

Proportionality in Action: An Empirical and Comparative Analysis of the Judicial Practice

Talya Steiner* (together with Mordechai Kremnitzer* and Andrej Lang*)

Proportionality is arguably the most important global constitutional principle, but despite the immense normative literature on the doctrine, there has been nearly no systematic research on the actual application of the doctrine in practice. The current study is the first attempt to broadly analyze the judicial practice of proportionality both empirically and comparatively. Documenting the similarities and variations in its application as well as the extent to which the application follows or diverges from theoretical accounts, we aim to provide an empirical grounding for the abundant literature on proportionality.

Our analysis is based on a database of apex court cases applying the proportionality doctrine (N=745) from six jurisdictions (Canada, Germany, India, Israel, Poland and South Africa). The research includes a quantitatively-informed qualitative analysis of the application of the different stages of the doctrine, focusing primarily on the division of labor between the subtests in justifying the striking down of means.

Our findings demonstrate several ways in which the reality of proportionality deviates from common conceptions of the doctrine, and reveal previously unrecognized variations between jurisdictions. Surprisingly, the first two stages of the doctrine – the worthy purpose requirement and the rational connection test – play a more significant role in some jurisdictions than that afforded to them in the literature, where they are perceived as threshold tests that are easily met, and therefore generally disregarded. Interestingly, though, the interpretation of the tests – particularly the worthy purpose requirement – can differ from country to country.

In addition, rather than the final balancing stage of the analysis operating independently after all preliminary stages have been cleared away, we find that in the majority of courts failures do not rely solely based on failure at the final stage, but

* PHD candidate at Hebrew University Law School; Project Manager, Israel Democracy Institute. Contact at: talyas@idi.org.il.

* Professor Amaritus, Hebrew University Law School; Senior fellow, Israel Democracy Institute.

* Senior Researcher, Martin-Luther University Halle-Wittenberg; Research fellow, Israel Democracy Institute.

rather most often based on a joint failure at both the necessity and strict proportionality stages. We characterize a practice found in several apex courts in which the final stage serves as the "finishing accord" of the analysis, drawing heavily upon the flaws that have been identified throughout the previous stages of the analysis.

At the same time, we document ways in which the judicial practice still falls short of sufficiently exploiting the potential offered by the worthy purpose and the suitability tests, often settling for a superficial analysis of these threshold stages. In our view, an integrative conception of proportionality in which each and every stage of the analysis is taken seriously and meaningfully engaged with while maintaining connections and feedback between the stages, can improve the quality of the judicial practice and fully exploit the analytical potential inherent in proportionality analysis.