

# Oakes Test and Proportionality Test: Balance between the Practical Costs of Limiting Rights and the Benefits Arising from the Law

Rafael Tedrus Bento

**Abstract**—The analysis of proportionality as a test is raised as a basic foundation for the achievement of Fundamental Rights. We used legal dogmatics and empirical analysis to seek the expected results, from the reading of the RV Oakes trial by the Supreme Court of Canada. In cases involving freedom of expression, two tests are used to resolve disputes. The first examines whether, in fact, the case can be characterized as a violation of freedom of expression; the second assesses whether this violation can be justified by the reasonable limit clause. This test was defined in the RV Oakes trial by the Supreme Court of Canada, concluding with the Oakes Test, used worldwide as a proportionality test. Resulting is a proportionality between the effects of the limiting measure and the objective - the more serious the harmful effects of a measure, the more important the objective must be.

**Keywords**—Oakes, proportionality, fundamental rights, Canadian Charter of Rights and Freedoms.

## I. INTRODUCTION

OAKES set the tone for the early years of the Dickson Court. Oakes spoke with boldness and confidence that permeated the jurisprudence of the Court's Charter. In fact, it clarified the Court's interpretative methodology for Charter cases, perhaps most centrally, that rights are of presumed importance and limits the exception that is only acceptable if governments meet a demanding justification test.

Oakes' summons by the courts of Antigua and Barbuda [1], Australia [2], Fiji [3], Hong Kong [4], Ireland [5], Israel [6], Jamaica [7], Namibia [8], South Africa [9], UK [10] and Zimbabwe [11], made Oakes one of the central models of the proportionality test based on fundamental rights. In addition, the definition of the Supreme Court when adopting proportionality in the application of the limitation to constitutional rights gave direction so that the other powers, when practicing their acts, already sought to meet the dictates of proportionality.

In the "RV Oakes" trial, the coordinates are given so that the objective is considered sufficiently important to impose limitations on the rights and freedoms provided for in the Canadian Constitution, so the objective must be linked to a) the values of a free and democratic society; b) urgent and substantial issues; c) the achievement of collective goals of fundamental importance; d) the scope of legislative power.

Rafael Tedrus Bento is with the Pontificia Universidade Católica de Campinas, Brazil (e-mail: rafaeltedrus@gmail.com).

## II. CANADIAN CHARTER OF RIGHTS AND FREEDOMS

The Canadian Charter of Rights and Freedoms ensures that the rights and freedoms set out in it are subject only to the reasonable limits prescribed by law that can be proven to be justified in a free and democratic society [12].

When enacted in 1982, Section 1 of the Charter represented an innovation in human rights law, as it established a general framework to justify the limits of rights and freedoms guaranteed in the Charter [13].

Section 1 strikes a balance between the rights of the individual and the interests of society, by allowing limits to guaranteed rights and freedoms. This analysis was made by the Supreme Court of Canada when substantiating the case known as "Canada (Attorney General) v. JTI-Macdonald Corp" by stating that "most modern constitutions recognize that rights are not absolute and can be limited if necessary, to achieve an important objective and if the limit is appropriately adapted or proportionate" [14].

The principles that guide the Supreme Court of Canada's judgment are based on the inclusion and participation of participation and groups in society, therefore, there are values that are paramount for the analysis of the specific case, such as the dignity of the human person, the commitment to the social justice and equality, respect for beliefs, cultural identities, and faith groups in social and political institutions.[15].

## III. OAKES TEST

On February 28, 1986, the famous "RV OAKES" case was heard before the Supreme Court of Canada, which established the "Oakes test", which was defined as an analysis of the limitation's clause (Section 1). Choudhry defined that "Canadian Charter of Rights and Freedoms, which allows reasonable limitations on rights and freedoms through legislation, if it can be demonstrated to be justified in a free and democratic society." [14, p. 2]

The control of the proportionality of the original forecast in Canada is provided for in the "Bill of Rights" of 1960, under the term "reasonableness", defined as follows in its letter:

"1. The Canadian Charter of Rights and Freedoms guarantees that the rights and freedoms set out in it will only be subject to reasonable limits, established by law and that can be demonstrated to be justified in a free and democratic society." [16]

The trial known as "RV Oakes" stated that parties seeking to defend a violation of rights must satisfy a four-part test [17].

McLachlin explained the Oakes test as a "reasoned demonstration" process, rather than simply accepting the state's claim. Thus, in determining whether the purpose of the law is important enough to override a guaranteed right, the Court must examine the real purpose of the law [18]. In this way, the real connection must be determined between whether the real benefit that the law is calculated to achieve outweighs the real seriousness of the limitation of the right. It was concluded, therefore, that Section 1 can be defined as a real judicial exercise, based on the facts that the law and the evidence offered have a plausible justification for the conviction and not only on abstractions of the law [17, p.3].

The adoption of the methodical called "Two-Step Balancing and Proportionality" requires a pre-test to verify the existence of the limitation or restriction itself, and then, in a second step, to verify whether such limitation is proportional or not. Thus, the first step of the Oakes test should address the aspect that the reason for the violation of rights must be "extremely substantial", which implies that the legislative objective should be to deepen the values of the "free and democratic society" referred to. the text of section [17, p.2]. These values cover a broad, but not comprehensive, set of values underlying the rights of the Charter, which are also guaranteed by section 1 and, for this reason, are the exclusive and definitive reasons that can justify their limitation [12, p.2].

The preliminary step should help to delimit the elements, interests and rights involved in the conflict, such a demarcation is fundamental for the application of the proportionality method that does not have the capacity to work with immeasurable values, this movement helps to bring a great repertoire of justifications and fundamentals, which will be fundamental to the final decision [15, p.2].

Panaccio proposed that the "structure is taken as a guide for decisions to be developed with a two-step methodology in the decision-making process, the first step would be to determine whether a guaranteed right was infringed or limited; and if the answer to this first question is positive, the second step would be to determine whether the infringement or limitation is reasonable or justifiable, according to the proportionality test." [17, p.3]

The double check can be verified in the "RV Oakes" case in the excerpt below:

"Two specific questions are raised by this general question: (1) Art. 8 of the Narcotics Control Act violates section 11 (d) of the Charter; and, (2) if it violates, art. 8 is a reasonable limit provided by law that can be justified in a free and democratic society, in accordance with section 1 of the Charter? If the answer to (1) is affirmative and the answer to (2) is negative, then the question of constitutionality must be answered affirmatively." [15, p.2]

The next three steps constitute the test of proportionality therefore, there must be a rational connection between as it violates the rights and the objective, in order to demand that the chosen means are carefully designed to minimize problems [17,

p.3]. In addition, the measure must be as restrictive as possible, that is, the means must undermine the right in the least possible way, to achieve the objectives. Finally, the harmful effects of the measure must be proportionate to the importance of the objective [17, p.3]. Thus, the burden of proving a justification in section 1 falls on the state, and the state must be prepared to present appropriate evidence [12, p.2].

Although in some cases the pressing and substantial objective of the legislation and a contested provision can be deduced from the legislation itself, in other cases evidence will be required [18, p.2].

As indicated above, to establish a minimum commitment, there must be evidence available of alternative measures that have been considered and rejected and why, which may require continuous monitoring to determine the actual negative and positive effects of the legislative provision [20].

#### IV. SUBSTANTIAL QUESTION OF THE JUDGE RV OAKES

In this case, the Defendant was accused of illegal possession of a narcotic for trafficking purposes and was convicted of illegal possession by the 1st degree court, after the defendant found the constitutional validity of Section 8 of the Narcotics Control Act [15, p.2].

This section states that if the Court finds the accused in possession of a narcotic, it is assumed that the accused is in possession for the purposes of trafficking and that, in the absence of the accused who provides otherwise, he should be convicted of trafficking. The Ontario Court of Appeal, in an appeal filed by the Crown, found that this provision constituted a "reverse charge" clause and found it unconstitutional because it violated the presumption of innocence. As per Section 11 (d) of the Canadian Charter of Rights and Freedoms. Accordingly, the Crown appealed, and a constitutional issue was declared as to whether Section 8 of the Narcotics Control Act violated Section 11 (d) and therefore had no force and effect.

Inherent in that question, it was put on trial whether Section 8 of the Narcotics Control Act was a reasonable limit. prescribed by law. and demonstrably justified in a free and democratic society for the purposes of Section 11. In its judgment, the Supreme Court of Canada found that Section 8 of the Narcotics Control Act violated the presumption of innocence in Section 11 (d) of the Canadian Charter of Rights and Freedoms, requiring the accused to prove that he is not guilty, or that is, determining the existence of negative evidence to the Defendant.

The Court used a rational connection test, in which the potential for a rational connection between the basic fact and the presumed fact to justify a reverse charge provision - does not apply to the interpretation of Section 11. Let's see:

"A basic fact may rationally tend to prove a presumed fact, but not yet prove its existence beyond reasonable doubt, which is an important aspect of the presumption of innocence. The appropriate stage for invoking the rational connection test is under s. 11 of the Charter." [15, p.2]

Thus, the provision failed the rational connection test because it was "superinclusive", by inferring that the intention to traffic in possession cases was present, simply because of the

existence of possession. In this respect, the “R. v. Oakes” sets a strict standard of justification. Thus, rights are the norm and presumption of importance and cannot be limited unless exceptional criteria are met [17, p.3].

The core of the judgment can be defined in the aspect that in a constitutional regime based on rights, these are the rule and Governments must bear the burden of justifying measures that violate rights, and the State must assume the risk of empirical uncertainty [12, p.2]. However, establishing this complex pattern can bring too much burden to the State, which would culminate in an impossibility of proof, since there must be certainty of the proof itself and scientific certainty that the means chosen to combat the problem are the most effective and least invasive as possible [12, p.2]. Furthermore, although “R. v. Oakes” has indicated that the nature of the proportionality test will vary depending on the circumstances, the Oakes Test, in itself, it was framed in abstract terms that did not invite courts, to differentiate its application in future appeals that may differ radically from the judge itself, whether in relation to the rights at stake or in the political context. With the application of this jurisprudence in future cases, Petter and Monahan observed that the Court treated criminal cases differently than in the non-criminal context [19]. According to the authors, in criminal cases, the Court was able to maintain a certain “illusion that the Judiciary is choosing between the State and the individual, and not between the competing interests of individuals or groups”, while the non-criminal cases raised questions of social policy and horizontal effectiveness of fundamental rights, in which the compensations inherent in the rights dispute are more visible.” [19, p.6] Therefore, the authors concluded that, in the context of criminal law, the State is the singular antagonist of the rights claimant, in which the State acts on behalf of the entire community, on the other hand, in other situations, the State tries to mediate competing claims between different groups. [19, p.6] The rationale here is that when the State acts on behalf of third parties, whose interests are opposed to those of the rights claimant, the interests of these individuals are a legitimate counterweight to the rights of the Charter's claimants. The idea is that some successful Charter claims have real costs for important interests of identifiable individuals that the state acts to protect. The application of the Charter is therefore not costly in human terms, claims for rights are redistributive, producing winners and losers [12, p.2]. In this regard, we can indicate that the idea of direct horizontal effectiveness of fundamental rights has not been fully accepted by the Supreme Court of Canada [20]. In this regard, it is possible to perceive the similarity of these ideas with those of Carlos Ari Sundfeld when questioning criticizing the use of the proportionality of principles by the Supreme Federal Court to base its decisions:

“One aspect that judges have to consider, before they claim to be competent to edit rules based on constitutional principles, is the rigidity of the rules they will produce. Transforming vague legal ideas into precise rules is a creative operation: painting pictures, not developing photographs.” [21]

The application of the Oakes Test should not be approached

in a mechanistic manner; on the contrary, it must be applied in a flexible manner, considering the factual and social context of each case [22].

## V. CONCLUSION

The argument is that Oakes established a uniform approach to assess justifiable limitations of the Charter's rights regardless of differences in context, but in the following decade, the Court sought criteria of deference, to predictably categorize cases in which deference was justified and those where it was not. was.

The objective to be accomplished by the measures that limit a right of the Charter must be sufficiently important to guarantee the substitution of a constitutionally protected right or freedom.

In its final point, the Oakes test requires a balance between the practical costs of limiting rights and the benefits brought about by the contested law. Its first three stages are based solely on the assessment of the purpose of the law and only on the fourth stage is there an analysis of the severity of the harmful effects on individuals and groups.

As we have seen, the Supreme Court of Canada has repeatedly emphasized that there must be an analysis of the individual context as a fundamental part of justifying the limitation of the Charter, as provided in Section 1. In this sense, the proportionality test involves three primary components, with the aim of granting the parties the means capable of demonstrating that the instruments used are reasonable and proven to be justified to begin with, the measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective and furthermore, the means must undermine the right in question as little as possible. Finally, there must be a proportionality between the effects of the limiting measure and the objective - the more serious the harmful effects of a measure, the more important the objective must be. This type of movement in favor of justification, which can be an asset for deliberation between the powers, was only possible due to the predictability given by the Supreme Court through the definition of the parameters of judgment.

## REFERENCES

- [1] Antigua and Barbuda. Attorney-General & Anor v. Goodwin & Ors. 1999. Available: [http://www.worldcourts.com/ecsc/eng/decisions/1999.10.25\\_AG\\_v\\_Goodwin.pdf](http://www.worldcourts.com/ecsc/eng/decisions/1999.10.25_AG_v_Goodwin.pdf). Accessed on: May 8, 2020.
- [2] Australia. Kartinyeri v. The Commonwealth. 1998. Available at: <https://jade.io/j/?a=outline&id=68043>. Accessed on: May 8, 2020;
- [3] Fiji Island. Chaudhry v. Attorney-General. 1999. Available at: [http://vanuatu.usp.ac.fj/library/Paclaw/Fiji/Fiji\\_cases/FLR\\_1999/Chaudhry\\_v\\_AG.html](http://vanuatu.usp.ac.fj/library/Paclaw/Fiji/Fiji_cases/FLR_1999/Chaudhry_v_AG.html). Accessed on: May 8, 2020.
- [4] Hong Kong. R. v. Sin Yau Ming. 1991. Available at: <https://www.legco.gov.hk/yr98-99/english/bc/bc65/papers/p1997e.pdf>. Accessed on: May 8, 2020.
- [5] Ireland. Blascaod Mor Teoranta v. Commissioners of Public Works in Ireland. 1998. Available at: <https://www.casemine.com/judgement/uk/5da027984653d058440f93fa>. Accessed on: 08 May 2020.
- [6] Israel. United Mizrahi Bank Ltd. v. Migdal Cooperative Village 1995. Available at: <https://versa.cardozo.yu.edu/opinions/united-mizrahi-bank-v-migdal-cooperative-village>. Accessed on: May 8, 2020;
- [7] Jamaica. Jamaica Bar Association v. Ernest Smith & Company. 2003.

- Available at:  
<https://www.courtsofappeal.gov.jm/sites/default/files/judgments/Jamaica%20Bar%20Assoc.%20%28The%29%20v.%20The%20Attorney%20General%2C%20The%20D.PP%20et%20al.pdf>. Accessed on: May 8, 2020.
- [8] Namibia. *Kauesa v. Minister of Home Affairs & Ors.* 1995. Available at: <https://namiblii.org/na/judgment/supreme-court/1995/3>. Accessed on: May 8, 2020.
- [9] South Africa. *S v. Zuma.* 1995. Available at: <http://www.saflii.org/za/cases/ZACC/1995/1.html>. Accessed on: May 8, 2020;
- [10] United Kingdom. *R. v. Lambert.* 2001. Available at: <https://publications.parliament.uk/pa/ld200102/ldjudgmt/jd010705/regina-1.htm>. Accessed on: May 8, 2020;
- [11] Zimbabwe. *Chavunduka v. Minister of Home Affairs.* 2000. Available at: <https://globalfreedomofexpression.columbia.edu/cases/chavunduka-v-minister-home-affairs/>. Accessed on: May 8, 2020.
- [12] Weinrib, Lorena E. *The Supreme Court of Canada and Section One of the Charter.* *Supreme Court Law Review.* Vol. 10. P. 469. 1986. Available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1147225](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1147225). Accessed on: May 8, 2020.
- [13] Choudhry, S. *So What is the Real Legacy of Oakes? Two Decades of Proportionality Analysis under the Canadian Charter's Section 1.* In: *Supreme Court Law Review.* v. 34, n. 2, 2006. Available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=930436](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=930436). Accessed on: 04 May 2020.
- [14] Canada. *Canada (Attorney General) v. JTI-Macdonald Corp.* Case number 30611. Canada: 2007. Available at: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2369/index.do>. Accessed on: May 8, 2020.
- [15] Canada. *R. v. Oakes* 1 SCR 103, Case number 17550, Canada: 1986. Available at: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/117/index.do>. Accessed on: 04 May 2020.
- [16] Canada. *Canadian Bill of Rights, 1960.* Available at: <https://laws-lois.justice.gc.ca/eng/acts/C-12.3/FullText.html>. Accessed on: 04 May 2020.
- [17] Panaccio, CM *In Defense of Two-Step Balancing and Proportionality in Rights Adjudication.* In: *The Canadian Journal of Law & Jurisprudence.* v. XXIV, n. 1, Jan. 2011.
- [18] Canada. *RJR-MacDonald Inc. v. Canada.* Case number 23460, 23490, Canada: 1995. Available at: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1290/index.do>. Accessed on: 05 May 2020.
- [19] Petter, AJ and Mohanan, PJ *Developments in Constitutional Law: The 1986-87 Term.* *Supreme Court Law Review.* Vol. 10. Pp. 61-145. 1988. Available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1640782](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1640782). Accessed on: May 8, 2020.
- [20] Marmelstein, George. *Fundamental rights course.* 7th Ed. São Paulo: Atlas. 2018.
- [21] Sundfeld, Carlos Ari. *Administrative Law for Sceptics.* 2nd Edition. São Paulo: Malheiros. 2014. P. 222.
- [22] *The Supreme Court of Canada has ruled on these aspects in the following case: CANADA. Stoffman v. Vancouver General Hospital.* Case number 20795. Canada: 1990. Available at: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/689/index.do>. Accessed on: 11 May 2020.