Proportionality: A rule of reason

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Sir Anthony Mason was a Justice of the High Court for 23 years, the last eight of which as Chief Justice. He presided over many landmark cases and was influential in many developments of the law. Lest this sound like a tribute to a person of the past, I should add that Sir Anthony now sits as a non-permanent member of Hong Kong's Court of Final Appeal. It is evident from a number of Sir Anthony's judgments in the High Court, and extra judicial writings, that he was a proponent of proportionality as a general legal principle to be applied in order to test the excessive use of legislative power. This has influenced my choice of topic for this lecture.

PROPORTIONALITY: THE CONCEPT

One meaning of the word "proportion" is the correct relation that one thing bears to another.[1] When something is in proportion it may be said to have achieved a correct balance. The term is employed in many disciplines, including mathematics, musical theory and philosophy. In law, proportionality is employed as a concept and an ideal; as a test and as a conclusion. Its basis as a legal rule is reason.

The common law applies a test of proportionality to the behaviour of a person faced with a threat of aggression or who is provoked to a violent act. It reflects the requirement of the law that the person exert some measure of control over his or her response. When self-defence is raised to a charge of murder, juries are directed that they must consider whether the force used by an accused person was proportionate to the threat offered.[2] In the defence of provocation, in a case of homicide, it is necessary for the jury to consider "the proportion of the fatal act to the provocation".[3]

Proportionality informs sentencing law theory. It is applied in order to determine the appropriate balance between the dual imperatives of a sentence appropriate to the crime and the protection of society. It was described in *Markarian v The Queen*[4] as "one of the fundamental principles of sentencing law" and in *Veen v The Queen (No 2)*[5] as "now firmly established in this country". This is unsurprising. After all, Art 20 of Magna Carta provided that: "For a trivial offence, a free man shall be fined only in proportion to the degree of his offence, and for a serious offence correspondingly, but not so heavily as to deprive him of his livelihood."

The common law requirement of proportionality of force is now found in statutes dealing with criminal law. Legislation in some States provides that a person, or a police officer, may use such force as is necessary to suppress a riot, but that force must be reasonably proportioned to the danger to be apprehended from the continuance of the riot.[6] Such provisions serve as a reminder of the source of the modern principle of proportionality, which was first invoked by the Prussian courts in the late 19th century in relation to excessive police powers.[7]

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[1] Soanes C and Stevenson A (eds), *Concise Oxford English Dictionary* (11th ed, Oxford University Press, 2004) p 1,151.

[2] *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645 at 662.

[3] *Johnson v The Queen* (1976) 136 CLR 619 at 636 (Barwick CJ).

[4] *Markarian v The Queen* (2005) 228 CLR 357 at [69].

[5] *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 472.

[6] *Criminal Code* (WA), ss 238, 239, 241; *Criminal Code* (Qld), ss 261, 264; *Criminal Code* (Tas), ss 34, 37.

[7] Schwarze J, *European Administrative Law* (1st rev ed, Sweet & Maxwell, 2006) pp 685-686.

A requirement of proportionality is found in the human rights legislation of many legal systems including in s 7(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).[8] In s 7B(1) of the *Sex Discrimination Act 1984* (Cth), a person is said not to indirectly discriminate against another person if the condition, requirement or practice they impose, which disadvantages the other person, is "reasonable" in the circumstances. One of the matters to be taken into account in that regard is whether the disadvantage is proportionate to the result sought by the person who imposes the condition, requirement or practice.[9]

The concept or ideal of proportionality may be seen to pervade our laws. Proportionality or reasonableness of action is clearly considered by legislatures to be an appropriate requirement of citizens in our society. A question which may be thought to arise with respect to legislatures themselves is whether legislative responses to perceived problems and to the attainment of legislative objectives ought to be proportional.

OUTLINE OF THE LECTURE

The focus of my discussion is upon the use made of proportionality as a test of the limits of legislative power in cases involving the Australian Constitution. Although proportionality is employed for some purposes in constitutional cases, it has never achieved the status of a general legal principle having application to questions of legislative power. The position here stands in contrast to many other constitutional systems where it is either expressly stated as a test within a constitutional document, as in Canada, New Zealand and South Africa and some European countries; or it has been assumed to apply, as it does in Germany and, to an extent, the United Kingdom.

My starting point is the source of a proportionality principle in public law – both ancient and modern. The latter takes us to Prussia in the late 18th and 19th centuries. I will discuss how proportionality came to be required and the method by which it came to be tested in the 20th century. What it meant to legal scholars and courts, then and now, may be useful to an understanding of how it might be applied in our system. In any event, such an understanding should enable something of a comparison with the use, in Australia, of a more limited form of proportionality or for limited purposes.

One area where its usefulness is accepted in Australia is where legislation has the effect of restricting constitutionally guaranteed freedoms. Here proportionality may be used to resolve the tension between what the legislation seeks to achieve and the need to protect a freedom which is not regarded as absolute. I will discuss the proportionality tests which have applied to legislation affecting the freedoms in s 92 of the Constitution and the implied freedom of communication on political and government matters (which I shall refer to as the freedom of political communication). It is in cases involving that freedom that concerns about the wider use of proportionality came to be expressed.

I will outline the basis given for these concerns, which have to do with perceived differences in the other legal systems in which it is used, both with respect to the role which a court assumes by the wider use of proportionality and the questions posed by different constitutional documents. I will then comment upon an aspect of the German Constitution, as interpreted by the German Constitutional Court. I shall do so bearing in mind two particular matters: that in Australia the freedom of political communication is said to be founded upon the need to maintain the system of representative government for which our Constitution provides; and that from the German perspective, proportionality is seen as an aspect of the rule of law. Since I understand my task is to promote discussion, I shall leave you to "join the dots".

EARLY SOURCES OF PROPORTIONALITY

Proportionality, as a rule of reason in public law, is hardly a new idea. For Plato, maintaining inner equilibrium involved, "that the various parts of the body and soul are kept in proportion to each other". In his view, "[w]hat is true of the human soul is also true of the city". Harmony and unity will

[8] Recently discussed in *Momcilovic v The Queen* (2011) 85 ALJR 957.

[9] *Sex Discrimination Act 1984* (Cth), s 7B(2)(c).

be produced only if the city is structured in such a way as to keep various classes of people in the right balance.[10] Cicero postulated that natural law and reason dictate a higher form of justice. The core idea is that of "proportionate equality", by which he meant more is owed to the superior, defined principally in terms of birth and wealth, and less to the inferior.[11]

Neither Plato nor Cicero's notions of equality and justice are particularly egalitarian or accord with today's standards. Nevertheless, their writings have been taken to reflect notions of proportionality in balancing public and private interests. One commentator has said that Plato and Cicero "support the more serious claim for an older genealogy of proportionality *as a matter of public law*".[12]

Natural law theories have influenced European public law. Modern lawyers trained in the English tradition might be less comfortable with theories founded upon the existence of universal, ethical or moral rules and standards to which man is thought to be subject. Perhaps this, in part, explains our reluctance to accept concepts such as proportionality as legal rules although, as we have seen, it has seeped into our laws. And it may explain the narrowness with which we have thus far given content to the meaning of the rule of law. Blackstone did not suffer this discomfort when he described civil liberty as "natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the publick".[13]

The Prussian legal scholar and draftsman, Carl Gottlieb Svarez is credited[14] with stating two distinct proportionality requirements of man-made laws: first, that the state was justified in restricting the liberty of the individual "only to the extent necessary for the liberty and security of others"; and, secondly, that the evil to be prevented by the law must be substantially greater than the attendant harm to individual liberty. Such an approach requires proportionality between ends and means and between costs and benefits and would prove attractive to the German legal science movement of the 19th century, which was founded upon a belief in pure reason and was opposed to arbitrariness.[15]

The first requirement was later drafted into a Prussian statute, as a general legislative requirement that police take only those measures necessary to preserve and maintain public order. In 1886, the Prussian Supreme Administrative Court used that provision as a basis for reviewing whether a measure taken by the police exceeded the objective to which it was directed.[16]

The German word for the principle (*Verhältnismäßigkeit*) translates as proportionality. It has been suggested that it is closer in meaning to reasonableness.[17] The basic idea of the proportionality principle is that, even when the legislature is specifically empowered to restrict rights, the restriction must be reasonable.[18] That is not to say that the Prussian Court's approach was to assume some implied prohibition against the unreasonable exercise of powers. It had a more fundamental, indeed what would have been regarded as a scientific, approach to "ends" and "means".[19] So understood, it may be appreciated that it was considered necessary to develop tests of proportionality. Such an approach to the application of a principle of proportionality may be contrasted with an unconstrained value judgment as to the reasonableness of a legislative provision, which is more likely to occur in the absence of tests and when proportionality is stated merely as a conclusion.[20]

[10] Poole TM, "Proportionality in Perspective" [2010] NZ Law Review 369 at 379.

[11] Poole, n 10 at 383.

[12] Poole, n 10 at 388.

[13] Blackstone W, *Commentaries on the Laws of England* (1765) Vol 1, p 121.

[14] Currie DP, *The Constitution of the Federated Republic of Germany* (University of Chicago Press, 1995) p 307.

[15] Cohen-Eliya M and Porat I, "Proportionality and the Culture of Justification" (2011) 59 Am J Comp L 463 at 486.

[16] Schwarze, n 7, pp 685-686.

[17] Singh MP, *German Administrative Law in Common Law Perspective* (2nd ed, Springer, 1985) p 88.

[18] Currie, n 14, p 20.

[19] Singh, n 17, p 88.

[20] Kirk J, "Constitutional Guarantees, Characterisation and the Concept of Proportionality" (1997) 21 MULR 1 at 19-20.

After World War II, a new Constitution was adopted in Germany, one which sought to protect the rights and freedoms of individuals. At that time, it was considered insufficient to require, by way of a test of proportionality, only that the legislative means selected be necessary to a legitimate goal of the legislation. The burdens imposed upon rights and freedoms had to be proportional to the benefits sought to be achieved.[21]

The modern form of the proportionality principle in Germany is subject to three tests.[22] In summary they are that: (1) the limitation or restriction be adapted, or suitable, to the legislative purpose. This does not usually assume particular significance; (2) the statutory restriction be reasonably necessary. The legislature is expected to choose the least burdensome measure; (3) the restriction not be excessive. This is referred to as proportionality in its strict sense. Thus, the German Federal Constitutional Court (*Bundesverfaßungsgericht* (Bverfg)) has required that the seriousness of the effect of the legislative intervention and the strength of the reasons justifying it (which is to say, the importance of the statutory objective) are in adequate proportion to each other.[23]

DEVELOPMENTS IN PROPORTIONALITY IN AUSTRALIA

With that background, let us turn to Australia and observe how, and to what extent, proportionality has been used to test the limits of legislative power.

An early example of the application of a test of reasonable proportionality has been identified[24] in the judgment of Dixon J, in 1933, in *Williams v Melbourne Corporation*.[25] The case concerned a by-law which prevented the use of certain streets of the city for the herding of cattle. The question, as his Honour saw it, was whether the by-law went "beyond any restraint which could reasonably be adopted for the specific purpose of preserving the safety, convenience and proper facility of traffic in general".[26] His Honour said that, although there may appear to be a sufficient connection between the subject of the power and that of the by-law, the true character of the by-law may show that it could not reasonably have been intended as a means of achieving the ends of the power.[27] In 1952, in *Marcus Clark & Co Ltd v Commonwealth*,[28] the defence power was described by McTiernan J as authorising such measures as are proportionate to the end for which the Constitution created the power.

As a test of characterisation of a law, as one within a constitutional head of power, the High Court, for a long time, has used the statement of Marshall CJ in *McCulloch v Maryland*.[29] He said: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." From these words the requirement that a law be "reasonably appropriate and adapted" has sprung. The expression is rather cumbersome. It may also be thought to be somewhat unclear in what it requires.

In the *Tasmanian Dam Case*, Deane J expressed the view that the "appropriate and adapted" test is of ends and means and contains within it a principle of proportionality. An issue in that case was whether a law gave effect to the object of an international treaty for the purposes of the external affairs power. His Honour said:[30]

> Implicit in the requirement that a law be capable of being reasonably considered to be appropriate and adapted to achieving what is said to provide it with the character of a law with respect to external affairs

[21] Currie, n 14, p 308.

[22] Schwarze, n 7, p 687.

[23] Schwarze, n 7, p 686.

[24] Selway B, "The Rise and Rise of the Reasonable Proportionality Test in Public Law" (1998) 7 PLR 212 at 213-214.

[25] *Williams v Melbourne Corporation* (1933) 49 CLR 142 at 155-156.

[26] *Williams v Melbourne Corporation* (1933) 49 CLR 142 at 156.

[27] *Williams v Melbourne Corporation* (1933) 49 CLR 142 at 155.

[28] *Marcus Clark & Co Ltd v Commonwealth* (1952) 87 CLR 177 at 226.

[29] *McCulloch v Maryland* (1819) 4 Wheat 316 at 421.

[30] *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1 at 260.

> is a need for there to be a reasonable proportionality between the designated purpose or object and the means by which the law embodies for achieving or procuring it.

Deane J gave what he called an "extravagant example" of a hypothetical law which lacked proportionality: one which required all sheep in Australia to be slaughtered, because Australia was a signatory to an international convention which required the taking of steps to prevent a disease which had not even been detected in Australia. His Honour said that: "The absence of any reasonable proportionality between the law and the purpose of discharging the obligation under the convention would preclude characterization as a law with respect to external affairs."[31] A law of this kind has also been described as one which uses a sledgehammer to crack a nut.[32]

The areas of application of proportionality thus far mentioned are the purposive powers of defence and external affairs, and the power to make delegated legislation. It is also accepted that proportionality has a role with respect to legislation which limits a constitutionally guaranteed freedom, such as that of freedom of trade, commerce and intercourse between the States, the subject of s 92,[33] and the implied freedom of political communication. It is generally understood that the freedoms are not absolute and some limitations upon them may be justified. It has been said that once it is accepted that a freedom is not absolute, some test must be devised to determine whether legislation exceeds proper bounds.[34] Proportionality is the obvious candidate. The question is, how is it applied and tested?

THE S 92 CASES

The test applied in s 92 cases is obviously comparable to the second test earlier discussed, that of reasonable necessity. Mason J stated such a test in 1975 in the *North Eastern Dairy Co* case.[35] The effect of the New South Wales regulations considered in this case was that the plaintiff, a Victorian milk supplier, could not sell milk in New South Wales. The milk had to be processed by a pasteuriser registered in New South Wales. Mason J said that it was not shown that the requirements of the regulations are the "only practical and reasonable mode of regulating the trade in milk so as to ensure high quality and to protect public health".[36] More recently, in *Betfair Pty Ltd v Western Australia*,[37] it was held that the criterion of "reasonable necessity", identified by Mason J in *North Eastern Dairy Co*, should be received as the doctrine of the court in cases involving s 92.

The test propounded by Mason J implies that if there is another, equally effective, method of achieving the same objective, it cannot be said that the legislation in question is reasonably necessary and therefore proportionate. Such an approach is evident in cases decided by the European Court of Justice (the ECJ), in connection with a treaty provision addressed to freedom of trade in the European Union.[38] It was an approach adopted in *Betfair*, where it was argued by Western Australia that it was necessary to prohibit the use of betting exchanges in that State, in order to protect the integrity of the racing industry. However, it was pointed out that the legislative measures taken in another State,

[31] *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1 at 260.

[32] Kirk, n 20 at 2; Fitzgerald BF, "Proportionality and Australian Constitutionalism" (1993) 12 U Tas LR 263 at 269.

[33] Section 92 of the Constitution relevantly provides: "On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free."

[34] Kirk J, "Constitutional Implications from Representative Democracy" (1995) 23 FL Rev 37 at 41; Stone A, "The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication" (1999) 23 MULR 688 at 676.

[35] *North Eastern Dairy Co Ltd v Dairy Industry Authority (NSW)* (1975) 134 CLR 559.

[36] *North Eastern Dairy Co Ltd v Dairy Industry Authority (NSW)* (1975) 134 CLR 559 at 616. In so finding, his Honour used the words of Lord Porter in *Commonwealth v Bank of New South Wales (Bank Nationalisation Case)* (1949) 79 CLR 497 at 641.

[37] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at [103].

[38] See Kiefel S, "Section 92: Markets, Protectionism and Proportionality – Australian and European Perspectives" (2010) 36 Mon LR 1.

Tasmania, showed that complete prohibition was not necessary. It followed that the law was not proportionate to its propounded legislative objective.[39]

In two other cases, *Castlemaine Tooheys*[40] and *Uebergang*,[41] a further inquiry was undertaken as to the adverse effects of the legislation and whether those effects were disproportionate to the legislative object.[42] Such an approach appears closer to the third test earlier mentioned, which tests for excessive effects (proportionality in its strict sense). We see hints of this in later cases involving the implied freedom of political communication.

IMPLIED FREEDOM OF POLITICAL COMMUNICATION CASES

On 30 September 1992, the High Court delivered judgment in two cases – *ACTV*[43] and *Nationwide News*[44] – in which the freedom of political communication was recognised. Included in considerable commentary which followed, was the statement that these cases put "proportionality firmly on the characterisation map".[45] Chief Justice Mason observed, in a foreword to a collection of essays on the Constitution published in the same year,[46] that proportionality may operate as a constraint upon the growth of central power.

The legislative provisions in question in *ACTV* were in the nature of prohibitions and restrictions affecting broadcasting of political advertisements during election periods. It was argued for the Commonwealth that the purpose of the prohibitions and restrictions was principally to prevent corruption of the political process during federal elections.[47] In holding the provisions invalid, a majority of the court spoke in the language of proportionality, in expressing views that the prohibitions went beyond what was reasonably necessary to achieve that objective[48] or was not reasonable and appropriate.[49] More important than these general statements, for present purposes, were the following features in the approaches taken in *ACTV* to proportionality. In the first place, the nature and importance of the freedom of communication was identified – as essential to the maintenance of the system of representative government for which the Constitution makes provision.[50] Mason CJ said that the court must "scrutinize with scrupulous care restrictions affecting free communications in the conduct of elections".[51] Mason CJ went further, in identifying an important aspect of the freedom which might be restricted by the legislation, namely the communication of information and ideas on political matters.[52] His Honour contrasted it with restrictive effects upon the mode of communication.

Mason CJ and McHugh J also considered what level of justification was necessary for a legislative restriction, on so important a freedom, in order for the legislation to be valid and concluded

[39] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at [110].

[40] *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 473.

[41] *Uebergang v Australian Wheat Board* (1980) 145 CLR 266 at 303-307 (Mason and Stephen JJ).

[42] As Mason CJ observed of *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 29.

[43] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

[44] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

[45] Fitzgerald, n 32 at 284.

[46] Mason A, "Foreword" in Lee HP and Winterton G (eds), *Australian Constitutional Perspectives* (Law Book Co, 1992) p vi.

[47] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 118.

[48] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 174 (Deane and Toohey JJ).

[49] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 221 (Gaudron J); see also at 146-147 (Mason J).

[50] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 140 (Mason CJ), 174 (Deane and Toohey JJ; see also *Aid/Watch Inc v Commissioner of Taxation* (2010) 241 CLR 539 at [44] (an "indispensable incident").

[51] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 144.

[52] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 143 (Mason CJ); see also at 234-235 (McHugh J).

that it must be a "compelling justification".[53] The justification of which their Honours spoke could only be found in the statutory purpose, the prevention of corruption. But plainly the means chosen to achieve that purpose were considered excessive and were unable to justify the extent of the intrusion into the freedom.

The impugned provision in *Nationwide News* made it an offence to use words, in writing or speech, which were calculated to bring a member of the Industrial Relations Commission or the Commission into disrepute. Freedom of communication about governmental institutions was therefore restricted. The importance of *Nationwide News* to my discussion is that it, and some subsequent cases, put a brake upon the extent to which proportionality might be used as a general test of the limits of legislative power.

In *ACTV*, the provisions in question were within Commonwealth legislative power. The proportionality tests therefore arose in the context of questions about the restrictions they effected upon the freedom of communication, and the provisions' purpose. In *Nationwide News*, Mason CJ used proportionality to test whether the legislation came within the incidental aspect of the industrial relations power. He said that a law must be reasonably proportionate to the pursuit of an end within power. And he made the statement that "the concept of reasonable proportionality is now an accepted test of validity on the issue of ultra vires".[54]

This proposition, and his Honour's use of proportionality, was not accepted by other members of the court in *Nationwide News* and some other later cases.[55] Proportionality was not given the status of a general principle to be applied to test the limits of legislative power. To the contrary, concerns were expressed about its operation as a freestanding principle. It was thought necessary to restrict its application to purposive heads of power and not as a test of legislation based upon a non-purposive power or the incidental power. It is not necessary to survey opinions about those views.[56] More to the point are the concerns which were expressed about the inappropriateness of a general principle of proportionality in an Australian constitutional setting.

CONCERNS ABOUT THE USE OF PROPORTIONALITY

In *Leask*,[57] the view was expressed that if proportionality became a "general touchstone" of constitutional power, the court might be drawn into areas of policy or value judgments. This prospect had been faced by the Privy Council in 1949 in the *Bank Nationalisation Case*, in connection with infringement of s 92 and whether legislation could be said to operate to restrict trade in a way that is more than regulatory. "The problem to be solved", it was observed, "will often be not so much legal as political, social or economic. Yet it must be solved by a court of law".[58]

Reference was made in *Leask* to the use made of a principle of proportionality by the ECJ. That court was considered to undertake a review of the merits or demerits of legislation, in a manner which may be considered to be more political than judicial.[59] It may be accepted that the ECJ is in a somewhat different position to a court in a constitutional system where powers are separated between legislature and judiciary. It therefore functions differently. Indeed, its position as a court of the European Community is unique. The German Constitution, however, does contain provisions concerning separation of powers. It specifies that the people should act through the agency of separate

[53] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 143 (Mason CJ), 235 (McHugh J). The phrase "culture of justification" is said to have been coined as an ideal for the South African Constitution, which came into force in 1997, as a departure from the culture of authority which had characterised the apartheid regime: Cohen-Eliya and Porat, n 15 at 474.

[54] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 29.

[55] *Cunliffe v Commonwealth (Migration Agents Case)* (1994) 182 CLR 272; *Leask v Commonwealth* (1996) 187 CLR 579.

[56] For a summary, see Zines L, *The High Court and the Constitution* (5th ed, Federation Press, 2008) pp 59-62.

[57] *Leask v Commonwealth* (1996) 187 CLR 579 at 616 (Toohey J, Gaudron J agreeing).

[58] *Commonwealth v Bank of New South Wales (Bank Nationalisation Case)* (1949) 79 CLR 497 at 639.

[59] *Leask v Commonwealth* (1996) 187 CLR 579 at 600-601.

legislative, executive and judicial bodies.[60] And it has been argued that the German exercise of balancing for proportionality, "does not have to be about policy choices … or ad hocery, but can be about interpreting constitutional rights within [an] … 'objective' system of values. Balancing is not a discretion or an option, but a constitutional obligation."[61]

Another point of comparison was made in *Leask*[62] to explain the inappropriateness of proportionality as a principle. It was that the ECJ operates by reference to the objectives in European Community treaties; whereas the legislative power in the Australian Constitution is referenced to subject matter. But we have seen that proportionality is applied to the freedoms which underpin representative and responsible government. It may be thought that the maintenance of responsible government is something of a constitutional objective.

LANGE AND ROACH

The importance of the maintenance of responsible government was stressed in two later cases – *Lange*[63] and *Roach*.[64] And in each of those cases a test said to include proportionality was applied.

In *Lange*, it was held that the law of defamation in New South Wales was "reasonably appropriate and adapted" and did not unduly restrict the freedom of communication.[65] In *Roach*, the freedom was not directly in issue, rather the exercise of the franchise provided by the Constitution was. Some of the impugned provisions in *Roach* disqualified prisoners from voting at federal elections regardless of the term of their imprisonment. Those provisions were held to be invalid.

In both *Lange* and *Roach*, the test applied had regard to the issue of the maintenance of the constitutionally prescribed system of representative and responsible government.[66] And, as stated, the test involved proportionality. Having said that, the test or method stated in *Lange* has been criticised for lacking definition.[67] The test[68] is: first, whether the law burdens the freedom; and, secondly, if it does, whether the law is appropriate and adapted to serve a legitimate end in a manner[69] which is compatible with the maintenance of representative and responsible government.[70] And it was said, in both cases, that there was no difference in this context between what was conveyed by the formula "reasonably appropriate and adapted" and proportionality.[71]

There may be questions about how the test, or method, applies proportionality to statutory purpose. It is sufficient presently to observe that the test is directed to a perceived constitutional imperative, the maintenance of a system of representative government. This is most evident in *Roach*, where there was no direct interference with the freedom of communication. The focus was upon the importance of the franchise to the maintenance of the system of representative government.

There may be grounds for thinking that there may be a greater acceptance of proportionality as a general principle in constitutional law if it is seen as applied to the attainment of something

[60] See Currie, n 14, p 102, referring to German Basic Law (*Grundgesetz*), Art 20(2).

[61] Cohen-Eliya and Porat, n 15 at 487.

[62] *Leask v Commonwealth* (1996) 187 CLR 579 at 600-601.

[63] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

[64] *Roach v Electoral Commission* (2007) 233 CLR 162.

[65] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 575.

[66] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 566-567; *Roach v Electoral Commission* (2007) 233 CLR 162 at [44], [101] (Gummow, Kirby and Crennan JJ).

[67] Stone, n 34, sufficient to provoke a response from McHugh J in *Coleman v Power* (2004) 220 CLR 1 at [88]-[91].

[68] As modified by *Coleman v Power* (2004) 220 CLR 1.

[69] See *Coleman v Power* (2004) 220 CLR 1 at [92]-[96] (McHugh J); [196], [211] (Gummow and Hayne JJ and Kirby J, respectively, agreeing).

[70] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567.

[71] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567 fn 272; *Roach v Electoral Commission* (2007) 233 CLR 162 at [85].

approaching a constitutional objective. Two further matters might also be considered in this regard. The first involves the basis given for the principle of proportionality. The second is the connection between that basis and the said objective, the maintenance of representative government in a democracy.

THE MAINTENANCE OF REPRESENTATIVE GOVERNMENT: SOME SIMILARITIES?

It is no doubt sometimes assumed, because proportionality has the status of a constitutional principle in Germany, that it is to be found within its Constitution. But the German Basic Law does not state a proportionality principle; rather, the German Federal Constitutional Court has always assumed its existence at a constitutional level.[72]

The principle of proportionality is said to have its basis in the rule of law (*Rechtßtaatprinzip*).[73] Although one writer suggests that the Constitutional Court has never fully explained its relationship to the rule of law,[74] recent decisions of the Federal Constitutional Court confirm that it proceeds upon the assumption that the rule of law makes certain requirements of legislatures in relation to the rights of citizens.[75]

The provision of the German Constitution which is said to embody the rule of law, in both its formal and substantive meanings,[76] requires that the constitutional order of the State, "must conform to the principles of a republican, democratic, and social state governed by the rule of law". It further provides that the people "shall be represented by a body chosen in general, direct, free, equal, and secret elections". It is said that the concept underlying this law is that of a free democracy governed by the rule of law.[77]

In *ACTV*, Mason CJ said that the concept of representative democracy "signifies government by the people through their representatives. Translated into constitutional terms, it denotes that the sovereign power which resides in the people is exercised on their behalf by their representatives."[78] Such a conception may involve something of a refinement of Dicey's notions of parliamentary sovereignty,[79] which were not, in any event, written with the Australian Constitution in mind. It might, however, have appealed to the Athenians referred to earlier.

Sir Anthony Mason[80] said that he rejected the notion that our constitutional arrangements contemplated the grant of an unlimited mandate to govern on the footing that the only effective enlistment of the governed is to vote for representatives at elections. He said that our constitutional arrangements are more subtle than that. They envisage an effective exercise of democratic government in which powers are exercised in conformity with the rule of law in the interests of the people. That said, let me conclude with a question: what does the constitutionally recognised maintenance of representative government in a democracy mean to the development of constitutional principle in general and, in particular, to the development of proportionality as a principle?

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[72] Currie, n 14, p 309.

[73] Schwarze, n 7, p 688.

[74] Currie, n 14, p 309, adding that one commentator has said one can distil the one from the other only if one first pours it in.

[75] Bverfg [Federal Constitutional Court], 1 BvR 518/02, 4 April 2006; Bverfg [Federal Constitutional Court], 1 BvR 256/08, 1 BvR 263/08, 1 BvR 568/08, 2 March 2010 at 76. (An English summary of these decisions is available at http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm viewed 25 November 2011.)

[76] German Basic Law (*Grundgesetz*), Art 28(1): see Schwarze, n 7, p 712.

[77] Emiliou N, *The Principle of Proportionality in European Law: A Comparative Study* (Kluwer Law, 1996) p 40.

[78] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 137.

[79] Fitzgerald, n 32 at 268.

[80] Mason A, "Courts, Constitutions and Fundamental Rights" in Lindell G (ed), *The Mason Papers* (Federation Press, 2007) p 225.