore

¹⁴² Makwanyane, ibid.
¹⁴³ See Reference re Secession of Quebec, [1998] 2 S.C.R.217 at paras 48-82, discussed in more detail in chapter 3 below [hereinafter Quebec Secession Reference].
¹⁴⁴ Section 1, which is part of the chapter titled "Founding Provisions" provides as follows:
"The Republic of South Africa is one, sovereign, democratic state founded on the following values:
(a) human dignity, the achievement of equality and the advancement of human rights and
the limits or depths of these values, but it has had occasion to invoke one or more of them in various contexts though not so far in relation to the legality requirement in limitation of human rights.

While the Court has taken a fairly expansive approach to the ideals of the new South Africa in general statements about its import, such as the one from Makwanyane quoted above, it has been more cautious when dealing with these principles individually. In the case of Fedsure Life Assurance Ltd. and Others v. Greater Johannesburg Transitional Metropolitan Council and Others, the Court said of legality:

> It is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law - to the extent at least that it expresses this principle of legality - is generally understood to be a fundamental principle of constitutional law. This has been recognised in other jurisdictions. ... It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution. Whether the principle of the rule of law has greater content than the principle of legality is not necessary for us to decide here. We need merely hold that fundamental to the interim Constitution is a principle of legality.¹⁴⁵

The Court uses the term “legality” in a limited sense in Fedsure, in which matter the question was raised in relation to the authority of local government bodies to make decisions to fix rates, and to levy a contribution from certain bodies in order to pay subsidies to others. The case was

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¹⁴⁵ 1999 (1) S.A. 374 (CC) at paras 56-58 [hereinafter Fedsure].
The rule of law has also been discussed in relation to the role of the judiciary, in the protection and enforcement of rights, in the review of executive action and in the impartial adjudication of proceedings in which the liberty of an individual is at stake. Not surprisingly, the rule of law has been a reference point in discussions about arbitrariness in the context of inequality, whether it be in the formulation of law by the legislature, or in the implementation by executive officials. Frequently quoted is the Court’s formulation of a test for measures alleged to breach the right of “equality before the law,” which it set out in the judgment in Prinsloo as follows:

In regard to mere differentiation the constitutional State is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest ‘naked preferences’ that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional State. The purpose of this aspect of equality is, therefore, to ensure that the State is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation.


De Lange, ibid. at paras 31, 45-48.

Hugo, supra note 76 at para 20.

See De Lange, supra note 146 at para 89 (but cf. para 125), 128; Coetzee, supra note 137 at paras 61-3.

Prinsloo, supra note 141 at para 25 (footnotes omitted). Note the emphasis on justification in the Court’s description of the legislative function. This aspect of Prinsloo has been followed in Walker, ibid. at para 27; Harksen v. Lane NO and Others, 1998 (1) S.A. 300 (CC) at para 43; East Zulu Motors (Pty) Ltd. v. Empangeni/Ngwelenzane Transitional Local Council and Others, 1998 (2) S.A. 61 (CC) at para 24. See also in relation to equality and the rule of law, Makwanyane, supra note 70 at para 163, De Lange, supra note 146 at para 131 and Mistry v. Interim National Medical and Denial Council and Others, 1998 (4) S.A. 1127 (CC) at para 29. In the judgment of Sachs J in Walker, at para 134, he linked the rule of law to the notion of restoratation of order after the ravages of apartheid rule, or the struggle to “achieve acceptance by all inhabitants of the city of the entitlements and responsibilities that went with municipal citizenship.”
Perhaps most pertinently in a discussion of methods of post-war constitutional analysis, the rule of law was invoked in *Ferreira* in relation to the two-stage process itself. The Court in that case had to define the content of the right to freedom and security of the person, entrenched in s. 11 of the 1993 Constitution in absolute terms. In interpreting the provision, the Court said the following:

Section 11(1) of the transitional Constitution contains no internal limitation such as is found in s 7 of the Canadian Charter. There seems to be no reason in principle why the limitation of the right should not consistently be sought for and justified under s 33(1) [the general limitation provision]. ... It would seem to further the norms of the rule of law and of constitutionalism better for Courts, in applying the Constitution, to seek for any limitation to s 11(1) rights in s 33(1), where the Constitution lays down criteria for limitation, than to seek limits in s 11(1) by means of an interpretative approach which must of necessity, having regard to the nature of the right to freedom, be more subjective, more uncertain and more constitutionally undefined.\(^{151}\)

The Court goes on to confirm the appropriateness of the two-stage approach to rights analysis, which it says is prescribed by the Constitution itself and which will tend to minimise subjectivity, thereby promoting the values inherent in the rule of law. The Court thus assigns normative value to the method of analysis prescribed by the text of the Constitution, claiming that it maximises the underlying principle of the rule of law and implying that the integrity of that method is important in the Court’s obligation to “promote the values that underlie an open and democratic society based on human dignity, equality and freedom.”\(^ {152}\)

Professor David Dyzenhaus, analysing the new constitutional arrangement and drawing on

\(^{151}\)*Supra* note 71 at para 82. This statement echoes the intentions of the expert drafters as set out in their Third Progress Report,* supra* note 66 and the text following it.

\(^{152}\)This obligation is set out in s. 39(1) of the 1996 Constitution, titled “Interpretation of Bill of Rights.”

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Mureinik's notion of a "culture of justification", has recently argued that the fundamental principles of the legal order, which Mureinik drew from administrative law at a time when South Africa had no written constitution entrenching them, and which could now be said to be elements of the obligation of governmental justification, together make up a "theory of legislation" rather than one of adjudication. They are, he says, "principles with which a legislature has to comply if it is to act coherently with the aspirations of the rule of law." In requiring this, the principles facilitate rather than constrain democracy, so that the demand that government satisfy the requirement of legality when exercising its powers should not entail the much-criticised consequence of judicial supremacism, but the intensification of democracy through principled scrutiny of government's justification for a particular legislative or executive action.\textsuperscript{154}

Dyzenhaus contrasts the "liberal" constitution of the United States with the "democratic" model chosen by Canada and South Africa, saying that the analytic separation of rights and limitations in the constitutions of the latter provides the legislature with,

... a say in determining the content of constitutional principles, through permitting it to enact statutes that limit constitutional rights. In terms of such a provision, the courts will reserve to themselves the decision at the first stage of

\textsuperscript{153} D. Dyzenhaus, "Law as Justification: Etienne Mureinik's Conception of Legal Culture" (1998) 14 S.A. Jnl. Human Rights 11 at 19-22. These fundamental principles include the following: "...the principle that policy should be implemented in a reasonable or non-discriminatory fashion; the principle that someone whose rights are affected by an official decision has a right to be heard before that decision is made; ...the principle that no executive decision can encroach on a fundamental right unless the empowering statute specifically authorises that encroachment; the principle that regulations made under discretionary powers (for example, the power to make regulations declaring and dealing with a state of emergency) must be capable of being defended in a court of law by a demonstration that there are genuine circumstances of the kind which justify invoking the power and that the powers actually invoked are demonstrably related to the purpose of the empowering statute."

\textsuperscript{154} Ibid. at 31.
analysis as to whether a statute infringes a constitutional right. But at the second stage, a limitation provision gives the government an opportunity to show that the limitation is justifiable, inter alia, in terms of constitutional principles - the principles of, to give the formulation in South Africa's final Constitution, "an open and democratic society based on human dignity, equality and freedom".¹⁵⁵

This emphasis on institutional roles in the process of justification reveals both the onus on the government in the adjudicative arena - to justify a particular act, and the strength of its position - its entitlement to try to persuade us of its adherence to the fundamental principles. Dyzenhaus posits that a theory of law as a "culture of justification" embodies the notion that the primary mode of law-making is legislation, and also embraces a commitment that the judiciary are guardians of the fundamental principles of law, which make internal to the law what he calls the twin aspirations of both democracy and administrative law - participation and accountability.¹⁵⁶

The Court's statement in Ferreira, quoted above, about the potential of the constitutional design to maximise the rule of law as a living principle, is congruent with Dyzenhaus' view.

This brief discussion of the contexts in which the rule of law has been invoked by the Constitutional Court, and of Dyzenhaus' development of Mureinik's work does, I hope, serve to evoke something of the complexity and multi-layered nature of the rule of law and democracy principles. It also attempts to draw out the non-severability of those fundamental principles from the requirement of legality. Finally, it highlights the crucial significance of the requirement

¹⁵⁵  Ibid. at 32.

¹⁵⁶  Ibid. at 34-35. He goes on to explain the terms "participation" and "accountability" as aspects of the basic principle of democracy, being that "... all decisions backed by the public force that goes with invoking the authority of 'the people' are legitimate only if they can be shown to be justifiable. And the criteria of justifiability cannot be grouped in a category of substance or one of process/propriety of method. For in the culture of justification, the determination of the content of substantive criteria must always at least to some extent be a question of correct process. And process criteria are adopted more often than not for substantive reasons..."
of legality as an indicator and monitor of institutional roles in the post-war model of constitutional rights-protection. It remains to be seen how and to what extent the potential of the legality principle as a facilitator of democracy and a tool for protection of rights through promotion of the values underlying them, is realised through judicial interpretation. In the following chapter I examine the legality concept at work, principally in decisions of the European Court of Human Rights and the Canadian Supreme Court, but with reference to South African cases where possible.
CHAPTER THREE

APPLICATION OF THE LEGALITY REQUIREMENT

3.1 INTRODUCTION

The requirement that a limitation on a right be "prescribed by law" or be "in terms of law of general application" is a requirement, at the very least, that the rule, conduct or decision which constitutes the limitation be authorised by law. This much may be gained from a simple textual analysis of the provision in the constitutions in which it appears. As discussed above, the requirement is framed as a prerequisite for substantive justification in Canada, South Africa and in the ECHR, in that it introduces and is additional to the criteria for substantive justification. In a state underlaid by the principle of the rule of law, it is necessary for all exercises of public power to emanate from lawful authority, not only those exercises which interfere with fundamental rights. And in a constitutional state such as Canada or South Africa, it is a fundamental principle of constitutionalism not only that all public power has its ultimate source in law, but that all law comply with the terms of the Constitution. This constitutionalised rule of law is a principle frequently evoked in matters which challenge fundamentally the nature or institutional arrangements of the democratic state, but the principle is not invoked by reference to the limitations provision of a charter of rights. Rather, reference is made to the terms of the preamble or the foundational constitutional principles, whether explicit or implied. Thus it

157 Quebec Secession Reference, supra note 143 at para 71; FedSure, supra note 145 at paras 56-58.
158 Quebec Secession Reference, ibid. at para 72; FedSure, ibid.
159 The preamble to the ECHR provides, in relevant part, that the governments signatory to it, "Being resolved, as the governments of European countries which are like-minded and have a common heritage.
is not obvious that the legality element of the limitations provision is necessary to ensure compliance with the requirement that all limitations on rights be legally authorised, though its explicit inclusion encourages a logical coherence in the limitations exercise, and permits an interpretation of the provision which demands more than that basic rule.

If the rule of law, as entrenched constitutionally, means at least that all exercises of public power must have their source in law which must be consistent with the constitution, and the rule of law permeates the entire constitution either explicitly or impliedly, then the requirement of legality in the limitation of rights is not a mere reiteration of the general principle, but a specific manifestation of it. Along with the rule of law, the principle of democracy underlies the notion of legality. According to the Canadian Charter, only those limitations on rights which are “prescribed by law... in a free and democratic society” are constitutionally permissible. The South African and ECHR limitations provisions similarly qualify the legality principle by a requirement of conformity to the expectations of democracy. What then is required of the government, in order for it to establish that it ought to be permitted to substantively justify its interference with a fundamental right? And further, what does it mean for the application of the legality requirement in limitation of rights, for it to be characterised as a manifestation or specific articulation of general, foundational principles which underlie the constitution as a

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of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration, [agree to the rights following thereon].” The preamble to the Canadian Charter reads as follows: “Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law.”

160 For Canada, see the Quebec Secession Reference, supra note 143 at paras 49-54, invoking the principles as vital unstated assumptions upon which the text is based - its lifeblood. For South Africa, see s. 1 of the 1996 Constitution, supra note 144.
Both the rule of law, and the details of the democratic principle, are philosophically and politically contested terrain, and it is not a simple task to extract particularities from them, which can be measured against governmental action to evaluate its compliance. Also, these principles reach both deeply, to the roots of the constitutional state, and broadly, to patrol its boundaries, and are in that sense conspicuously general in their terms. The legality requirement in the limitation of rights is the setting for a particular incarnation of these principles. I will proceed to examine the ways in which the rationales for the legality requirement have been articulated in the case law by reference to these foundational principles, and to what extent the treatment of legality is congruent with judicial visions of the function and status of these principles. In doing this I will try to draw out what I perceive as tensions in the interpretation of the legality requirement, between the demands of the constitutional principles and the judiciary’s approach to its own institutional function and that of the legislature, these tensions being most evident in the Canadian jurisprudence.

Although the constitutional principles underlying the legality requirement constitute the basis for judicial interpretation of the provision in all its applications, it may be helpful to examine separately the circumstances in which legality is most frequently at issue. The specific questions raised in the application of the criteria may vary from category to category, and an analysis of their judicial treatment is interesting both for the differences and the similarities. These categories, or areas of frequent application, are drawn principally from the constitutional or Convention case-law of the European Court of Human Rights, the Canadian and the South
African courts, and may be characterised as follows:

(a) common law rules;
(b) non-statutory executive action, and particularly the exercise of prerogative powers;
(c) subordinate legislation;
(d) acts or bills of attainder;
(e) legislative vagueness (statutes or regulations);
(f) (unlawful) exercise of statutory duty or permission;
(g) (unlimited or insufficiently fettered) discretion delegated to administrative officials;
(h) (unlimited or insufficiently fettered) discretion delegated to judicial officers;
(i) departmental directives, guidelines, rules or policies.

Some of these categories are, or have become, relatively unproblematic, through consistent and reasoned judicial interpretation or through legislative regulation, in which case I will not discuss them in detail. This is not to say that they do not raise difficult interpretive or theoretical questions, only that what was in the early post-war stages of legality jurisprudence and debate seen as distinctive about these types of “law” and which caused doubts about their susceptibility to legality review, has been dissipated. Common law rules are “law” for limitation purposes as long as they comply with the ordinary criteria for legality. Subordinate legislation is also considered “law” as long as it is not unduly vague. So-called bills of attainder will almost inevitably fail to satisfy the generality element of legality, and explicit identification as such is probably not necessary for their invalidation. The category of constitutionally authorised executive (at least prerogative) power is not as clearly capable of constituting law for limitation purposes, but there are judicial statements to the effect that it may. Other categories are closely
related and even overlap, and I will discuss them together. Three of the categories of application permit more detailed consideration, as they have been developed to some extent in the jurisprudence. These are (i) legislative vagueness; (ii) delegation of authority, discretionary or otherwise, to enforcement, administrative or judicial officers; and (iii) departmental directives and administrative guidelines.

3.2 COMMON LAW

As described above, in all the jurisdictions I have referred to, and despite uncertainty in this regard during the immediate post-war period of treaty drafting, common law rules have been interpreted by courts to be “law” for purposes of limitation of rights.¹⁶¹ In a different context - where the status of a university retirement policy was at issue - Wilson J said that in order for the legality requirement to be satisfied, “[t]he definition of law for such purposes must necessarily be narrow. Only those limits which have survived the rigours of the law-making process are effective.” This is true of common law rules only in that they exist at a particular point in time, unchanged by the legislature. In *McKinney*, Wilson J used the term “law-making” as synonymous with “legislative”, and the inclusion of common law as “law” for legality purposes does inevitably raise questions about the extent to which the democracy principle is served thereby.

¹⁶¹ *Supra* note 24. In the European context, the reason given relates directly to drafting intention: “It would clearly be contrary to the intention of the drafters of the Convention to hold that a restriction imposed by virtue of the common law is not ‘prescribed by law’ on the sole ground that it is not enunciated in legislation: this would deprive a common-law State which is Party to the Convention of the protection of Article 10§2 and strike at the very roots of that State’s legal system.” *Sunday Times* case, *supra* note 24. The South African Constitutional Court gave no reasons for its finding that the phrase “law of general application” included common law, save to say that the limitations provision draws no distinction between categories of “law” for these purposes. See *Du Plessis, supra* note 24 (Kriegler J); *Shabalala and Others v. Attorney-General, Transvaal and Another*, 1996 (1) SA 725 (CC) at para 23.
The simple democratic rationale for the endorsement of judge-made law is that the legislature
has the power to amend the common law by means of legislative enactment, thus those rules of
the common law that emerge intact from parliamentary scrutiny, or that are ignored by
parliament, are said to have the implied assent of the representative body. In reality not all
common law rules are actually considered by the legislature, and even fewer are subject to the
kind of complex, multi-layered, participatory and deliberative scrutiny that the democracy
principle is said to embody. Despite these conceptual stretches, as long as it is the case that
common law rules in a particular legal system constitute a binding source of legal rights and
obligations and may be overturned or amended by the legislature, it is the only feasible solution
and must be correct that they will be capable of restricting rights, if they are sufficiently precise
and accessible and comply with the other limitation criteria.

One of the legality problems raised by common law is the constitutional effect of a judicial
order which has the effect of overturning an existing common law rule. It is difficult to see how
such an order could be foreseeable and accessible in the terms described in the Sunday Times
case, which required that the rights-holder “... be able to have an indication that is adequate in
the circumstances of the legal rules applicable to a given case”, which rules should be “...
formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able

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162 Quebec Secession Reference, supra note 143 at paras 61–68. The democratic system envisaged by the
Court in that case must respect the dignity of its people, recognise their cultural, religious and group
identities and enhance their participation in society. It must be legitimate, in the sense that it must allow
discursive participation of, and be accountable to, those it represents, but must also reflect the aspirations
of the people and adhere to the moral values inherent in the system. Representative and responsible
democratic government involves compromise, negotiation and deliberation; democracy entails the
consideration of dissenting voices, and the acknowledgment and address of those voices in the generally
applicable laws.

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- if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.\textsuperscript{163} Despite that, it will surely be rare that a court will exempt an applicant from the exigencies of the new rule on the basis that it is not prescribed by law, unless the new rule is radically different or there are clearly conflicting decisions articulating the previously existing rule.\textsuperscript{164} There seems to be an acknowledgement by the courts that the nature of the development of common law is such that a lenient standard of predictability is the only feasible one, in order not to stultify the incremental process of development of judicial precedent, which ordinarily has retroactive effect in relation to the parties to a particular dispute.\textsuperscript{165}

From a rights-protection perspective, however, the question must be asked whether in cases in which interference with a fundamental right has been established, the retroactive effect of common law reforms which further restrict a right should be permitted to burden the

\textsuperscript{163} \textit{Sunday Times, supra} note 24 at para 49.

\textsuperscript{164} In the \textit{Gay News Case} (1982), 5 E.H.R.R. 123 at 128-9, a decision of the Commission of Human Rights in which the clarity of the existing common law of blasphemous libel was at issue, the Commission stated, "While this branch of the law presents certain particularities for the very reason that it is by definition law developed by the courts, it is nevertheless subject to the rule that the law-making function of the courts must remain within reasonable limits.... By stating that the \textit{mens rea} in this offence did only relate to the intention to publish, the courts therefore did not overstep the limits of what can still be regarded as an acceptable clarification of the law." In other words, "clarification" of the common law is acceptable for legality purposes, but if a court were to go beyond that (to create a new rule) the legality of its action would be questionable. This statement is unusual in the sense that the European functionaries do not, on the whole, insist on legislative primacy or express concern that the source of precision of a legal rule is judicial interpretation or administrative guidelines rather than the impugned statutory provision itself.

\textsuperscript{165} Detailed discussion of retroactivity in common law rulings is beyond the scope of this project, but for an introduction to the issues see for example B.H. Levy, "Realist Jurisprudence and Prospective Overruling" (1960) 109 U. Penn. L.R. 1.
unsuspecting party. Hovius argues that such a consequence should not be allowed, and it does seem that the breadth of the remedial powers of courts in constitutional cases provides scope for alleviation of the effects of retroactivity. Prospective overruling or, in constitutional terms, suspension of an order of invalidity, is a device which has been used by both the Canadian and South African courts, though not yet in relation to common law rulings. This matter aside, the question of whether common law itself qualifies as law has been, irrevocably I would argue, decided in favour of its inclusion, even if the criteria which have developed for testing legality - and its democratic law-making rationale - do not always sit easily with the decision. It remains in particular cases to evaluate the precision, accessibility and foreseeability of the common law rule in issue.

3.3 NON-STATUTORY EXECUTIVE ACTION

The extent to which non-statutory executive action and more particularly the exercise of prerogative powers are subject to judicial review, differs from jurisdiction to jurisdiction. That makes the narrower question of their susceptibility to legality review complicated, from a comparative perspective, and I will thus refer mainly to the South African position. In the case


167 Section 24(1) of the Charter orders a court to provide “such remedy as the court considers appropriate and just in the circumstances.” See for examples of suspension of invalidity, Reference re Section 23 of the Manitoba Act, 1870, [1983] 1 S.C.R. 721; Schachter v. Canada, [1992] 2 S.C.R. 679 (CC) [hereinafter Schachter]. Section 98(5) of the 1993 South African Constitution expressly permitted this type of order; see Executive Council, Western Cape Legislature and Others v. President of the Republic of South Africa and Others, 1995 (4) SA 877 (CC) [hereinafter Western Cape Legislature]; S. v. Ntuli, 1996 (1) SA 1207 (CC); Fraser v. The Children’s Court, Pretoria North and Others, 1997 (2) SA 261 (CC). Section 172(1)(b)(i) of the 1996 Constitution permits a court to make “an order limiting the retrospective effect of the declaration of invalidity” but the applicability of this section to common law has not been tested. Arguably however, the court’s power to make “any order that is just and equitable” in terms of s. 172(1)(b) is sufficient.
of Hugo, the Constitutional Court decided that in the new constitutional state, founded upon and regulated by the 1993 Constitution, the President’s power to pardon offenders is a manifestation of executive power which has its origins in the English royal prerogative powers. All executive power is subject to the Constitution and therefore susceptible to judicial review. The Court also decided that those prerogative-type executive powers listed in the Constitution are the only ones authorised, thus that there are none remaining which exist by virtue of the common law.

Although the majority of the Court had no need to decide the legality question and the two judges who did, Kriegler and Mokgoro JJ, disagreed, the basic principle seems clear enough: executive powers, all of which are authorised either by Parliament or the Constitution directly, are subject to the Bill of Rights and thus any exercise thereof which infringes a fundamental right must comply with the limitations criteria in order not to be invalidated. The tricky part is that the empowering provision, a clause in the Constitution, gives no explicit authority to the President to limit rights (reasonably) in the exercise of those powers. Does that mean that the executive is prevented from limiting rights at all in the exercise of constitutional powers,

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168 Hugo, supra note 76 at paras 5-29. For the Canadian position, which is that executive acts are subject to Charter scrutiny, see Operation Dismantle v. The Queen, [1985] 1 S.C.R. 441. The legality question in relation to non-statutory executive acts has not been explicitly decided, but see Douglas/Kwantlen Faculty Association v. Douglas College, [1990] 3 S.C.R. 570 at 585-586; Lavigne v. OPSEU, [1991] 2 S.C.R. 211 at 333-334, in both of which the implication is that government action derived from common law rather than statutory authorisation constitutes “law” for s. 1 purposes. Hogg states in relation to both these cases that there was statutory authority for the collective agreement, but that the Court chose to decide the matters on common law grounds (see Hogg, Constitutional Law of Canada, supra note 108 at 34-16.1).

169 Since the Hugo decision, draft legislation giving effect to the right to just administrative action, entrenched in s. 33 of the 1996 Constitution, has been published for comment; see South African Law Commission Discussion Paper 81, Project 115 Administrative Law, January 1999. The draft Administrative Justice Bill includes all executive action authorised by either the Constitution or legislation under the term “administrative action”, thereby subjecting it to the requirements of the draft Bill as well as to the Constitution itself. Section 4 of the draft Bill sets out the grounds of review of administrative action.
because the power to do so is not explicitly authorised by the empowering constitutional provision? Or does the executive have that power, as long as the exercise of constitutionally derived authority constitutes rule-making, thus effecting the limitation of rights by means of a "law of general application"? If that is the case, is there any democratic justification for such a conclusion?

The Presidential Act at issue in Hugo, which was an exercise of the constitutionally entrenched executive power to "pardon or reprieve offenders," was not passed through the legislature and was not published in the Government Gazette along with ordinary legislation. The power was subject only to a constitutional requirement that there be prior consultation with the Executive Deputy Presidents. While the classification of types of executive power is a contentious and difficult matter, it appears that the legality requirement necessitates a distinction, at least, between rule-making powers and others, such as adjudicative powers. It is possible that in relation to rule-making powers, different criteria for legality ought to apply since the dangers of arbitrariness and discrimination in exercise thereof are shifted away, by obligations of publication and generality in the making of those rules.

170 The same question arises in the context of a broad statutory delegation of decision-making discretion to an executive official, which will be discussed in further detail below.

171 Section 82(1)(k) of the 1993 Constitution.


173 The draft Administrative Justice Bill, supra note 169, defines "rule" as "any statement designed to have the force of law, including subordinate legislation made in terms of an Act of Parliament or in terms of provincial legislation", and requires notice-and-comment procedures in respect of all proposed rules, and public access to and drafting consistency of all completed rules.
In Hugo, the two judges who considered the legality question differed more on the application of the legality criteria than the nature of those criteria, which both judges appeared to derive from the rule of law and from notions of democratic law-making.\textsuperscript{174} Mokgoro J suggests a democratic justification for the treatment of presidential prerogative-type powers as “law” for limitation purposes, which is that they are authorised directly by the Constitution, itself the product of vigorous negotiation. Kriegler J disagrees in terms which suggest that he would never find a non-statutory executive act to be “law” for limitation purposes.\textsuperscript{175} Thus the issue which divides them, and the core legality question in this context, is whether the nature of non-statutory, constitutional exercises of executive power is such that it can never be used to limit rights, even reasonably and justifiably, or whether and in what circumstances it may do so.

In the case of executive action authorised by primary legislation (discussed in sections 3.4 and 3.7 below), the Canadian and South African courts have in fact made a distinction between executive rule-making, and other executive action. Where rule-making is at issue, the courts ask whether those delegated rules themselves constitute law of general application, and not whether the empowering provision (whether legislative or constitutional) authorises limitation of

\textsuperscript{174} De Waal, Currie and Erasmus, \textit{supra} note 126 at 148.

\textsuperscript{175} \textit{Supra} note 76 at para 76, note 86. He says, in relation to Mokgoro J’s view that the Presidential Act constitutes “law of general application”, “The exercise by the President of the powers afforded by s 82(1)(k) - even in the general manner he chose in this instance - does not make ‘law’, nor can it be said to be ‘of general application’. The exercise of such power is non-recurrent and specific, intended to benefit particular persons or classes of persons, to do so once only, and is given effect by an executive order directed to specific state officials. I respectfully suggest that one cannot by a process of linguistic interpretation fit such an executive/presidential/administrative decision and order into the purview of s 33(1). That savings clause is not there for the preservation of executive acts of government but to allow certain rules of law to be saved.”
rights. Where the action taken is adjudicative or administrative or in any way non-legislative, the empowering provision is examined for compliance with legality. In Hugo, both judges look at the Presidential Act itself and not at the constitutional provision which authorises the exercise of the power, when searching for a “law of general application”. Krieger J effectively characterises the action as non-legislative but does not check the empowering provision - s. 82 of the 1993 Constitution - to see whether it authorises reasonable limitation of rights. Mokgoro J characterises the action as rule-making and finds that it does satisfy the legality requirement, without checking whether the Constitution itself authorised the limitation of rights.

In the case of executive rule-making authorised by primary legislation, there is a democratic check on the regulations, in that the legislature is free to amend or repeal the empowering provision should the regulations be unduly onerous, insufficiently public-regarding or otherwise inappropriate. But in the case of executive empowerment by constitutional provision to perform a rule-making function, it is more difficult for the executive power to be controlled through the democratic process. If the constitution does not, either expressly or impliedly, authorise the President to limit rights reasonably in the exercise of his or her power to pardon, it would in my view be difficult to rationalise a judicial interpretation of the provision that permits such restrictions.

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176 See for example Larbi-Odam and Others v. MEC for Education (North-West Province) and Another, 1998 (1) S.A. 655 (CC) at para 27; Therens, supra note 24 at 645; Irwin Toy, supra note 120 at 981.

177 The limitations provision in the 1993 Constitution required that rights be limited only “by law of general application” whereas the 1996 Constitution refers to limits “in terms of law of general application” (my emphasis). Although it is unlikely that anything turns on this change, the 1993 Constitution could have been construed as having a narrower ambit than the later version.

178 But see the obligations of participation, publication, drafting consistency and the grounds for review proposed in the draft Administrative Justice Bill, supra note 169.
3.4 SUBORDINATE LEGISLATION

Regulations are instances of executive rule-making, authorised by empowering legislation which has itself passed through the democratically elected legislative branch. Regulations which exceed the jurisdiction granted them by the empowering legislation are *ultra vires* and thus invalid, on the basis that they are not authorised by law. Curiously however, and as mentioned above, the courts in both Canada and South Africa have, in their assessment of the legality of subordinate legislation, not asked whether the empowering legislation authorises the executive law-maker to (reasonably) restrict rights. In other words, as long as the regulations themselves are accessible and sufficiently precise, the relevant courts have deemed them to be "law" for legality purposes, without reference to the precision of the empowering legislation, including the question of whether such empowering legislation explicitly or impliedly authorises the executive official concerned to limit rights. Whether that question is a separate, administrative law *vires* issue is not clear. The implication of these cases is that when the executive is authorised to make binding rules, it performs the task of a legislator and thus has a choice whether those rules restrict rights reasonably. This obviously raises the question of the democratic legitimacy of such powers.

Ordinarily regulations are not tabled in or approved by the legislature, and any such requirement would in many cases defeat the purpose of the delegation, which is to streamline the legislative process because the primary legislative body does not have the capacity nor the time to deal with the regulatory minutiae of every governmental rule. The dangers of abuse of the authority to
delegate law-making power are obvious and judicial precedent in this area has served to limit the scope of that power and regulate its content. But when a court treats executive-made rules automatically as "law" for limitation purposes, it means that there is no examination of whether the empowering legislation authorises limitations on rights, and the regulations are thus democratically legitimate for legality purposes only in the sense that like common law rules, they have not been superceded by primary legislative action.

In Canada, the concept of democracy invoked by the Court in the Quebec Secession Reference is an intense, multi-layered, participatory, deliberative one. It emphatically situates the legislative process within a qualitative framework rather than a merely process-oriented or formal one. The duty of legislators to be public-regarding, in all the complexity which that entails, in their reasoning and decision-making, and thus in their obligation of justification in constitutional review, is a weighty one. The notion that simple majoritarian preferences, or the views of an unelected executive official, could serve as the basis for legislative choices is firmly renounced. It is somewhat surprising therefore, that the democracy principle has only rarely been invoked in relation to the requirement of legality in limitation of rights, which is most obviously a test of the quality of the law-making process. It also seems incongruous that executive law-making

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179 In the case of apartheid South Africa, these dangers and their actual consequences are also well-documented and notorious, though a detailed discussion of the abuses of executive law-making are beyond the scope of this project. See for example E. Mureinik, "Fundamental Rights and Delegated Legislation" (1985) 1 S.A. Jnl. Human Rights 111; O'Regan, supra note 172 at 162; H. Corder, "Administrative Justice in the Final Constitution" (1997) 13 S.A. Jnl. Human Rights 28.

180 See for instance Western Cape Legislature, supra note 167.

181 It was invoked by Wilson J in McKinney, supra note 121, and by the same judge in R. v. Swain, supra note 137, quoting from Hunter v. Southam. In Swain, Wilson J, commenting on whether discretionary powers conferred by statute should be interpreted so as to comply with the Charter, said this would amount to a presumption of constitutionality which would be inappropriate, and that she preferred the
has been immune to the demands of democracy, in the courts’ unquestioning treatment of regulations as “law” for limitation purposes. Despite judicial references to the rigours of the legislative process, and the responsibilities of lawmakers, it is clear that the courts’ examination of the process of enactment of both primary and subordinate legislation is superficial at best, and takes account only of the formal requirements of valid enactment. Whether dissenting voices have been heard, and compromises made, is way beyond the scope of a court’s enquiry into the legality of the impugned provisions.182

The European Court’s references to the principle of democracy embrace similar values to those in Canada, but relate less to participation in the legislative process and more to the substantive measures required of states to protect rights in the region. In relation to limitation of rights, Delmas-Marty characterises its legality jurisprudence as the development of two complementary strands - a broad “European” legality, being the requirement that an impugned measure have a basis in the domestic law of the member state, and a narrow “democratic” legality, being the requirement that the “quality” of the impugned law comply with principles underlying the terms of the Convention.183 Democracy, being one of these foundational values, is explicitly invoked

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182 The 1996 Constitution for South Africa contains explicit (though not specific) obligations on legislative bodies at national, provincial and local levels to operate openly and to facilitate public involvement and that of minority parties, where appropriate, in the legislative and other processes of its organs. See ss. 57(2), 59(1), 70(2), 72(1), 116(2), 118(1), 152(1). Whether these provisions are in any way justiciable remains to be seen. The draft Administrative Justice Bill, supra note 169, prescribes similar obligations in respect of subordinate legislation.

183 Delmas-Marty, supra note 73 at 323-4.
in the limitations provisions unlike the rule of law, though it could be argued that the latter is inherent in the former. Delmas-Marty says of the relationships as follows,

> While [the principle of legality] may appear in the text of the Convention (and certain Additional Protocols) as a mere pre-condition, it is in reality an adjunct of the ‘rule of law’ which itself is integral to the idea of a ‘democratic society’; in this sense it forms part of the ‘democratic necessity’ of which it constitutes the first criterion.\(^\text{184}\)

This is an important idea as it shows the unity of the rights-guarantee and limitations concept, and of the values underlying it. The task of the courts is to create a doctrinal framework for these integrated ideas. It must extract from these general underlying principles criteria of sufficient particularity that they may be used to evaluate governmental measures alleged to interfere unjustifiably with human rights, and at the same time maintain a sense of the Convention as a coherent whole. Delmas-Marty sees democratic necessity as the basis of all the elements of justification, and thus as a thread running through the specific requirements of each element.

Expanding her commentary on notions of European democracy as entrenched in the Convention, Delmas-Marty identifies certain other areas in which the Court has attempted to give content to the concept: in its references to the rule of law and the criteria emanating from it of accessibility, foreseeability and minimisation of arbitrariness and discrimination; also in the value of tolerance, which is linked to pluralism and to broad-mindedness; and in the protection of minorities and the notion of avoidance of abuse of a dominant position.\(^\text{185}\) The European

\(^{184}\) *Ibid.* at 322-323.

\(^{185}\) *Ibid.* at 327-8. She also sets out in summary form the ways in which the Court has developed “a picture of the democratic State as perceived in the Council of Europe at the end of the twentieth century,” at 301-
Court’s vision of a democratic society invokes many of the same values as the Canadian Supreme Court, such as pluralism, tolerance and minority protection. Rather than stressing the importance of participation and accountability in the law-making process, however, it focuses almost solely on the content and meaning of the known laws, and the safeguards they provide against rights infringement. This is understandable as a function of the Convention’s status as a regional instrument, monitoring and assessing rights protection in numerous and variably structured democratic systems, and operates in similar fashion to the Court’s “margin of appreciation”, but it serves as a warning in relation to its usefulness as a comparable body of jurisprudence.

This summary of the European and Canadian courts’ democracy jurisprudence is included as a reminder of the potential dangers of delegation of legislative power, or at least to show that the democratic check on executive law-making authority is of a different quality than the notions of democracy espoused in other contexts. For purposes of legality, courts need to develop a standard that the process and content of executive law-making should meet, a standard that takes account of the concept of democracy enshrined in the constitutions, and that maintains a constant awareness of the democratic deficiencies of this type of legislation.

3.5 BILL OF ATTAINDER

As for bills of attainder, there appears to be little doubt that these specifically targeted legislative acts do not comply with the constitutional obligation that limits on rights apply generally, or be
prescribed by law. The standard definition of a bill of attainder is a fairly narrow one, referring to laws which are designed to target specific named individuals or easily ascertainable members of a group for punishment without judicial trial. There is little case law in this area, and the promulgation of such bills is by all accounts a fairly rare occurrence in democratic countries. In jurisdictions without an explicit constitutional prohibition on bills of attainder or a justiciable bill of rights which implicitly has the same effect, bills of attainder or similar legislative acts are occasionally invalidated or stated to be prohibited on the basis that they contravene the principle of separation of powers, through legislative usurpation of the judicial role or interference with the integrity, independence and impartiality of the courts.

The academic commentator Woolman says about the South African legality formulation, “in terms of law of general application", that the requirement of generality is partly intended to prohibit bills of attainder and thus to impede arbitrary and discriminatory conduct not only of officials authorised to exercise discretionary powers, but also of law-making bodies themselves. This follows from ordinary application of the sequenced rights and limitations method of analysis. The preliminary limitation question in each case of impugned official discretion,

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186 See Woolman, supra note 54 at 12-28 to 12-29. The term “generality” traditionally refers to the principle that laws should bind both the state and the individuals subject to its constitutional precepts. But in the context of limitation of rights, it is used also to distinguish bills of attainder from laws which apply generally.

187 See United States v. Lovett, 328 U.S. 303 (1946); United States v. Brown, 381 U.S. 437 (1965). The United States Constitution contains express prohibitions of bills of attainder at both the federal and state levels, at articles I, ss 9, 10. In Communist Party of Australia and Others v. Commonwealth of Australia, (1951) 83 C.L.R. 1 at 172 the High Court of Australia confirmed the view that a specifically targeted act does not amount to a bill of attainder if it does not claim to convict a person of an offence.

assuming that interference with a fundamental right has been established, will be whether the interference is authorised by an empowering statute or regulation or common law rule, which empowering norm must comply with the generality requirement (and with all the other requirements of legality). An empowering provision which authorises either arbitrary or discriminatory decision-making power will fail the test of generality, thus the norm itself and conduct in terms thereof will be invalidated. If there is authorisation to limit rights reasonably, the legality requirement will be satisfied and the justifiability of the particular interference will have to be established by the respondent. Most decisions of administrative officials, and judicial orders, are specifically targeted in the sense that they bind or affect only the parties to the dispute, and the requirement of generality cannot be intended to disqualify them on that ground alone. In constitutional states with an express legality requirement, it seems fairly clear that any bill of attainder, whether explicitly identified as such or not, would not survive judicial scrutiny.

3.6 LEGISLATIVE VAGUENESS

Vagueness as a legal doctrine pre-dated the enactment of constitutional rights-protecting instruments in some jurisdictions, at least in relation to subordinate legislation. Despite this, it is apparent from the relevant case law that the constitutionality of vague laws has proved to be complex and problematic in those jurisdictions which have considered it. For one, there is the analytic problem of where in the rights and limitations analysis the test for legislative precision should lie. If a legislative provision breaches a right because of its vagueness, can it be justified by the government as a reasonable limitation, and which aspects of the limitations stage are engaged thereby? Then there is the question of the extent to which a vague legislative provision can or should be cured or improved by judicial interpretation thereof, thus the relative
institutional roles of legislature and judiciary in satisfaction of the demands of legality. Thirdly, the content of the obligation of precision is a matter of some difficulty and debate. The individual’s right to be bound only by laws which are sufficiently clear and precise that one may regulate one’s conduct in accordance therewith, competes with the government’s need for flexibility in its processes, and with the impossibility of attaining perfect drafting clarity. I will address each of these concerns in turn, but first will discuss the stated rationales for judicial recognition of vagueness as a breach of the legality principle, with specific reference to the ways in which these rationales are drawn from the fundamental principles that pervade the constitutional state.

3.6.1 Rationales

The judicial doctrine of statutory “void for vagueness” is not a part of English law, and in a system of parliamentary sovereignty the courts are obliged to give effect to vague primary legislation, one way or another. Yet most commentators would not dispute the claim that the English legal system is characterised by adherence to a network of fundamental constitutional principles, among them the separation of powers and the rule of law, which includes the precept that one should be bound only by known legal rules. The writer J.C. Jeffries argues that in the United States at least, it appears that the contemporary insistence on a prohibition of retroactive definition of criminal offences “may have sprung in part from the desire to establish a secure intellectual foundation for modern vagueness review.” Certainly it appears that the vagueness

189 See generally T.R.S. Allen, supra note 9.

doctrine has developed substantially in the post-war years as a constitutional method of protecting civil rights, and that the legality principle and those fundamental constitutional precepts underlying it are said to form the basis for its emergence and the framework for its evolution.\textsuperscript{191}

The European Court’s legality - and vagueness - jurisprudence is generally acknowledged\textsuperscript{192} to have commenced with the \textit{Sunday Times} decision, delivered in 1979.\textsuperscript{195} The applicants in that case complained that the common law of contempt of court was so vague and imprecise as to constitute a failure of legality. The Court said that the basis of vagueness doctrine was the principle that a person should be able to regulate his or her behaviour. The rule of law was not mentioned expressly by the Court, but as the commentator Harris said at the time, the paragraph setting out the criteria of accessibility and foreseeability, which it said should be used to assess compliance with the “prescribed by law” requirement “... might well be mistaken for a passage from Dicey’s discussion of the Rule of Law.”\textsuperscript{194} The need for precision - and the criteria of accessibility and foreseeability - have since then been linked expressly to the demands of the rule of law, and specifically the protection of the individual against arbitrary interference with

\textsuperscript{191} It is not obvious from the drafting materials available and analysed in chapter 1 of this dissertation that legislative vagueness as such was perceived as a legality concern in the early post-war years, though the principles which today form its intellectual basis were well-known at the time. This may be because it is the possible effects of vagueness that were articulated as problems to be solved by legality, such as overbreadth, unfettered discretion and arbitrariness.

\textsuperscript{192} See for example Hovius, \textit{supra} note 166 at 225.

\textsuperscript{193} \textit{Sunday Times, supra} note 24.

The rule of law has not been invoked only in the context of legislative vagueness. That the rule of law underlies the *Convention* as a whole, has been reiterated by the European Court, which has employed the rule in areas of specific application besides legality. The writer Merrills identifies these as the right of access to the courts and judicial safeguards against arbitrary or discriminatory enforcement.196 In *Golder*,197 which concerned access to court, the Court emphasised context and purpose in construing the treaty, and the usefulness of the Preamble to those methods. It noted that attainment of the rule of law was not stated in the Preamble to be part of the object and purpose of the *Convention*, but to be "one of the features of the common spiritual heritage of the member States of the Council of Europe." The Court went on to say that it would be wrong to see this reference to the rule of law as rhetorical and irrelevant to interpretation of the *Convention*. It also commented on the Statute of the Council of Europe and its stated commitment to the rule of law, which is seen as reinforcing the principle in the *Convention*.

The notion of judicial safeguards when interferences with fundamental rights are authorised by

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197 *Supra* note 70 at paras 34-6.
government is closely linked both to that of access to court and to the demands of legality. This arose in the *Klass* case, as a question of democratic necessity ("necessary in a democratic society"). *Klass* related to the circumstances in which telephone tapping was acceptable, but the impugned activity was based on legislation prescribing in detail the conditions and procedures for its use, thus legality was not directly at issue. The Court again invoked the rule of law, saying that it implies amongst other things that "interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure." Because of the detailed legislation, the Court in *Klass* was not faced with the question of whether the judicial control should be spelt out in the text imposing the interference itself (which would be a question of legality), but subsequently, in *Silver*, rejected the argument that the legality principle required that it should be. Merrills argues that this is correct, since the argument of the applicants in *Silver* would "in effect have subsumed the safeguards question under the legality principle, rather than as part of the necessity issue (where it is surely more appropriate)." He comments, about the *Klass* decision, that the Court treated the question of safeguards against abuse in a relative rather than an absolute way, as a compromise between the defence of democratic society and individual rights. He says that the implication of this approach is that the values represented by the rule of

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198 Delmas-Marty's view is that the requirement of effective judicial enforcement "merges" in the *Malone* case into the requirement of legality; *supra* note 73 at 327.

199 *Silver*, *supra* note 38 at para 90. The applicants contended, unsuccessfully, that compliance with legality meant that the law itself must provide safeguards against abuse, since the rule of law implies that an interference by the authorities with an individual's rights should be subject to effective control. The Court rejected the suggestion that this was an element of the expression "in accordance with the law," saying it preferred to consider that question in the context of remedies.

200 Merrills, *supra* note 196 at 133.
law, though important, are merely factors in the balance. This relative approach is evident in the Court's vagueness jurisprudence, which is inevitably framed in terms which emphasis the need for a balance between the quest for precision, and competing interests.

As for Canada, it was established law in the pre-Charter period that a vague by-law could be annulled by a court. The test for validity (and the rationale for the doctrine) was whether the vagueness was so serious that the judge concludes that a reasonably intelligent person, sufficiently well-informed if the by-law is technical in nature, is unable to determine the meaning of the by-law and govern his or her actions accordingly. Since enactment of the Charter, and the end of parliamentary supremacy, the doctrine has been applied constitutionally to primary legislation. In Irwin Toy, the first of the Charter vagueness judgments in which the Supreme Court linked precision to the legality question, the test for whether the legality requirement was satisfied by allegedly vague law was "... whether the legislature has provided an intelligible standard according to which the judiciary must do its work." Note the absence of any reference to rights, or the foundational constitutional principles which may form the basis of the doctrine. At best the test can be understood as a measure of the relative institutional roles of legislature and judiciary. In the Prostitution Reference, a year later, Lamer J made an effort to underpin the doctrine by reference to the rationales of fair notice of the consequences of

201 This approach can be compared to that of the Canadian Supreme Court in Nova Scotia Pharmaceuticals, supra note 107 at 641-2, discussed below.

202 City of Montreal v. Arcade Amusements Inc., [1985] 1 S.C.R. 368 at 400. See also Rand J in Saumur v. City of Quebec, [1953] 2 S.C.R. 299 at 333, in the context of provincial legislation encroaching on rights of religion and free speech. The doctrine of vagueness is also said to have existed in the form of the criminal law principle, nulla poena sine lege, which condemned judicial creation of new criminal offences.

203 Irwin Toy, supra note 120 at 983.
conduct, and the limitation of law enforcement discretion. As in Europe, the rule of law was not explicitly invoked at that early stage of the legality jurisprudence, though the rationales identified by the Canadian Supreme Court had been associated with the principle long before that in academic commentary and also, by that stage, by the European Court of Human Rights.

The rationale of "fair notice" was ultimately identified as an aspect of the rule of law by Gonthier J for an unanimous Court in the important Nova Scotia Pharmaceuticals decision, and was paired there with the objective of limitation of enforcement discretion. That case involved a challenge to a provision in the Combines Investigation Act on the basis that the term "unduly" therein was unconstitutionally vague. The Court said that the fair notice rationale has both a formal and a substantive element. The formal element is described as acquaintance with the actual text of a statute, and is subject to common law qualifications such as the rule that ignorance of the law is no excuse, and to the rule that judicial interpretation of a statutory provision is also relevant "law" for these purposes. The substantive element of fair notice is described by Gonthier J as "a subjective understanding that the law touches upon some conduct, based on the substratum of values underlying the legal enactment and on the role that the legal

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204 Prostitution Reference, supra note 96 at 1152. Dickson J endorsed his analysis, and Wilson J in dissent agreed with the majority that the provision was not unduly vague. For further endorsement of these twin rationales see Committee for Commonwealth, supra note 113 at 208. At approximately the same time, the Supreme Court articulated a further rationale underpinning the vagueness doctrine, which is that law which is drafted insufficiently clearly has a "chilling effect" on the exercise of fundamental rights. See in this regard Keegstra, supra note 119; Taylor, supra note 105. The "chilling effect" is usually used with reference to the freedom of expression. The notion of a "chilling effect" has not been invoked at the legality stage of the constitutional analysis.

205 Supra note 107, broadly at 626-643. See also Wilson J in McKinney, supra note 121 at 386; L'Heureux-Dubé J in Committee for Commonwealth, ibid. at 208-214.

enactment plays in the life of the society.” He gives a few examples to illustrate this aspect of notice, but it remains somewhat mysterious, and has not been used by courts since then in their interpretation of the legality requirement.\(^{207}\) A clue as to its function is given when he says that there is a connection between the formal and substantive aspects of fair notice, in that an unusual or innovative legislative scheme may be “digested” by society through publicity of its tenets, thus satisfying both the formal and substantive notice requirements.

With regard to the limitation of law enforcement discretion, the second aspect of the rule of law upon which vagueness doctrine was said to be based, the Court explained the rationale in terms of its criminal law effects: a law would be unconstitutionally vague if “... the power to decide whether a charge will lead to conviction or acquittal, normally the preserve of the judiciary, becomes fused with the power to prosecute because of the wording of the law.”\(^{208}\) This rationale is framed as a separation of powers concern, not as an unacceptable encroachment on rights-holders’ ability to evaluate their options, marking a shift in judicial discourse away from rights and towards problems of proper institutional roles, which one can identify as a major preoccupation of the Court in its vagueness jurisprudence. But a focus on the judicial role rather than on the rights-holder serves to conceal the premise, fundamental to the rule of law, that rules be sufficiently precise that the actor may make her choices before the fact. Being vindicated after the fact by a sympathetic judicial interpretation of the vague law is a failure in operation of

\(^{207}\) Gonthier J refers to the decision of Lamer J in \textit{Re B.C. Motor Vehicle Act, supra} note 73, for the proposition that fair notice - which in the \textit{Motor Vehicle} case was discussed in the context of the principles of fundamental justice entrenched in s. 7 of the \textit{Charter} - involves a substantive as well as a formal element.

\(^{208}\) \textit{Nova Scotia Pharmaceuticals, ibid.} at 636.
the rule of law. It is the exercise of a right which a person deserves, not the court case.

The Court in *Nova Scotia Pharmaceuticals* also cautioned that the rule of law must be seen in its contemporary context: the state as an arbiter rather than an enforcer, intervening in almost every field of human endeavour, attempting to realise social objectives which must be balanced one against the other, and which sometimes conflict with individual interests. This kind of intervention, the Court said, often reaches a level of complexity which demands that corresponding enactments be framed in fairly general terms, involving the judiciary in a mediating role in the actualisation of the law. In what sounds remarkably like a statement of judicial policy rather than principle, the Court resolved,

One must be wary of using the doctrine of vagueness to prevent or impede State action in furtherance of valid social objectives, by requiring the law to achieve a degree of precision to which the subject-matter does not lend itself. A delicate balance must be maintained between societal interests and individual rights. A measure of generality also sometimes allows for greater respect for fundamental rights, since circumstances that would not justify the invalidation of a more precise enactment may be accommodated through the application of a more general one.209

This statement, which claims to be a modern articulation of the meaning of the rule of law, is also constructed as an argument in favour of judicial validation of laws which are potentially somewhat imprecise. It focuses on the virtuous objectives, and difficult tasks, of the legislative and executive branches of government, emphasises the value of judicial recognition of practical constraints on government and suggests that it is the onerous task of the Court to weigh up conflicting interests. While this may be correct at some stages of the proportionality test for

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209 *Ibid. at* 642.
limitations, I cannot see that there is “balancing” required at the legality stage. It does not make sense of the constitutional principles or the legality requirement drawn from those principles, to characterise them as factors to be ranked alongside government efficiency.\textsuperscript{210}

Compare the judicial concept of the rule of law in \textit{Nova Scotia Pharmaceuticals} with that expressed in the momentous \textit{Quebec Secession Reference} judgment. From a transitional South African perspective, the Canadian Supreme Court’s vision of the rule of law, as expressed in the \textit{Quebec Secession Reference}, seems ambitious indeed: “At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs.”\textsuperscript{211} The Court in that case describes the rule of law as being constituted by three elements: the supremacy of law over the acts of both government and private persons, the necessity for the creation and maintenance of an actual order of positive laws to preserve order, and the requirement that the exercise of all public power must find its ultimate source in a legal rule. Closely linked to this is the constitutionalism principle, which binds all branches and levels of government to the provisions of the Constitution, and which operates as the source of all lawful authority to exercise public power.

With the adoption of the \textit{Charter}, the \textit{Quebec Secession} Court goes on to say, the Canadian system of government was transformed from one of parliamentary supremacy to one of

\textsuperscript{210} That is not to say that some of the factors listed by the Court - such as the need for flexibility to deal with a range of unpredictable circumstances - are not relevant to the extent of precision which should be required of the legislature in a particular case, but as general guidelines for interpretation they are inappropriate.

\textsuperscript{211} \textit{Supra} note 143 at para 70. The statement of Sachs J in \textit{Walker}, quoted \textit{supra} note 150, gives vivid life to this abstract promise.
constitutional supremacy, thus subjecting the will of parliament to significant constitutional constraints the implication of which is that the values crystallised in the constitution are beyond the ordinary reach of majority rule. It identifies three reasons why constitutional entrenchment is justifiable, and in fact enhances democracy. Firstly, it protects human rights and freedoms which may otherwise be restricted or denied by government, even if democratically; secondly, it may protect minorities against the tyranny of the majority; lastly, it preserves a particular allocation of powers to the different levels of government, which may otherwise be altered unilaterally by that level of government which has the legislative power to do so. The *Nova Scotia Pharmaceuticals* account of the rule of law and constitutionalism, while not directly in conflict with the strong, principled representation in the *Quebec Secession Reference*, is framed in more pragmatic terms, and contains traces of deference to the parliamentary function.

### 3.6.2 Location of vagueness test

One of the questions plaguing the Canadian vagueness jurisprudence, with which Gonthier J in *Nova Scotia Pharmaceuticals* tried to grapple, is that of the appropriate location in the two-stage method of analysis for an evaluation of the vagueness of a legislative provision. It has been confirmed that undue vagueness is itself contrary to the "principles of fundamental justice" entrenched in s. 7 of the *Charter*, because a vague law does not provide fair notice to citizens, and fails to prevent arbitrary law enforcement and ensure the subjection of government to the law. If a breach of the right is established, however, the respondent government is entitled to

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attempt to justify the vagueness as a permissible restriction on the right. Nevertheless, as the Court has speculated, it is doubtful whether that kind of violation of the right can ever be justified, except perhaps in times of war or national emergency. Even then, I would argue, there is no reason why a derogation of rights need be framed with such imprecision that it fails the legality requirement. The extremity of the circumstances may justify substantial inroads on the substance of rights, and extraordinary delegation of discretion, but “vagueness” has negative connotations and is not a term one would normally use to refer to deliberate breadth, rather to drafting deficiency. Vagueness or imprecision, and breadth of discretion, may be overlapping categories but purposefully broad delegation of authority to make decisions is not necessarily vague in its formulation.

Assuming that vague legislation is found to interfere with a right other than s. 7, such as the freedom of expression (the most common other context in which vagueness challenges arise), the vagueness must be justified in terms of the limitation requirements in order for the provision to be upheld. As described above, in the European Court the precision of legislation is a requirement of legality, whereas in Canada the Supreme Court has decided that it could be a matter of legality, and/or - more likely - a minimal impairment concern. This duality seems to arise partly as a result of the perceived consequences of unduly vague legislation, one of which

Lucas, supra note 107. In all of these except Heywood, the Court found that the impugned provision was not so vague that it constituted an infringement of s. 7. In Heywood, the provision was found to breach s. 7, and not to be justified under s. 1 of the Charter.

Reference re B.C. Motor Vehicle Act, supra note 73 at 518; Heywood, ibid. at 802-803. This is also the implication of Lamer J’s statement of the rationale in the Prostitution Reference, ibid.
may in any particular instance be "overbreadth" - excessive impairment of a Charter right.215

The Court in *Nova Scotia Pharmaceuticals* makes a distinction between types of vagueness, when it says that it will reserve the title of "vagueness" to imprecision which constitutes a breach of the s. 7 principles of fundamental justice, or which is of such a "serious degree of vagueness" that it fails the test of "prescribed by law" - when it "so lacks in precision as not to give sufficient guidance for legal debate."216 It will treat vagueness that results in overbreadth, as excessive impairment of rights. In other words, in a particular case a court could find that a statutory enactment is sufficiently precise to satisfy the legality requirement, but nevertheless constitutes excessive impairment of rights and is unconstitutional for that reason. However, when coupled with a stated reluctance to find a disposition so vague as not to qualify as law for legality purposes and a concomitant preference for the minimal impairment aspect of limitations analysis, the distinction between overbreadth vagueness, and other vagueness, does not make sense. If the distinction is substantive, as it claims to be, then the policy preference is inappropriate and incomprehensible, but if the distinction is strategic or pragmatic, then it constitutes a betrayal of the constitutional text, and of the principles underlying the recognition of a doctrine of vagueness.

215 *Nova Scotia Pharmaceuticals*, supra note 107 at 630. For further discussion of the relationship between vagueness and overbreadth, which is beyond the scope of the present discussion, see Rogerson, *supra* note 172.

216 Use of the word "debate" as a standard for precision is an indication of the extent to which the rights-holder's quest for clarity is subjugated in the jurisprudence by concerns about the proper allocation of work between the legislature and the judiciary in the duty to create precise law. This will be discussed in further detail in section 3.6.3 below, titled "Institutional Roles".
The constitutional instruction that limits on rights be "prescribed by law" applies to all limits. The fact that a particular legislative provision which interferes with a right, not only fails the legality criteria but also constitutes a constitutionally excessive impairment, means that it is invalid on both grounds. Courts, especially in Canada, have exploited this phenomenon of multiple grounds of invalidity to avoid decision-making in relation to "prescribed by law". But if the principle of legality, animated by the very foundations of the constitutional state - democracy and the rule of law - prohibits the promulgation of imprecise law, then an unduly vague provision is inconsistent with the constitution and of no force or effect, whether its effect is overbreadth or not. The use of "prescribed by law" only as a default provision - a last resort - by courts which realise that the democratic process has foundered under the rigours of the constitutional framework but cannot identify another ground for invalidity, undermines the stringency of its demands and creates the impression that it is a malleable requirement, dependent for its tenets on the urgency of competing concerns.

It is appropriate, rather, to seek the criteria for legality in its underlying purposes, and to apply them consistently, though obviously in a manner which takes account of the nuances induced by particular contexts. Undue vagueness of statutory enactments which restrict rights, whether resulting in unfair notice, overbreadth, excessive discretion or the potential for arbitrary or discriminatory administration, constitutes legislative failure and should be recognised as a breach of the legality principle. A decision to assume that the provision is sufficiently precise and to proceed with the balance of the limitations enquiry should be motivated so as not to undermine the integrity of the method of analysis. Of course difficult questions of what role the judiciary should play in the creation of precision, what constitutes sufficient precision, and how
to distinguish vagueness from sufficiently precise but excessively broad delegation of discretion, remain.

3.6.3 Institutional roles

Both the European Court and the Canadian Supreme Court have decided that a constitutional rights challenge based on the imprecision of legislation cannot be decided by recourse only to the words of the law itself. Parliamentary drafting deficiencies may be cured by judicial interpretation of statutory provisions, thus the assessment of the precision of a law so as to determine its foreseeability should take account not only of the statute, as amplified by subordinate legislation authorised thereby (and in the case of Europe, even departmental instructions and administrative practices which do not have the status of law\(^{217}\)), but also of judicial precedent surrounding it.\(^{218}\) Gonthier J in \textit{Nova Scotia Pharmaceuticales} rationalises this situation as follows:

\begin{quote}
In my opinion the generality of these terms may entail a greater role for the judiciary, but ... I fail to see a difference in kind between general provisions where the judiciary would assume part of the legislative role and ‘mechanical’ provisions where the judiciary would simply apply the law. The judiciary always has a mediating role in the actualization of law, although the extent of this role
\end{quote}

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\(^{217}\) I will deal with this aspect of the jurisprudence in section 3.8 below titled “Departmental directives and administrative guidelines”.

\(^{218}\) For the position under the \textit{European Convention} see \textit{Muller Case} (1988), Eur. Ct. H.R. Ser. A, No. 133 at para 29; \textit{Marki intern Verlag Case} (1989), Eur. Ct. H.R. Ser. A, No. 165 at para 30; \textit{Huvig, supra} note 99 at paras 28-29; \textit{Amuur, supra} note 195 at para 50. Note that the enquiry in these cases is an individual one, in the sense that the Court asks whether the applicant could have foreseen the application of the law in the specific circumstances, rather than whether the law as such violates the Convention. Hovius, \textit{supra} note 166 at 232-5, argues that this approach is inappropriate in the Canadian context, where the validity of a law is frequently challenged. For the position on judicial interpretation of statutory provisions in Canada, see \textit{Prostitution Reference, supra} note 96 at 1156-1157; \textit{R. v. Butler}, [1992] 1 S.C.R. 452 at 490-1; \textit{Nova Scotia Pharmaceuticales, supra} note 107 at 633; \textit{Michaud v. Quebec (A.G.)}, [1996] 3 S.C.R. 3 at 21 [hereinafter \textit{Michaud}].

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While this frank acknowledgement of the judicial law-making role is refreshing in that it permits debate about the extent to which judges should fill in the lacunae and delineate the boundaries of imprecise statutory provisions, the notion that legislative deficiencies may be remedied by judicial improvements does evoke the fear of large-scale effective delegation of law-making authority by the legislature to the courts. Gonthier J’s view that there is no difference between “mechanical” application and “actualization” of the law through interpretation serves to conceal the fundamental question in relation to these constitutional rights challenges, which is at what point the court should decide that the legislature has failed to perform its law-making function, breaching rights unjustifiably by leaving too much for judicial interpretation.

In a rights context, the view that legislation is acceptable as long as it is intelligible to the judiciary could result in a weakening of the constitutional obligation on the legislature to firstly contemplate, and secondly prescribe, by law, the details of any authority to restrict fundamental rights. If, as Dyzenhaus suggests, one of the purposes of the post-war two-stage model is to intensify democracy by allowing the legislature to justify its choices with reference to the values underlying the constitutional state, then the failure by courts to insist that it perform this task on the basis that it too is capable thereof, undermines the finely balanced constitutional arrangement.

This is not to suggest that judicial interpretation of statutory provisions according to established

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219 Ibid. at 641.
canons that are stable and rights-informed is unnecessary or in any way shameful. Similarly, judicial interpretation of statutes under a new constitutional regime, according to coherent and consistent interpretive principles which promote the values underlying the constitutional state, is the obligation of the courts. In cases of principled, rights-promoting interpretation of a statutory provision which is nevertheless after-the-fact, it may be appropriate to compensate an ignorant applicant by means of a favourable costs order or other remedy which acknowledges that he or she has acted acceptably. A line has to be drawn, however - difficult as it may be - between proper judicial interpretation of statutes, and judicial validation of unconstitutionally vague legislative text. The limitations provision, by carving out a particular role for the legislative branch of government, demands that this be done.

In relation to the rationale of fair notice, which relates to both formal accessibility of the law and substantive foreseeability of its consequences, the rule that it is legislation as amplified by judicial interpretation which should pass a precision test, and the potential consequence that the judiciary may over-compensate for legislative laziness, is problematic for two reasons. Firstly, because it makes a lay person’s quest to ascertain the law considerably more difficult than it may otherwise have been, virtually compelling legal advice, and ignoring the practical reality of frequent ignorance of the law. Secondly, as mentioned above, because the case-by-case development of judicial precedent operates retroactively so that determination of the scope of

[220] See Jeffries, supra note 190 at 207-210; G. Trotter, “Le Beau: Toward a Canadian Vagueness Doctrine” (1988) 62 C.R. (3d) 183 at 187-8; D. Stuart, “The Canadian Void for Vagueness Doctrine Arrives with no Teeth” (1990) 77 C.R. (3d) at 108-9. The idea that legal advice will suffice is unrealistic. It is difficult even for experienced lawyers to predict the way in which a judge will interpret a statute or rule in a particular application of it, let alone the way in which the application of constitutional limitation tests will be determined.
individual rights may occur only after a rights-holder has acted, with insufficient warning. One should ask whether, in the particular context of constitutional rights-protection, it is necessary to specially accommodate the fact of ignorance of the law and retroactive operation or whether the general rules with their exceptions can justifiably be used even if it means that a rights-holder will on occasion be surprised at a restriction being upheld. This could be decided on a case-by-case basis, depending on the impact of such a decision on the claimant, and the competing interests which would be served by an order which takes no account of subjective unforeseeability.

Despite these criticisms of the judicially developed rule that an allegation of vagueness of a legislative provision should be assessed with reference to the law as judicially interpreted, the polar opposite position, that only the statutory provision itself ought to be considered, is obviously both incorrect and unfeasible. It would disrupt the workings of the legal system in a way that would not serve the constitutional purposes of the legality provision. What is important, however, is to insist on the distinction between proper and improper judicial interpretation and thus to expose a misapprehension under which the Canadian Supreme Court appears to be labouring. This is that through robust interpretation, the judiciary can fix deficiencies in legislative drafting in order to uphold the validity of the statutory provision, a result which is said to be deferential to the policy choices of that governmental body. The contradiction between the Court's idea of deference - upholding the validity of a legislative act - and the activist approach the Court has to take to achieve that outcome - is captured in Gonthier J's statement quoted above, but goes un-remarked by him. In the paragraph after he concedes the judicial law-making role, he warns against the use of vagueness doctrine to impede state
attempts to achieve legitimate social objectives, and advises that a delicate balance between individual rights and societal interests must be maintained. This is the language of deference to the legislature.

3.6.4 Extent of precision

How vague is too vague? Is it possible to articulate a standard of constitutional precision, in the form of criteria which can be generally applied? If the need for precision arises because vague law is inconsistent with the foundational principles - extracted from the rule of law - should the decision-making criteria (in the context of limitations analysis) be drawn from those principles themselves, or is it possible for the government to try to justify vagueness on the basis of other, possibly conflicting interests which may in turn have the effect of restricting the reach of those underlying principles? These governmental interests may include the danger of excessive rigidity, the impossibility of attaining absolute certainty, the need for the law to keep pace with changing circumstances, the complexity of state regulation in the modern era, the efficient achievement of social and economic objectives of the state, and competing societal interests. If so, does this mean that after democratic deliberation, the legislature may choose to legislate broadly and in conflict with the precision aspect of the rule of law?

In the European Court, the consistently reiterated obligation of precision has always been stated to be tempered by competing interests, such as those stated above. It seems then that not only the fundamental rights listed specifically in the Convention, but the foundational principles

\[221\] This list of factors is taken from the judgments in *Sunday Times*, supra note 24 and *Nova Scotia Pharmaceuticals*, supra note 107 at 638-642.
underlying the instrument as a whole, are considered by the Court to be capable of limitation in the public interest and for efficient government. Or, at least, the Court takes account of those general environmental factors when it sets the standard for precision, as well as specific factors argued by the state party to be relevant to its justification obligation in the particular case.222

On top of these general factors which are trotted out whenever the Court is faced with a challenge based on imprecision, the Court examines the vagueness question in its particular context. It has said several times, in the telephone-tapping cases where surveillance is secret and the technology increasingly sophisticated, that the more serious the interference with a right, the more onerous is the obligation of precision.223 Also, where a law authorises deprivation of liberty - especially in respect of a foreign asylum seeker - it must be sufficiently precise in order to avoid all risk of arbitrariness.224 On the other hand, it has said that in relation to circumstances in which a child may be taken into state custody, legislation in fairly general terms is acceptable so that the state may intervene whenever a child is believed to be in danger,225 and that in the field of competition, where the relevant factors are in constant evolution in line with developments in the market and in means of communication, somewhat imprecise wording is nevertheless valid.226

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222 See Merrills' comment in this regard, in the text accompanying note 201 supra.

223 See Malone, supra note 38 at para 67; Krustlin, supra note 195 at para 33; Kopp, supra note 195 at para 73-75.

224 Amuur, supra note 195 at para 50.


In Canada, according to the judgment in *Nova Scotia Pharmaceuticals*, the standard of precision to be met by government is one of intelligibility, so that legislation must provide an adequate basis for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. This standard, the Court said, strikes the appropriate balance between individual rights and competing interests: the need for flexibility and the interpretive role of the courts, the impossibility of achieving absolute certainty, and the possibility of varying judicial interpretations existing simultaneously. Legal dispositions cannot hope to do more than delineate a “risk zone”. Like the enforcement discretion rationale, the test set by the Court for evaluation of allegedly vague law is very much lawyer- and state-oriented rather than rights- or individual-oriented. What was a rationale for the vagueness doctrine - the illegality of binding people to unknowable laws - has thus been re-articulated as a standard of legislative precision, but the interests of the rights-holder have been elided in the process of accommodation of competing interests, demarcation of judicial territory and notions of practical feasibility.\(^{227}\) This is obviously problematic from a rights perspective, especially in light of the Court’s robust attitude towards its own role in the development of an intelligible law through interpretation.

But if this formulation of the proper standard of precision is unsatisfactory, it is not an easy task to unearth a more acceptable one.

The European approach to the standard for precision is flexible and admits of administrative expedience, while maintaining its focus on the rights-holder and the dangers of imprecise limitation of rights. In the Canadian and South African contexts, adoption of this approach may

\(^{227}\) The factors militating against a high standard of precision are set out at *Nova Scotia Pharmaceuticals*, *supra* note 107 at 639.
well be appropriate but needs to be tailored to fit the notion of foundational values underpinning the constitutional state as a whole. There are two principles which may assist in this task. The first is discussed briefly above in relation to the “two level guarantee” of s. 1 of the Canadian Charter, which Weinrib describes as the “integration of the values of rights-holding into each of the two levels,” that of rights and that of limitations.\(^\text{228}\) Only those concerns or competing interests which are consistent with the values underlying the constitutional enterprise should be considered in the limitations exercise. Those factors tending to suggest that a high standard of precision is inappropriate, and which are congruous with notions of democracy, equality and freedom, could be taken into account at this stage. The need for flexibility in particular cases because of unpredictable variations in the circumstances of individual rights-holders, or because a state measure may impact differently on different groups or individuals, may qualify as a valid competing concern if such flexibility serves to promote the right to equality, for example, by its ability to accommodate conditions that would be excluded by more precise constraints. Also, if there is considerable established and meritorious precedent in relation to a particular term, such as “the best interests of the child”, it is possible that legislative precision is unnecessary so that an understanding of the term be developed incrementally.

The second principle which may be of assistance relates to the notion of a “culture of justification” - the obligations of the state in establishing the legality of the restrictions placed by it on rights. The opportunity, and duty, of justification of limitations on rights may mean, in relation to vague legislation, that evidence should be brought, of deliberation and purpose - to

\(^{228}\) L.E. Weinrib, “Learning to Live With the Override” (1990) 35 McGill L.J. 541 at 567.
show that what appears to be careless drafting or abdication of legislative responsibility to the judiciary or to executive officials, is instead deliberate choice for demonstrable and public-regarding reasons. It means that it should be possible for the state to establish how and why it is that a rights-holder’s quest for legal certainty could be restricted on grounds that are demonstrably justifiable. At this stage of the limitations analysis the court is not concerned with the substantive justification itself, but with the law-making institutions fulfilling their responsibilities under the constitution. The tests for precision should not merely replicate those that will be applied in the substantive part of the limitations enquiry, and should be directed at establishing simply that a provision can be termed “law” for limitation purposes.

3.7 DELEGATION OF STATUTORY DUTY OR DISCRETIONARY AUTHORITY

One of the consequences of vague legislation could be that it serves to confer a wide or unfettered decision-making discretion on an executive or judicial official, rather than a strictly defined discretion which permits the consideration by the official of certain prescribed factors only, in the process of adjudication or implementation of the legislative objective. But wide or unfettered discretion is not always the result of vagueness in drafting. It may be the consequence of deliberate choice or the application of expertise. This is not to say that the issues raised by the topic do not overlap with those raised by the vagueness doctrine. I have chosen to separate the discussion partly because the cases which focus on the delegation of discretion appear to me to be closely related in some ways to the cases about execution of a statutory duty or permission, at least in the sense that it is not always easy to distinguish legislation which purports to provide simple instruction in the execution of a statutory duty or
permission, from legislation which grants some discretion to the official. The dilemmas of interpretation which these cases raise for the judiciary, about its institutional role in relation to that of the legislature, and the extent to which the legislation fails to prevent arbitrary or discriminatory enforcement, are frequently similar.

There have been a number of constitutional decisions in Canada, concerning legislation which mandates police, customs, prison or other enforcement officials to carry out statutory duties, in which it was established by the applicant that the legislation constitutes an interference with a Charter right. In order to decide whether that legislation limiting rights is “prescribed by law”, the courts have applied a test which was first articulated by Le Dain J in the Therens decision, where he put it as follows:

The requirement that the limit be prescribed by law is chiefly concerned with the distinction between a limit imposed by law and one that is arbitrary. The limit will be prescribed by law within the meaning of s. 1 if it is expressly provided for by statute or regulation, or results by necessary implication from the terms of a statute or regulation or from its operating requirements. The limit may also result from the application of a common law rule.

In that case, which concerned a provision of the Criminal Code permitting breathalyser testing,

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229 In this regard see D.J. Galligan, “Discretionary Powers and the Principle of Legality” in Administrative discretion and problems of accountability (Strasbourg: Council of Europe, 1995) 11 at 18-19. He says as follows, about the relationship between rules and discretion: “It is rather easy to make the assumption that powers conferred by statute or other legal instrument have clear boundaries and that, within those boundaries, rules and discretion can be combined in any number of varying combinations. According to this view, both are competing for the same ground, so that the more rules, the less the discretion, and the more discretion, the fewer the rules. ...This approach to discretion draws on a specifically legal point of view which sees rules and discretion as the opposites of each other and which is associated with the narrower conception of the rule of law as the rule of rules, since according to both a solution to arbitrariness and unpredictability is more rules.” Galligan advocates a “broader social conception” of discretion, which recognises that discretion occurs also within and in relation to rules - in their interpretation and application.

230 Therens, supra note 24 at 645. Le Dain J was in dissent, with the concurrence of McIntyre J and, on this point, Dickson C.J.C. The majority judgment written by Estey J was not inconsistent with this approach.
the right to counsel was not purported to be limited by the legislative provision, nor was it a necessary implication thereof, as it permitted some flexibility in relation to timing.\textsuperscript{231} The Court therefore held that the restriction on the right to counsel, which had been effected by the police officer administering the breathalyser test, was not prescribed by law. There was thus no need to consider whether the limit was justified.\textsuperscript{232} The standard articulated in \textit{Therens} has been applied regularly since then, principally in relation to the conduct of police, customs and prison officials.\textsuperscript{233}

For the most part, these are not cases in which the most obvious question to ask is whether the legislature has prescribed sufficiently intelligible criteria for the rights-holder to know the law, and for the exercise of decision-making authority or discretionary enforcement power. Rather, they are cases in which enforcement officers have acted to achieve a statutorily mandated objective, and in doing so have restricted a fundamental right, without the empowering legislation explicitly authorising them to do so. The Court thus asks whether it is a necessary implication of the terms of the statute or its operating requirements, that the limit on the right be authorised ("prescribed") by the legislature. It does not tell us exactly how the necessary

\begin{itemize}
\item \textsuperscript{231} The impugned legislation required that a demand for a sample of breath be made "forthwith or as soon as practicable", and be provided "then or as soon thereafter as is practicable". The Court decided that these words did not preclude any contact at all with counsel before the breathalyser test, and thus that a restriction of the right was not a necessary implication. Estey J makes a fairly strong statement about the legislative absence of authority to limit rights: he says parliament has not purported to place a limitation on the right not to be arbitrarily detained, so the court is not concerned at all here with s. 1 of the \textit{Charter}. \textit{Ibid.} at 646.
\end{itemize}
implications of a statute are identified, but Wilson J in the Simmons decision hints at a method when she says that there is nothing in the impugned sections which is incompatible with the right, in that case the right to counsel.\textsuperscript{234} While this test and its refinements fit fairly comfortably into the Therens-type situation\textsuperscript{235} and capture the purposes of the legality requirement by requiring the legislature in effect to contemplate and articulate - even if indirectly - the possibility that rights may be restricted by the official action, the test becomes harder to apply where there is a broad grant of discretion to administrative or judicial-type officials.

The difficulty with a standard for limitations on rights which requires that they be authorised expressly or by necessary implication, is that it is in the nature of a broad grant of discretion, that the official empowered to exercise it make reasoned choices based on contextual considerations, rather than merely execute a narrowly defined duty. If in the legislation providing for the exercise of that discretion, a limit on a right is expressly permitted, then the legality question is easy, but if not then legality must be decided in relation to the "necessary implications" of a grant of discretion, which are inherently difficult to discern.

\begin{footnotesize}
\textsuperscript{234} Simmons, \textit{ibid.} at 544.

\textsuperscript{235} But compare the reasons of Dickson C.J and Wilson J in Strachan, \textit{supra} note 233. Dickson J reads into the right an internal qualification, with the consequence that he finds that in order for the police to get the situation under control, the police who initially refused a request for a lawyer did not infringe the right to counsel without delay. Wilson J disagrees, saying that s. 1 is the sole source of limitations, and they must be prescribed by law, not imposed by the police in their discretion. The danger in reading internal limits or qualifications into the plain language and clear purpose of the rights guarantee can be readily seen in this case.
\end{footnotesize}
In the first of these cases under the *Charter - Hufsky*\textsuperscript{236} - for example, the impugned legislation conferred an authority on a police officer to choose, in his or her absolute discretion, the drivers of motor vehicles whom he or she would require to stop for a spot check. The Court decided unsurprisingly that this constituted an interference with the right not to be arbitrarily detained under s. 9 of the *Charter*, but said that the right is impliedly limited by the legislation, due to the very fact of there being no criteria set out which constrain a police officer’s decision about which vehicles to stop. Somehow it does not follow so neatly from an absence of criteria for the exercise of discretion that limitation of the right engaged thereby is necessarily permitted, and that may be because the absence of such criteria provides no indication for the rights-holder of the circumstances in or grounds upon which her rights may be limited by the police officer, and the extent or basis of her entitlement to resist what may seem to be arbitrary restriction. On the other hand, context is important and may serve to “prescribe” the general nature of the discretion conferred. In the *Hufsky* situation, driving was at issue - a licenced activity requiring competence of the driver and roadworthiness of the vehicle in the public interest. Without proof of bad faith, arbitrariness or discrimination and assuming the repercussions can relate only to driving infractions, it is arguable that there are sufficient inherent constraints on the discretion for the legality requirement to be satisfied.

Since the decision in *Hufsky*, there have been several others in Canada which deal specifically

\textsuperscript{236} Supra note 233 at 633-634. The case involved a challenge to the constitutionality of s. 189a of the Ontario Highway Traffic Amendment Act, 1981, which authorised spot checks by police officers “in the lawful execution of [their] duties and responsibilities” without setting out criteria for the selection of the drivers to be stopped and subjected to the spot check procedure.
with the question of whether a broad legislative grant of discretion - to a labour arbitrator,\textsuperscript{237} prosecutor,\textsuperscript{238} judge,\textsuperscript{239} presiding officer of an administrative tribunal,\textsuperscript{240} or member of Cabinet\textsuperscript{241} - impliedly authorises the (reasonable and demonstrably justifiable) limitation of rights and therefore complies with the legality requirement. Again the context in which discretionary decisions are made, often by skilled officers, may well dictate the terms of the authority conferred. But the problem which these cases raise for the courts boils down to this: does a broad legislative grant of decision-making discretion which makes no reference to the authority to limit rights, nevertheless by virtue of the broad terms of the empowerment impliedly confer the power to do so, as long as the limitation is reasonable and demonstrably justifiable? In other words, is it the judge's function, in accordance with the \textit{Charter}, to interpret the legislative grant of broad discretion in such a way that it permits reasonable limitations on rights, or does the legality requirement mean that it should be interpreted in such a way that it permits no limitations on rights unless the authority to restrict them has been defined by the legislature?

The Supreme Court of Canada wrestled with this problem in the important case of \textit{Slaight Communications}. Lamer J (as he then was) for the majority set out the approach that should be applied to \textit{Charter} challenges to orders made by executive officials on the basis of discretionary

\begin{itemize}
\item \textit{Slaight Communications}, supra note 121.
\item \textit{Swain}, supra note 137; \textit{Michaud}, supra note 218; \textit{New Brunswick}, supra note 109.
\end{itemize}

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authority conferred by the legislature. His reasoning is somewhat contradictory, but the effect of it appears to be that if the empowering legislation either expressly or by necessary implication confers the authority to limit rights, the justifiability of the legislation itself is assessed, and the sole remaining question is whether the order made is within or exceeds the jurisdiction of the authorised officer (in other words, whether the officer did in fact limit rights reasonably). If on the other hand the empowering legislation confers an imprecise discretion which neither expressly nor by necessary implication includes the authority to limit rights (reasonably), the question for the court is whether the order itself infringes a right in a way that is reasonable and demonstrably justifiable under s. 1 of the Charter. If so, the order is constitutionally valid.

In Slaight, the impugned statute conferred on a labour adjudicator the power, in relevant part, to “do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.” Lamer J summarises his interpretive principles as follows:

Section 61.5(9)(c) must therefore be interpreted as conferring on the adjudicator a power to require the employer to do any other thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal, provided however that such an order, if it limits a protected right or freedom, only does so within reasonable limits that can be demonstrably justified in a free and democratic society. It is only if the limitation on a right or freedom is not kept within reasonable and justifiable limits that one can speak of an infringement of the Charter. The Charter does not provide an absolute guarantee of the rights and freedoms mentioned in it. What it guarantees is the right to have such rights and freedoms subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. There is thus no reason not to ascribe to Parliament an intent to limit a right or freedom mentioned in the Charter or to allow a protected right or freedom to be limited

242 Supra note 121 at 1079-1081.

243 Canada Labour Code, R.S.C. 1970, c. L-1, as amended by S.C. 1977-78, c. 27, s. 21. at ss. 61.5(9).
when the language used by Parliament suggests this."

I quote at length in order to show the whole train of thought. The legality concern that springs immediately to mind on examination of this reasoning is this: where lies the legal authority, in the imprecise discretion scenario, to limit rights reasonably? Lamer J’s view is that the breadth of the discretion conferred is a suggestion that Parliament intended the officer to be able to limit the rights. Of course the context of the exercise of discretion, or other indicators of limitations on the officer’s jurisdiction, may serve to “prescribe” the boundaries of the discretion. Also, in a literal sense a very broad conferral of discretion may have the consequence of implicitly permitting restriction of rights, in that it does not exclude the possibility that the authority permits this. But does this interpretation promote the values underlying the constitutional requirement of legality - the ascertainability of legal rules, the minimisation of arbitrariness and discrimination and the obligation on the legislature to deliberate on its conferrals of authority?

The dilemma is captured in the opposing reasons (on this point) of Lamer C.J. and Wilson J in the Swain case, which in fact involved a statutory duty rather than discretion. Wilson J, in reaction to Lamer C.J.’s view that constitutional requirements ought to be read into legislation conferring discretion, states as follows:

I cannot agree with [Chief Justice Lamer] that discretionary powers conferred by statute should be interpreted in such a way as to ensure their compliance with the Charter. My own view is that this approach is tantamount to a presumption of constitutionality, a presumption which I believe has no application in Charter cases. While I recognize that the efficacy of “reading down” in the Charter context has not as yet been finally decided..., I prefer the view expressed in

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244 See the reasons of Lamer C.J. in Swain, supra note 137 at 1010, where he refers back to his reasons in Slaight Communications, supra note 121 at 1078. He perceives the conferral of broad discretion as language suggesting authority to limit rights, whereas Wilson J demands something more prescriptive of the legislature in this regard.
Hunter v. Southam Inc., [1984] 2 S.C.R. 145 at p. 169, that: ‘... it is the legislature’s responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution’s requirements.’

While the constitutional permissibility of the “reading down” principle has been decided in its favour since then, it is generally applied by the Court as a remedy rather than an interpretive principle, and does not usually answer the question of when a broad grant of discretion authorises limitation of rights.

It is worth noting that the problem of when to impute to Parliament an intention to authorise limitation of rights can be framed - as is done by Wilson J - as one of division of labour between legislature and judiciary, just as in the case of vague legislation. In each case of vague law or broad discretion, the court must decide whether its duty is to make up for the legislative deficiency or ellipsis by robust interpretation, or whether the purpose of the legality requirement is to ensure that the legislature does the work of limitation itself. As in the case of vagueness, the irony of the kind of vigorous judicial action required to rehabilitate broadly framed laws is that the statutory provision is upheld and the court is considered deferential to the legislative branch for this reason. This raises the question of what it is the courts are deferring to, in cases such as these where it is not clear that the legislature has gone to the trouble of deliberating and choosing to permit the limitation of rights?

245 Swain, ibid. at 1024.

246 See Nova Scotia Pharmaceuticals, supra note 107 at 660 (in which it is framed as an interpretive principle rather than a remedy); Osborne, supra note 80; Schachter, supra note 167; Grant, supra note 233; Heywood, supra note 213; M. v. H., [1999] S.C.J. No. 23 at paras 138-139.

247 Sopinka J, with Wilson J concurring, makes the obvious part of this point nicely in his separate concurring reasons in Hebert, supra note 233 at 205. That case involved the use of undercover police officers in a prison cell to obtain information from an accused, thereby limiting the accused’s right to silence without there being statutory authority for this action. Sopinka J says: “The use of undercover officers in these
Professor Galligan characterises the elements of an administrative decision as involving (a) fact-finding, (b) standard-setting and (c) the application of the standards to the facts. He goes on to suggest the points at which discretion can occur, and identifies the strongest form of discretion as the authority to set the standards and criteria which ought to govern the official’s decision. This type of discretion may be engaged where the conferral of decision-making authority is more or less unfettered. He acknowledges that in a constitutional democracy, the “assumption” is that it is the primary responsibility of the legislature to formulate criteria for the exercise of administrative discretion, but says there may be good reasons for departing from this principle, and goes on to propose methods of enhancing the legitimacy of such choices, through procedures for formulation and publication of administrative standards, and public participation in the process.

There are administrative as well as constitutional law constraints on the exercise of discretion, varying from jurisdiction to jurisdiction but usually involving reasonableness, good faith, procedural fairness, and reasons for the decision. It is arguable that however good the reasons are for authorising broad discretion including the authority to decide criteria for the exercise thereof, the legality principle demands that at the very least the legislature which confers such authority should be obliged to consider whether such exercise may involve the limitation of circumstances is certainly legal, in the sense that it is not prescribed by law; but it does not follow that this tactic is prescribed by law. The word ‘prescribe’ connotes a mandate for specific action, not merely permission for that which is not prohibited.” (His emphasis.)

248 Supra note 229 at 16.

249 See also the draft Administrative Justice Bill, supra note 169 for South Africa.
rights, and if so, signal that it has done so and that the reasonable restriction of rights is an element of the discretionary authority conferred. The compliance of administrative guidelines more generally with the legality principle will be discussed further in section 3.8 immediately hereafter, in relation to decided cases.

3.8 DEPARTMENTAL DIRECTIVES AND ADMINISTRATIVE GUIDELINES

As mentioned above, the European Court takes account of all applicable rules when deciding whether a limitation on a right is accessible and intelligible to the rights-holder, and thus “prescribed by law” or “in accordance with the law” under the Convention. This includes rules that do not have the status of law, but that are relevant to the situation at hand, such as departmental directives and guidelines for the exercise of discretion by government officials. This use of non-legal sources has been explained by commentators as related to the judicial function under the Convention, which is to pronounce on the consistency with the terms of the Convention of a particular application of state law in specific circumstances, rather than to invalidate a legal rule which is inconsistent therewith. The Court’s view is that the fact that particular rules do not have the force of law, and could be amended without legislative or delegated legislative act and without a particular procedure being followed, does not cancel out the reality that they may be binding for the time being on those they address and are accessible to those whose rights are thereby restricted. Because there is no standard publication method for

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250 See for example Silver, supra note 38 at paras 26-27, 86-90; Malone, supra note 38 at paras 67-68; Leander Case (1987), Eur. Ct. H.R. Ser. A, No. 116 at para 51; Amuur, supra note 195 at paras 50-53, although in that case it is not clear from the Court’s reasons whether it is the status or the substance of the applicable rules which offend the legality requirement.

251 Hovius, supra note 166 at 234-235.
non-law however, the Court requires the accessibility aspect of the legality principle to be fulfilled in fact, or at least for it to have been likely that the applicant would have had access to the relevant materials, before it will take account of non-statutory rules.

Hovius argues that the willingness of the European Court to take into account administrative guidelines in its evaluation of the foreseeability of legal rules and thus their legality, is inappropriate for Canada (and his reasoning would apply equally to South Africa). This is because the constitutional validity of a statute itself is often at stake in Canadian Charter challenges, in which case it would be inappropriate for the court to confine itself to an examination of the concrete circumstances. And in the early lower court decision of Ontario Board of Censors, the Canadian court agreed, holding that the Board of Censors’ internal standards for the exercise of the statutory discretion granted it, had no legal force and were thus not “prescribed by law”. They could therefore not be used to define the boundaries of the statutory discretion, and the overbroad, vague empowering provision was struck down for failure to satisfy the legality requirement. The foreseeability of a particular legal rule to an individual applicant is obviously not the only reason why it may be constitutionally desirable that criteria for the exercise of discretion be contained in the law itself. Hovius sums up the democracy rationale for this concern by saying that legislative prescription “strengthens political accountability and makes it more likely that the law will be subject to public discussion and scrutiny.”

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253 See also Weatherall v. Canada, supra note 118 in which a Commissioner’s Directive adopted in terms of the Penitentiary Act but without the force of law was invalidated for similar reasons, though overturned on appeal to the Supreme Court without reference to “prescribed by law”. 131
Apart from those decisions described above in which the validity of guidelines which set out criteria for discretionary decision-making are concerned, there are two Canadian Supreme Court cases in which non-law has been more directly in issue at the legality stage. Both of them divided the Court on various aspects of the disputes. In McKinney, which involved an equality challenge to the constitutionality of a university policy on retirement age, Wilson J (dissenting) is the only judge to seriously and explicitly consider the status, for purposes of s. 1 of the Charter, of the university’s retirement policy, though she avoids a decision in that regard. She points out that once a purposive approach to constitutional interpretation is embraced, the definition of “law” should differ in different parts of the Charter, so that “law” for purposes of deciding the jurisdiction of the Charter, or for purposes of s. 15, should be defined generously for maximum rights-protection, while it should necessarily be narrow for s. 1 purposes. She invokes both the rule of law and the democracy principle to justify this strict approach. But then on the basis of the reasoning in Slaight, she finds it unnecessary to decide the “prescribed by law” question in relation to the policy itself, because the empowering legislation does not purport to permit unreasonable and unjustifiable limits on rights, and the age restriction is unreasonable.

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254 McKinney, supra note 121; Committee for Commonwealth, supra note 113.

255 McKinney, ibid. at 393-397. The reasoning in this judgment is extraordinarily messy. La Forest J, Dickson C.J. and Gonthier JJ concurring, held that the university is not subject to the Charter, but that if it were, the retirement policy would infringe s. 15 but could be justified as a reasonable limitation thereon (without reference to “prescribed by law”). Sopinka J agreed that the university is not subject to the Charter, and declined to decide whether, if it were, the retirement policy would constitute “law” for s. 15 purposes, but went on to say that assuming it was, it would be justified under s. 1. Cory J agreed with Wilson J that the university is subject to the Charter, but agreed with La Forest J that the retirement policy is justified under s. 1. L’Heureux-Dubé J found that the university is not subject to the Charter, and therefore did not proceed with the rights analysis.
In Committee for Commonwealth of Canada, the validity of conduct of airport officials, taken in terms either of regulations, internal directives or common law powers - this was a matter of disagreement amongst the judges - was at issue. The officials had forbidden the distribution at the airport of political pamphlets by members of the respondent organisation, thereby interfering with their freedom of expression. This action was stated to have been taken on the basis of federal regulations, s. 7 of which prohibited the conducting of any business or undertaking, commercial or otherwise, and any advertising or soliciting at an airport unless authorised by the Minister. There was also an established policy or internal airport directive prohibiting all political expression on the premises, which may have been the basis of the official action.

All members of the Court invalidated the official conduct, but on various grounds. Lamer C.J. (Sopinka J concurring) found that regulation 7 was not applicable, and that the internal directives could not qualify as “law” for legality purposes as they were not accessible to the public, were binding only on government officials and could be amended or cancelled at will. He thus conducted no enquiry into the substantive justifiability of the limitation. L’Heureux-Dubé J, with whom Gonthier and Cory JJ agreed on this point, found that regulation 7 did apply, but that it was too vague to be considered “law” for purposes of s. 1 of the Charter, as its broad and undefined terms failed to meet the concerns underlying the vagueness concept - proper notice of the law, and the prevention of arbitrary action by government under that law. McLachlin J said that the regulation did apply, and was not too vague to constitute a limit prescribed by law, though if it did not apply, the officials acted under common law and their actions were similarly prescribed by law. Her view was that from a practical point of view, it would be wrong to limit the application of s. 1 to enacted laws or regulations, as that would

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require the Crown to pass detailed regulations to deal with every contingency as a pre-condition of justifying its conduct under s. 1. Such a technical approach, she concluded, does not accord with the spirit of the Charter and would make it unduly difficult to justify limits on rights which may be reasonable and indeed, necessary. Ultimately however, she found that the government action was invalid due to overbreadth. La Forest J found that the action was taken under a common law power to manage property, and was thus prescribed by law, but not justifiable.

What can we draw from these cases? Only two of the judges in Committee for Commonwealth considered the status of the internal airport directives, and they disqualified them as “law” for legality/justification purposes. None of the McKinney judges make an explicit finding on the status of the university retirement policy for s. 1 purposes, but five of the seven decide implicitly that it is “law”, though of these only Cory J’s opinion is not obiter. The Canadian judges have neither followed nor clearly rejected the European Court approach, though what looks like their avoidance of the direct question of the legality of guideline-type limitations on rights indicates, in my view, a sense on their part that it would be wrong to decide explicitly that these do qualify as law. Like the decisions discussed in section 2.4.3 above in which the Court ignored the legality requirement altogether, however, the avoidance of the legality question could make a practical difference to the outcome of a decision, as could a generous, “non-technical” approach to the meaning of “law” for legality purposes.

In spite of the impression one gets from these decisions that the judges do not think of administrative guidelines as law, they manifest an ambivalence towards the requirement that may stem from discomfort at having to decide that a particular action based on directives which
are substantively reasonable and justifiable, is invalid because of the directives' non-compliance with the legality requirement. McLachlin J in *McKinney*, and Mokgoro J in *Hugo*, as much as admit that this is the basis of their views - that to strike down a substantively reasonable limitation because it is formally deficient in some “technical” way is for the judiciary to be too tough on the legislature. This despite the fact that it is the executive which has formulated the non-law directives, without explicit legislative authorisation to do so. Looking back at the drafting histories of these limitation provisions, nowhere is there a concern expressed that the work of the executive will be hindered if it cannot set standards itself to guide its decisions. That task was seen as a legislative one, or at least one to be constrained by the legislature. The notion that the judiciary ought to be deferential to the executive in this context would surely come as a surprise to the judges themselves. If one looks even superficially at the values sought to be promoted by a requirement of legality - participation and accountability in the democratic process, fair notice of the legal rules which bind, and the minimisation of arbitrary or discriminatory enforcement - it is glaringly obvious that they are not respected in a generous, relaxed approach to the procedural demands of legality.

I think that at least in the South African situation, the requirement that rights be restricted only “in terms of law of general application” means not that it is only law itself which may limit rights, but that non-legislative restrictions must be authorised by law. A requirement that departmental directives, guidelines or rules for the exercise of discretion must be authorised by law if they are to restrict rights, and that their capacity to restrict rights should be explicit or necessarily implied in the empowering law, need not stultify governmental activity or prevent the implementation of reasonable and justifiable restrictions which are necessary for the efficient
day-to-day operations of the executive branch. The institutional arrangements of the constitutional state are disrupted if the executive has the authority to restrict rights, without that authority having been contemplated by the legislature. But if it does deliberate thereon and choose to permit executive officials to limit rights reasonably, and the conduct of those officials is reviewable, precise and accessible, the principle of legality is satisfied.
Examination of the drafting histories of post-war constitutions and regional human rights-protecting instruments reveals a concern with the deficiencies of majoritarian democracy. The existence of a representative parliament with legislative sovereignty is perceived as insufficient defence against tyranny or the abuse of minorities. The entrenchment of justiciable human rights in a manner which protects them from the ordinary reach of government has been adopted in many political systems as a response to these perceived dangers. The creation of a constitutional democracy alters the institutional roles of the legislative, executive and judicial branches of government. The nature of their institutional functions in a post-war rights-protecting system emerges from an analysis of the constitutional framework set up to guide adjudication of a rights claim.

The separate articulation of rights and permissible limitations thereon serves both to empower, and constrain, the legislature and the judiciary in particular ways. The courts are the guardians of the constitution, and must interpret the rights guarantees to promote and uphold the values underlying them, and evaluate the actions of the state insofar as they interfere therewith, in accordance with specified standards and criteria. The role of the courts in a constitutional democracy is vastly expanded in that they are obligated to invalidate state action that fails to comply with the constitution. But the danger of judicial supremacism, which is commonly evoked in debate about the merits of the constitutional state, is moderated by provisions

256 In South Africa, of course, majoritarian democracy was not the problem. Political transformation from rule by a racial minority and oppression of the majority has, however, resulted in a constitutional democracy with entrenched rights, thus the deficiencies of majoritarian democracy were heeded there too.
regulating the justificatory role of the legislative body.

As far as human rights is concerned, the focus of the legislative role in a constitutional state could be said to be obligation, of respect for and promotion of rights, and of justification for restriction thereof. This is in contrast to a system of parliamentary sovereignty, where the legislative role can be characterised as one embodying the notion of state power. The two-stage method of constitutional analysis constitutes a finely balanced arrangement which should serve to maximise rights-protection and intensify democracy, through reasoned and consistent adherence to the principles underlying the constitutional structure. The requirement of legality in the limitation of rights is an important aspect of this design.

A coherent approach to the legality requirement ought to make sense of the institutional roles of all branches of government in the constitutional state. The notion that limitations on rights should be encapsulated in or prescribed by law means that excessive or unthinking delegation by the legislature of its primary responsibility to make law, either to the executive through the conferral of such authority, or to the judiciary through unintelligible drafting, is constitutionally unacceptable. It means that the state has an opportunity to justify its decision to restrict or permit restriction of rights, and an obligation to do so in terms which conform to the constitutional values expressed through the rights/limitations guarantee or underlying the document as a whole.

Both the rule of law, and the concept of democratic law-making, have been identified as forming the intellectual basis of the legality requirement and the rationale for its inclusion in post-war
constitutions. These principles do not constitute the exclusive foundational values of the constitutional state, but are necessary elements in its formation and development. Similarly, the legality requirement in limitation of rights is not sufficient on its own to make constitutional democracy the best it can be, but it is a starting point, a vital precondition to the substantive grounds of permissible limitation. It serves as a constant reminder of the conditions without which the vibrant exercise of guaranteed rights is impossible, such as the accessibility and foreseeability of legal rules, and the assurance of equality of treatment by administrative officials.

I have ventured to compare judicial treatment of the legality principle under the European Convention on Human Rights, the Canadian Charter and the South African Bill of Rights. In doing so I have examined the manner in which courts have interpreted the foundational constitutional values where they arise in legality and elsewhere, and have tried to identify inconsistencies in approach in order to expose what appears to be, in certain contexts anyway, an unnecessarily timorous application of the demands of the legality requirement. Where courts have been dismissive of the precepts of legality, without revealing or explaining coherently their reasons for this tactic, I have reflected on the possible causes for this deference and have suggested that they lie principally in uncertainty about the extent of the judicial law-making role and reluctance to engage wholeheartedly with the extraordinary powers granted them by the constitutional arrangement, powers which involve evaluation of legislative efforts at fulfilling its justificatory role.

A requirement of legality in limitation of rights is not the single, isolated mechanism for
achievement of the ideals of intensification of democracy, suppression of executive power and realisation of the rule of law. Substantive criteria for restrictions on rights assist in focussing the attention of the legislative body on the need to be public-regarding in its processes and the implementation of its policies. Those criteria serve to entrench principles of legitimacy of purpose, rationality and proportionality in the exercise of the law-making power. Administrative law principles, now constitutionally entrenched in South Africa and soon to be supplemented by legislation giving effect to the rights, can serve to promote the values of participation and accountability in the exercise of executive authority, by insisting on publication and accessibility, consistency, fairness, reasoning and proportionality in decision-making. Legality is an integral element in the constitutional structure, a specific manifestation of the fundamental notion that rights are supreme, restrictions thereon are exceptional, and justification for restrictions is essential for legitimacy of public power.