PROJECT SUMMARY

Proportionality in Public Policy

THE BALANCE BETWEEN RIGHTS AND PUBLIC INTERESTS IN DECISION–MAKING

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The Israel Democracy Institute
4 Pinsker St., P.O.B. 4702, Jerusalem 9104602 Israel
Tel: (972)-2-5300-800; Fax: (972)-2-5300-867
E-mail: orders@idi.org.il
Website: en.idi.org.il

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Project Overview

Proportionality and Public Policy: Towards a Better Balance of Interests and Rights in Public Decision-Making

Proportionality is a prominent legal doctrine created by judges for resolving conflicts that often arise in policy-making between the public interests meant to be promoted by the policy and individual constitutional rights that may be limited by it. Using the proportionality doctrine, judges determine whether and to what extent individual rights can be limited for the sake of the promotion or protection of a public interest. Over the past several decades, proportionality has become a central tenet of global constitutional law and a defining element in the protection of human rights, as well as the topic of much debate and critique.

In academia, limitations on human rights are primarily the focus of the legal field, and scholarship on proportionality tends to have a distinct doctrinal and normative nature. In addition, while courts' *ex-post* evaluations of rights-limiting policy based on the proportionality doctrine receive much research attention, the *ex-ante* process of decision-making that led to the rights-restricting policy remains under-explored.

The "Proportionality in Public Policy" research project, conducted at the Israel Democracy Institute and supported by an ERC advanced grant, was an effort to further explore the balance between rights and competing interests from a comparative and interdisciplinary perspective by utilizing a range of empirical methodologies. The project was headed by Professor Mordechai Kremnitzer and Professor Raanan Sulitzeanu Kenan.

The project was organized around three central strands of research, each emphasizing different research questions and utilizing different methodologies:

The first strand focused on the judicial application of proportionality. The main effort in this strand was a comparative empirical analysis of the application of the proportionality doctrine in the case law of six apex courts. By combining qualitative analysis of a large sample of case law with a quantitative analysis based on systemic coding, a detailed portrayal was created of judicial practice regarding proportionality. The findings that emerged uncovered some previously unrecognized characteristics of the implementation of proportionality that deviate from the theoretical portrayal of the doctrine. Additionally, alongside many similarities, intriguing variations between jurisdictions were documented. The new light shed by these findings presents an opportunity for renewed thought regarding the optimal application of the proportionality doctrine, in light of functions it is meant to fulfil and the social contexts in which it operates (for further detail, see page 13).

Additionally, this strand included a comparative analysis of the relationship between the proportionality framework and the right to equality in four national and one supra-national jurisdiction (see page 18); an exercise of distilling "red lines" – minimal thresholds of protection of the right – from ECtHR jurisprudence on fair trial rights, demonstrating the possibility of extracting quasi-guidelines from proportionality-based case law (page 21); a comparative analysis of judicial responses to theoretical objections to proportionality, embedded in limitations jurisprudence (page 23); and a reflection on the relationship between public trust, judicial independence and courts' choice between rules and standards in human rights law (page 25).

The project's second strand engaged in descriptive policy research, in an attempt to deepen the understanding of the processes through which policy that limits rights is initiated, shaped and approved. Shining a light on this process is highly important considering it is where limitations on rights are originally decided upon, and therefore where interventions may be implemented most effectively, especially given that not all policy is ultimately subjected to judicial review.

A first step was the juxtaposition of two literatures – on judicial proportionality and policy analysis. The novel dialogue created between the two illuminates the unique characteristics of each of the two processes and its distinct perspective. These insights lead to a better theoretical understanding of how proportionality can best be integrated into the process of ex post policy analysis and how ex post proportionality-based judicial review can best be structured to guide policy-makers in the future (for further detail, see page 29).

In the next stage, detailed case studies were conducted, tracking specific policy processes in varied geographical contexts, all raising questions of conflict between the public interest in national security and individual rights. Preliminarily, the case studies located and mapped the consideration of rights and the logic of proportionality in the various ways in which they are expressed outside the judicial arena. Each case study then assessed both beneficial and detrimental factors that affected the level of rights restriction in the ultimate policy design, and documented barriers at both the individual and organizational levels that may have prevented rights from being afforded their optimal weight in the process (for further detail, see pages 31-42).

The effort to trace rights considerations in the policy process posed some unique challenges: as opposed to judicial rights review, where judicial decisions are easily accessible and engage openly and systemically with the justifiability of rights limitations, policy design is an intricate, non-linear process that can span weeks or years, involves numerous stages – some openly accessible but many others not – and revolves around a broad array of issues of which rights are only one. Furthermore, discussions often do not make explicit use of the language of proportionality or even explicitly mention rights, and therefore locating these considerations is itself a challenge. Finally, the policy process itself can differ from one case to another, as well as over time and between countries. These characteristics raise epistemic and methodological questions regarding how to study the application of the rights discourse in policy-making.

The third strand of the project adopted a behavioural perspective to examine decisions made in the context of conflicts between rights and competing interests. First, an experimental methodology was used to examine the application of the proportionality doctrine by experts. The findings demonstrate that experts, unlike lay people, approach proportionality decisions guided by theory, and that they are responsive to the relevant factors as required by the doctrine. However, the findings also suggest that experts' judgements are affected by ideology and susceptible to various cognitive biases, such as anchoring and order effects. Moreover, experts demonstrate low agreement rates in their proportionality judgements, raising concern regarding the reliability of these decisions (see pages 45-50).

Other experimental work addressed, from a broader perspective, ways in which different contextual features shape balancing decisions and the weight afforded to rights when they are in conflict with public interests. We find, for example, that the social climate surrounding constitutionalism and rights and the level of polarization of the political system affect the way in which subtle cues pertaining to rights protection are processed, and the level of protection afforded to rights in actual decision outcomes (see page 51). We also find that the location of a policy decision within a sequence of decisions affects the outcome and the level of rights protection (see page 54). Additionality, we find that the possibility of adopting a rights-restricting measure temporarily increases the willingness to approve it, and subsequently that its prior existence increases the willingness to renew the policy, leading to a slippery slope effect (see page 58). Interestingly, we find that variance in the formulation of the doctrine – specifically focusing on the necessity test as opposed to the balancing test - can increase the level of protection afforded to rights in practice when the doctrine is applied (see page 61). We also find that presenting a reminder regarding the importance of protecting constitutional rights can mitigate levels of political bias in balancing decisions (see page 65).

This strand of the project experimentally studied subject matter that had not been significantly studied in this manner before, requiring us to develop new paradigms and variables. In the course of this work, some theoretical and methodological aspects required our attention. For example, the empirical analysis of normative judgements presents a unique challenge given the lack of an objective scale for judging the "correctness" or "accuracy" of decisions. Additionally, the fact that proportionality is a general principle, applicable to an exceptionally broad array of specific contexts, presents a challenge in terms of the generalization of conclusions from experimental studies that are typically grounded in a specific decisional context.

The findings in this strand of research vividly expose some of the difficulties the proportionality doctrine raises for the various actors applying it, and demonstrate the importance of investing in improving it as a concrete tool guiding policy-making in day-to-day practice. Hopefully, they set a foundation for future research that can further investigate methods for mitigating irrelevant effects on proportionality decision-making, and the possibility of using "nudges" to ensure that rights receive adequate consideration in the application of the doctrine.

As proportionality continues to expand to new jurisdictions and becomes an increasingly central concept at all levels of decision-making, significant questions persist regarding the foundational assumptions of the doctrine, its contribution to protecting human rights, and the long-term effects of internalizing the proportionality standard by the different types of actors. We believe that an empirically grounded understanding of the application of proportionality by different actors in various contexts can significantly contribute to coping with these issues. Despite the many challenges that the multidisciplinary approach of this project has raised, it has assisted in moving our research closer to capturing the complexity of the function of the legal doctrine in the real world. We hope it lays the foundation for a more diverse comparative and empirical exploration of proportionality and the protection of rights.

Even beyond the specific topic of proportionality, we hope the project helps in expanding the boundaries of the study of public law by extending the focus beyond courts and legal actors to include additional institutions, policy-makers and even lay people. We also hope the project contributes to the diversification of the questions posed in research on public law and the methodological tool kit used to answer them.

Talya Steiner
Raanan Sulitzeanu Kenan
Mordechai Kremnitzer
Jerusalem, September 2019

Judicial Application of Proportionality

Proportionality in Action: Comparative and Empirical Perspectives on the Judicial Practice

Cambridge University Press (Forthcoming 2020)

Edited by **Mordechai Kremnitzer**, **Talya Steiner,** and **Andrej Lang**

Contributing Authors: **Talya Steiner, Andrej Lang, Richard Stacey, Aparna Chandra, Anna Sledzinska-Simon, Lorian Hardcastle**

Proportionality is widely accepted as one of the most important constitutional principles of our time, and is becoming the main framework used by courts around the world for deciding constitutional rights cases. It is composed of several, interrelated subtests – worthy purpose, suitability, necessity and the balancing test – that require different types of justification for limiting a constitutional right. Overall, the refined methodology of proportionality aids courts in assessing whether a justification for limiting a fundamental right is sound.

Considering its prominent status in constitutional law around the globe, proportionality has attracted growing scholarly interest. To date, however, the academic literature on proportionality is primarily either historical or normative. Although the normative literature relies from time to time on case law from different jurisdictions, the cases are chosen selectively for the purpose of demonstrating and supporting the positions asserted. Much of the normative literature on proportionality addresses the subject in a relatively abstract and monolithic way, without sufficient nuance. Proportionality is presented in the form of idealized models of judicial reasoning that are supported by highly selective references to case law. In addition, although the concept of proportionality is applied across the globe, very little comparative analysis has been done regarding when and how the doctrine is applied in different countries, and what the ramifications of these differences are.

The book presents the first attempt to broadly analyze the judicial practice of applying proportionality both empirically and comparatively. It includes detailed accounts of the application of the proportionality doctrine in six jurisdictions: Canada, Germany, India, Israel, Poland and South Africa. In five of these, proportionality is a dominant constitutional principle, but the countries are diverse in terms of political backgrounds, democratic histories and legal cultures, and they include both relatively old democracies and new, post-Communist democracies, as well as Western and non-Western countries. We have also chosen to include India, a country that appears to be in the process of adopting the proportionality doctrine, as an illuminating reference point for contrast and comparison. Each chapter is written and contextualized by constitutional scholars from the relevant jurisdictions. The country analyses are based on a single questionnaire, creating a tightly ordered common structure for all the country chapters, which facilitates comparisons across countries.

Methodologically, the analysis of each jurisdiction is based on a large sample of case law and uses a combination of qualitative and quantitative methods to assess what courts actually do when they apply the proportionality doctrine. At the qualitative level, the book describes the particular structure of proportionality analysis in each of the countries, the sequential or non-sequential character of the tests, the roles of the different subtests and the interplay among them, all as demonstrated in a large number of cases. The analysis looks beyond the formal definition of the stages to observe to what extent the court actually applies the stages of proportionality as it defines them and what characterizes proportional or disproportional limitation of rights. The analysis includes the ways in which courts establish the purpose of a policy, how they deal with multiple purposes and what purposes they consider to be worthy, the extent to which courts evaluate alternatives and the methods with which they conduct such evaluations, the degree to which fact-finding and evidence are incorporated into the proportionality framework, the allocation of the burden of proof at each stage, and how the courts act when the facts of a case are unclear.

At the quantitative level, a robust sample of supreme court or constitutional court cases from each jurisdiction is systematically coded, using categories such as policy fields and the rights to which proportionality is applied, the decisions at each stage of the analysis (whether the limitation is by law or for a worthy purpose, and the three subtests of proportionality), and the outcome. The combination of in-depth qualitative analysis and robust quantitative analysis provides a fresh, evidence-based prism through which the application of the proportionality doctrine by courts throughout the democratic world can be evaluated and debated.

Each of the country-based chapters presents one empirically grounded analysis of the constitutional practice of proportionality in each jurisdiction, at times exposing gaps between the accepted scholarly view in that country and the actual practice of proportionality.

The book concludes with a comparative chapter that focuses on the structure of the proportionality doctrine and the relationship between the different stages of the analysis. The chapter refers to two central attributes of the proportionality doctrine in the theoretical literature: The first is the sequential structure of the analysis, made up of distinct stages, each ending with a finding of pass or fail and the analysis proceeds only when the previous test is passed. The second is the conception of a single dominant element in the analysis – typically either necessity or balancing. Although the South African court is known to have explicitly rejected the strictly sequential model for a more holistic proportionality analysis, its practice is most often ignored or rejected in theoretical discussions.

Surprisingly, our empirical findings demonstrate that the practice of proportionality in several of the analyzed jurisdictions deviates from the strictly sequential model. We document several unrecognized practices, such as leaving stages undecided, using negative signalling while passing and continuing the analysis to subsequent stages despite previous failure. In addition, we find that reliance on a single dominant element does not, in fact, define the practice in the majority of jurisdictions analyzed. Thus,

we find that 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. We also find that in the majority of jurisdictions analyzed, outcomes of unconstitutionality do not rely solely on the final balancing stage, but rather most often on a joint failure at both the necessity and strict proportionality stages. We characterize a practice found in several apex courts in which the last stage encompasses a synthesis of the previous stages, drawing on flaws identified throughout the analysis.

These findings demonstrate that, in practice, proportionality analysis that uses the different stages in an integrative manner to reach an overall judgement, similar to the practice of the South African court, is more widely practiced than previously recognized, even if not deliberately or consistently. On the other hand, the German practice of relying almost exclusively on the final stage of strict proportionality is less common than typically perceived.

We offer some potential causes for the gravitation of courts towards such an integrative model, tying it to the complex and debatable nature of proportionality decisions and the institutional sensitivities courts face when conducting constitutional review. Specifically, we point to the understandable draw of the final balancing stage for courts, due to the decisional flexibility and engagement with constitutional values it allows. Nevertheless, we also recognize the apprehension courts may have regarding this stage, considering its explicit political nature. The integrative practice of proportionality allows for incorporating the balancing test without making it the sole basis of the decision, and for bolstering it with additional failures. Moreover, this practice recognizes the relative weaknesses of each of the stages of the analysis, and by integrating them strengthens the basis for the outcome.

In our assessment, this integrative use of proportionality analysis is also desirable from a normative point of view if, and to the extent that, it is applied in a way that meaningfully engages with each and every stage of the analysis. Recognizing the connections between the stages and allowing feedback between them can improve the quality of judicial practice and fully exploit the analytical potential inherent in proportionality analysis. We believe that this type of proportionality analysis best reflects the role of the court in ensuring that rights are limited only when limitation is justified, and also provides the most positive guidance to policy-makers in terms of what is expected of them when they design policy that restrict rights. Although such tendencies have been documented in several courts, we encourage a more deliberate and consistent application of proportionality following this model.

Proportionality and the Right to Equality

Guy Lurie

German Law Journal (Forthcoming, 2020)

This article focuses on the overlap and interaction between the doctrine of proportionality and other doctrines used to assess the constitutionality of state violations of the right to equality. In general, the proportionality doctrine calls for examining the constitutionality of all limitations of rights in a similar, one-size-fits-all manner. This article examines this doctrinal contention by focusing on the application of the proportionality framework by courts in Canada, Germany, Israel and South Africa as well as by the European Court of Human Rights (ECtHR) in the context of alleged violations of the right to equality.

The article makes three main contributions to the comparative constitutional literature. First, it shows that all the courts examined face the same pathology in trying to apply the doctrine of proportionality to alleged violations of the right to equality. Both proportionality and the right to equality are normative relational measures of the ends and the means of state policies. Both doctrines balance interests, values and rights. Analytically, as shown in this article, their overlap and interaction are thus problematic. The various tests used by courts to examine whether differential treatment amounts to discrimination are not easily compatible with the regular two-step constitutional review utilized in proportionality analysis that separates the question of the existence of a rights limitation from the question of its justification. When courts use tests that set out suspect grounds for a finding of discrimination, these often effectively become categorical prohibitions, standing in tension with the application of proportionality as an optimizing principle. Other attempts to imbue the right to equality with substantive qualities in order to establish whether the right is being infringed involve tests that are very similar to

the proportionality tests, rendering the second stage of proportionality analysis redundant or cumbersome.

The second contribution of the article is its survey of two models used by courts in applying proportionality in the context of violations of the right to equality: (1) focusing the constitutional review on the scope of the right and the infringement; and (2) inconsistency or flexibility in the application of the doctrine. Courts that follow the first model (Canada, South Africa and the ECtHR) in practice (although not necessarily in doctrine) discard the two-step constitutional review typical of proportionality doctrine, instead applying a single-step constitutional review focused on defining the scope of the right and the infringement. The courts in Israel and Germany utilize the second model and tend to apply proportionality in an inconsistent manner, either explicitly as part of a flexible doctrine (in the case of Germany) or implicitly as a matter of practice (in the case of Israel).

The third contribution of the article is in pointing out that each court's choice of model is relevant to the ongoing debate over the advantages and disadvantages of the proportionality doctrine itself. Some of the criticisms of proportionality are its one-size-fits-all treatment of all rights and its inherent perception of all rights as principles subject to optimization. The findings of this article suggest that some of this criticism has merit, because of the exceptionally problematic application of proportionality in the context of the right to equality. Specifically, in the first model the right to equality is treated as a categorical prohibition in a single-step constitutional review, rather than a principle optimized according to the standard two-step proportionality doctrine. On the other hand, the very existence of the two models identified in this article shows that it is possible to accommodate the doctrine of proportionality with the substantive definitions of the right to equality; proportionality does not have to function identically with regard to every right. Indeed, the use of tests akin to proportionality in the substantive definition of the right to equality, as detailed in the article, perhaps hints at the inherent value of the subtests of proportionality in

differentiating between illegitimate and legitimate state actions. One may argue that the utilization of what are essentially components of proportionality in the context of the right to equality demonstrates that the subtests of proportionality – a rational connection between the means and the ends of state actions, their necessity and benefits for their purpose that outweigh the detriment to rights – are somehow indeed part of the basic idea of the rule of law, as argued by proponents of proportionality.

In Search of "Red Lines" in the Jurisprudence of the ECtHR on Fair Trial Rights

Shlomit Stein

Israel Law Review 50(2) 2017 177–209

Proportionality and balancing are central to the reasoning of the European Court of Human Rights (ECtHR) and are applied in the vast majority of its cases. However, the application of these concepts has been criticized for being inconsistent and failing to provide clear guidelines for the future drafting of policies that strike a fair balance between individual rights and public interests. While ad hoc balancing may be justified at the theoretical level, at the practical level a policy-maker seeking to understand which infringements constitute clear violations of the European Convention on Human Rights (ECHR) is left confused.

Moreover, the court's jurisprudence is strewn with references to the "essence" or "core" of rights which should not be infringed upon. This idea of a right's essence is tied to the concept of human dignity and suggests some form of deontological constraints within the balancing method. The court does not seem to define this essence with any precision, however, and therefore the "very essence of the right" as the standard of protection does not contribute to resolving the ambiguity caused by balancing and proportionality analysis.

This article seeks to clarify matters somewhat by taking an overview perspective on a large sample of proportionality-based ECtHR case law dealing with the limitation of a specific protected right. This large sample of case law is broken down and distilled in order to discover "red lines": minimal thresholds of protection of the right which will typically be protected and will by and large lead to a finding of disproportionality if crossed.

The article conducts this type of analytic exercise regarding five aspects of the right to a fair trial under Articles 5 and 6 of the ECHR: the admission of evidence obtained through torture or ill treatment; use of anonymous witnesses; limitations on disclosure of information on which allegations against detainees are based; trials in the absence of the defendant; preventative detention for security processes. The article teases out the clearest possible red lines with regard to these five elements (lines that when overstepped will usually result in an unjustified violation of the right concerned). The article also assesses ECtHR jurisprudence on each of these issues in relation to the jurisprudence of other international human-rights law courts.

The conclusion of this exercise is that quasi-guidelines can be extracted from proportionality-based case law, even if some room for discretion in particular contexts will always remain. These red lines help limit the sphere of discretion. Identifying these red lines can assist legislatures and policy-makers in drafting laws and policies that conform to the obligations of their states according to the ECHR, and to instruct policy-makers outside the member states of the Council of Europe.

The Magnetism of Moral Reasoning and the Principle of Proportionality in Comparative Constitutional Adjudication

Richard Stacey

American Journal of Comparative Law 67(2) 2019 435-475

In the family of constitutional democracies born in the latter twentieth century, constitutional limitation clauses have emerged to manage the conflict between individual rights and the legislative pursuit of broader social objectives. In six paradigmatic post-war constitutional democracies – Canada, Germany, Israel, India, Poland and South Africa – the principle of proportionality has become the analytical fulcrum of the inquiry into the constitutionality of rights limitations.

Criticism of the principle of proportionality as a heuristic for limitations analysis has crystallized into three main objections: proportionality analysis devalues rights by exposing them to the ordinary processes of political bargaining; it offends the rule of law because it involves unpredictable moral reasoning; and it involves the unintelligible balancing of incommensurable goods.

This article considers, first, whether limitations jurisprudence in the paradigmatic countries contains responses to these objections. It argues that there are ways of meeting the devaluation and incommensurability objections, but suggests that models of analysis that purport to meet the unpredictability objection by minimizing the role of moral reasoning are undermined by continued judicial reliance on moral reasoning in the paradigm countries.

The article argues, second, that moral reasoning maintains this magnetic attraction for judges because the conception of the rule of law at work in the paradigm countries, which judges and other legal officials are committed to upholding, compels judges and legislators to engage directly

and fully with the normative commitments of a political community and its constitution. Because people reasonably disagree over the content and contours of these normative commitments, judges cannot rely on amoral analysis but must make arguments intended to persuade rational, morally autonomous members of a political community of how our most fundamental normative commitments should be understood by the legal system.

Rules vs. Standards in Human Rights Adjudication: A Positive Analysis

Barak Medina

Liberal democracies share, to a great extent, the underlying moral principles of human rights, and yet human rights laws differ substantially across legal systems. These differences are primarily in the form of these laws—the extent that human rights laws are composed of rules-based norms or mostly require a case-by-case, standard-like analysis.

The choice along the rules-standards spectrum is shaped by two types of considerations: moral ones, dealing with the nature of rights, and sociological considerations, which evaluate the expected effect of legal norms on developing a common culture of respect of human rights. These considerations do not induce a decisive judgment, but they present the costs of implementing an open-ended "balancing" approach. Specifically, it is improbable that the optimal form of human rights law is a corner solution of the type of an open standard. And yet, this particular form of is very popular, a fact that calls for explanation.

This Article suggests that the tendency toward standards is mostly a response to a decline in public trust in the courts. Employing rules is a rational strategy for a court to shield itself from political actors' pressure. However, standards enable courts to adjust the scope of judicial review in anticipation of popular and political reaction to certain rulings. Accordingly, the greater the threats to the judiciary's independence, the closer to the standards-end of the spectrum human right law is expected to be. This choice may thus serve as an indicator of the courts' diffuse popular support over time or across legal systems.

Engagement with Rights in the Policy Process

Proportionality and Policy Analysis: An Integrative Discussion and Its Implications

Mordechai Kremnitzer | Raanan Sulitzeanu-Kenan

Proportionality analysis is a legal concept that presents a set of normative requirements that policies must meet in order to protect constitutional rights. Specifically, rights may be restricted solely for the sake of promoting a worthy public goal; the rights-restricting means must be capable of promoting this goal; there must be no less restrictive alternative that would attain the same goal; and the expected benefit to the public must outweigh the expected harm entailed by the restriction of rights. These requirements are classically utilized by courts in ex-post judicial review of policy but they are also expected to guide policy-makers ex ante in the process of creating policy.

Policy analysis is a method used in the process of developing, evaluating and selecting public policy. Policy analysis consists of characterizing an undesirable phenomenon, defining a specific policy problem to be addressed, generating policy alternatives, and conducting a comparative evaluation of the alternatives, leading to a choice of policy.

In practice, the lack of an integrative discussion of legal proportionality and policy analysis results in a lack of applicable guidelines for policy-makers on how to integrate proportionality into the policy-making process for the purpose of protecting rights. This has led policy-makers and legal advisors to over-rely on the judicial application of proportionality, despite the divergent nature of policy-making and judicial review and the many differences between them. The blind adoption of the judicial practice by policy-makers can, in our view, lead to suboptimal and even problematic results.

In this paper, we present the first integrative discussion of policy analysis and legal proportionality in order to specify a method of meaningful

integration of the proportionality requirements into policy analysis. The method we propose is based on the recognition that policy-making is a fundamentally different exercise than judicial review of policy. Based on a characterization of the differences between policy-making and judicial review – in their goals, guiding principles, timing and institutional characteristics – we demonstrate why these justify a different method for applying proportionality.

The outcome of this integrated discussion is twofold: For policy-makers it provides a set of requirements that complement existing practices of policy analysis to best integrate the proportionality principle into policy-making. In addition, for judges, it offers a set of guidelines to complement proportionality-based judicial review that focus on verifying that proportionality was properly integrated in the policy–making process.

Proportionality Analysis and the Engagement with Rights in the Making of Policy: Perspectives from Four Case Studies

Talya Steiner

Traditionally, protecting human rights and guaranteeing that limitations imposed on rights comply with constitutional standards are considered the central role of courts. Recently, however, they have increasingly been recognized as an important part of the legislative and regulatory processes as well, and a rise in interest can be found in pre-enactment rights scrutiny, or what has been called "political constitutionalism".

At the theoretical level, several normative benefits have been tied to enhancement of the engagement with rights in the policy-making process. It is expected to improve rights protection by being anticipatory rather than remedial, as well as to positively impact institutional culture concerning rights, enhance the accountability of the political branches on issues of rights protection, and develop a "culture of justification" in which institutional responsibility for the protection of human rights is shared by all branches. Significant engagement with rights considerations in the enactment process may also allow judicial review to focus more predominantly on questions of process rather than substance.

When advancing from the theory of engagement with rights in the policy-making process to actual practice, several questions arise. For example, what are the optimal processes to be used to account for rights in the policy making process? What role can specific actors in the policy process play with regard to rights considerations, and what types of actors are instrumental as opposed to detrimental in ensuring the adequate consideration of rights? What is the nature of discussions on rights? Is the engagement with rights by definition legalistic, or do different forms of engagement evolve? What types of factors ultimately determine the extent to which rights considerations affect policy design?

Different mechanisms aimed at ensuring pre-legislative consideration of rights exist in various jurisdictions, and a growing body of literature has attempted to explore their effectiveness and ramifications in practice. These studies have painted a mixed picture, and have presented aspects in which the reality falls short of the theoretical ideal. Overall, there is a need for a richer, more nuanced and empirically grounded understanding of what rights review in the policy process may entail in practice, alongside a deeper analysis of the systemic barriers it may face, in a greater variety of political and geographical contexts and in specific policy fields.

Our research consisted of four case studies, all aimed at enriching our understanding of the potential ways in which consideration of rights can affect policy design and mechanisms that can improve the ability to create proportionate policy. The studies also document some of the barriers at both the individual and organizational levels that may prevent rights from being afforded their optimal weight in the policy process.

The specific focus of the case studies is national security policy. The effect on rights in this context is typically highly significant and therefore the meaningful integration of rights consideration into the policy process is of the utmost importance. At the same time, however, such integration can be particularly challenging in this context, considering factors such as secrecy, urgency, the significant weight afforded to security needs, and the deep unpopularity of terror suspects, who are most likely to bear the brunt of rights-restricting measures. While courts have often been important guardians of fundamental rights, they face substantial institutional limits, particularly in the counter-terrorism context. Therefore, exploring the potential and limitations of integrating rights considerations in the policy-making process in this specific policy context can provide particularly intriguing insights for this type of research.

Each individual case study closely details a particular policy-making process, relying on a broad variety of sources, including both publicly available as well as internal governmental documents, documents prepared by outside

parties such as legal experts and NGOs, protocols of parliamentary debates and media coverage. These materials were complemented by interviews with key players in the process.

Each case study then scrutinizes the process from the perspective of the consideration of rights, using two types of interrelated analyses: analysis of the actors and institutions involved and substantive analysis of the flow of rights discourse throughout the process. The institutional analysis is significant, since the judiciary tends to address "the policy-maker" as a uniform actor, while in practice the policy process is a multi-actor endeavour. Mapping out the actors involved in shaping the policy, specifically in terms of the roles they play relative to rights considerations, contributes a significant level of complexity that does not exist in court-centred analyses.

The substantive content analysis investigates the nature of deliberation about rights limitation in the policy setting. The nature of the rights discourse in the policy setting differs from the analytical structure of the judicial setting. The policy process has a fragmented and iterative nature, in which a proposed policy is discussed multiple times in different forums by different actors, and throughout the process the policy constantly shifts and changes in response to multiple factors. Previously unaddressed questions at the focus of the case studies include when the issue of rights limitations is discussed, what elements are considered, what shape and form such analyses take, how such questions are formulated and framed, if at all, and how they are deliberated and ultimately decided.

Some of the main research questions for the case studies included: Who were the different office holders and institutions involved in shaping the policy? How were rights considerations phrased and was proportionality analysis formally part of the process? Under what circumstances did considerations of rights ultimately affect policy design, and what factors contributed to their impact or lack thereof? Was there a process of identifying and evaluating the people whose rights were expected to be

infringed? How did the prospect of judicial review affect the consideration of rights and the policy design?

Some of the most interesting insights stemming from a combined reading of the case studies include the nature of the dynamic between bureaucratic and political actors in engaging with rights in the policy process; the shadow cast by existing practice and policy instruments on the proportionality analysis of new policy proposals; and some of the persistent structural limitations of the rights discourse in the particular context of security and counter-terrorism. Based on the case studies several approaches to deliberating over right limitations can be characterized, including a "risk-assessment" approach focusing on the possibility of judicial review; a minimization approach aiming to limit the scope of the right limitation using "narrow-tailoring" techniques; and an approach that attempts to challenge the basic premises of the policy regarding its goals, effectiveness and available alternatives.

Proportionality and Consideration of Rights in the Policy Process: The Case of the Israeli Counter Terrorism Act

Lila Margalit

The paper presents a case study of the Israeli Counter Terrorism Act (CTA), adopted by the Knesset (Israeli parliament) in 2016. The CTA was a comprehensive bill which sought to consolidate and update the Israeli anti-terrorism framework – much of which had previously been enshrined in emergency legislation – and granted the government wide-ranging criminal and administrative powers with significant human rights implications. Tracing the development of the law from the internal government deliberations through the public hearings in the Knesset, the case study explores the role played by rights considerations throughout the process, focusing in particular on the scrutiny conducted by the parliamentary committee charged with preparing the bill for its final readings.

The picture that emerges from the case study is a complex one. On the one hand, deliberations on the bill took place under relatively favourable conditions, conducive to more effective rights-based scrutiny. These included the unrushed nature of the process, which gave policy makers ample time to consider the issues in depth, as well as the fact that the bill was initiated and promoted by the professional echelons of the public service and was not the subject of significant political grandstanding.

These factors contributed to a parliamentary process – facilitated by the Knesset committee legal advisor – that, while not challenging the government's core policy agenda, did force it to justify and refine the specific "legitimate purposes" of particular provisions, agree to some narrow tailoring and improve certain procedural safeguards. While parliamentary deliberations were not always couched in the language of rights and there was no formalized process of rights scrutiny, in practice the legal advisor promoted a process of informed rights consideration by defining

rights-based dilemmas to be grappled with, challenging governmental assumptions and at times proposing specific alternatives. The case study highlights the unique function of the Knesset committee legal advisor, whose independence from the executive, non-partisan affiliation and broad advisory mandate place her in a unique position to facilitate substantive scrutiny. It also unravels the intriguing dynamic between the parliamentary advisor, government attorneys and members of the parliamentary committee.

At the same time, the study reveals two important structural limitations on the potential for substantive pre-enactment rights engagement in the field of counter-terrorism. The first is the government's near monopoly on the expertise and information necessary to effectively evaluate – and challenge – the factual narratives underpinning its proposals. The fact that many rights-infringing security measures rely on secret evidence also serves to constrain public assessment of their use (or abuse) in practice. The resulting information gap creates a significant obstacle for those seeking to conduct effective rights-based scrutiny. The second is the problem of voice – the fact that those whose rights are most likely to be burdened by counter-terrorism measures are not generally represented in the decision-making process.

Relatedly, the case study highlights the importance of including people in the policy-making process who take seriously the risk of erroneous or abusive application of the law by the officials charged with its implementation. Although narrow tailoring is a fundamental component of proportionality analysis, some government legal advisors indicated a high level of faith in the power of internal control mechanisms to prevent abuse or overreach resulting from the application of broad provisions. A far more pressing concern than excessive breadth, in their eyes, was the risk that the law would fail to provide authorities with the tools they needed to address emerging threats. Throughout the deliberations, government lawyers also expressed a high degree of confidence in their discretion and their ability to prevent errors or misuse of power. The introduction in committee of people more motivated to question government discretion contributed to important modifications of the bill.

Non-Judicial Constitutional Review of Counter-Terrorism Policies: The Role of Fundamental Rights in the Making of the Anti-Terror Database and Data Retention Legislation in Germany

Andrej Lang

The paper focuses on two controversial pieces of federal legislation in Germany: the Data Retention Act and the Anti-Terror Database Act. The case study follows the full gamut of these policy processes, beginning with the original enactment of the bills, judicial review of the bills resulting in the striking down of specific sections, and the subsequent amendment processes that took place in response to the judicial decision. The paper analyses how fundamental rights considerations and the proportionality doctrine were considered throughout the process, primarily by the fundamental rights divisions within the Ministry of Justice and the Ministry of Interior, who reviewed the draft bills to ensure they did not infringe upon rights. It also looks at how these divisions interacted with the political process.

The German model of ministerial rights review, as revealed in the two case studies, displays particular virtues and vices. On the one hand, the fact that this form of review is done in close proximity to the centre of power of the legislative process ensures that, in substance, the impact of federal legislation on fundamental rights is virtually always considered and that the constitutional requirements laid down in the case law of the Federal Constitutional Court are met when new legislation is drafted. Thus this sort of review complements the German strong-form model of judicial review. On the other hand, the case studies demonstrate how the procedural design of this rights-review process is not conducive to a principled and deliberative engagement with fundamental rights.

First, the legal opinions of constitutional experts within the federal bureaucracy are constrained by the hierarchical ministerial structure. Instead of expressing a genuine constitutional viewpoint, they are formulated as risk assessments, setting forth the different levels of likelihood that a draft bill will be overturned by the Constitutional Court. As a result, the role of rights is mostly mediated through the Court's case law and the prospect of judicial review.

Moreover, the legal opinions do not resemble a lengthy, structured proportionality analysis in which the fundamental right takes centre stage, but instead are geared towards efficiency and are service-oriented, and they are thus formulated as specific comments on certain paragraphs in the draft bill.

Finally, there is little willingness to make substantial changes at the stage of parliamentary hearings, and therefore the discourse in parliament and its committees is dominated by a government-versus-opposition dynamic, which decreases the quality of the political discourse on rights.

Overall, the dynamic and discourse surrounding the two bills are indicative of the prominent role of fundamental rights within the German constitutional order and legislative process, but they also reveal the legalistic and rather formalistic political culture surrounding these processes. The picture that emerges is one in which rights are prominently considered and clearly have a constraining effect on the making of anti-terrorism legislation. Often, however, they ultimately recede when weighed against the overarching objective of ensuring collective security in the wake of the threat of terrorism.

Proportionality and Rights in the Making of the EU Directive on Combating Terrorism

Fiona de Londras | Jasmin Tregidga

The paper considers the process of making counter-terrorism law within the European Union, taking the 2017 Directive on Combating Terrorism as its focus. As a comprehensive counter-terrorism instrument, the Directive both incorporates pre-existing legal instruments and adds new elements to the EU's fast-growing and now wide-ranging counter-terrorism acquis. The case study meticulously details the many sources that fed into the Directive, from previous framework decisions comprehensively defining terrorism and related offences to UN Security Council resolutions and the priorities of member states.

Generally speaking, EU policy must be compatible with the Charter of Fundamental Rights and also, by virtue of all member states being contracting parties to it, the European Convention on Human Rights. Various procedures and institutions exist in the EU policy-making process to ensure this compatibility, such as inclusion of stakeholders in the process and *ex ante* impact assessments structured around the proportionality principle requirements. Interestingly, however, in the case of the enactment of the DCT several shortcomings were revealed regarding how these generally entrenched concepts played out. In particular, the case study shows significant deviation from the ordinary process of legislation and from the EU's own Better Regulation processes, which reduced the input from "outsiders" (including civil society and the EU's own Fundamental Rights Agency), thus significantly decreasing rights-based contestation and deliberation in the process of drafting the Directive. Instead of the usual relatively open process, the Directive was drafted pursuant to an opaque and expedited policy process and was thus non-participatory and, as far as can be discerned, relatively uncontested within the EU policy and law-making space.

A significant insight arising from the case study is how the complex nature of supranational policy-making impacts the engagement with rights compatibility and proportionality analysis. The case study documents the domino effects that pre-existing instruments, provisions and commitments have on subsequent instruments such as this Directive. Once a provision is introduced without adequate analysis of its impact on rights and its proportionality, its mere existence can come to function or be presented as an indication that rights have already been considered (and that it is proportionate) and therefore that the question of proportionality need not be re-evaluated. Furthermore, the adoption of an instrument in one place (e.g., the Security Council) can create obligations to adopt the same instrument in other places (e.g., the European Union) for the sake of harmonization, creating an additional barrier to further examination of rights compatibility. As illustrated in the case of the Directive, this element of supranational policy-making can result in acute deficiencies in accounting for rights in the policy process; similar phenomena may be found in purely national contexts as well.

Having traced the development of the Directive, this article makes three important points about proportionality and transnational counter-terrorism: first, that legal standards in transnational space "compact" from one instrument to another so that inadequacies in earlier processes are not subsequently remedied and in fact are reinforced in later law-making processes; second, that without a meaningful, enacted commitment to transparency, participation and contestation in a transnational law-making process the bureaucracy, opaqueness, and institutional complexity of a supranational institution such as the EU can mean that this law-making takes place "in the dark", with no opportunity for deficiencies to be exposed and analyzed; and third, that such processes have serious implications for domestic law, into which the Directive must be received and implemented and where the prior inadequacies in transnational law-making remain unresolved.

Fundamental Rights and Proportionality in the Parliamentary Process: The Case of the South African Protection of State Information Bill

Juha Tuovinen

This paper presents a case study of the Protection of State Information Bill (POSIB). The POSIB was intended to replace the Protection of Information Act of 1982, an apartheid-era law that regulates the classification, protection and dissemination of state information, and sets forth criminal offences related to the disclosure of such information. The 1982 law quite likely violates Constitutional rights and contradicts the post-apartheid-era ethos of open democracy and a culture of justification. The case study follows the evolution of the bill from the introduction of the original version in 2008 to its withdrawal and the submission of an amended bill in 2010 and through three years of deliberation in the South African Parliament. Despite much criticism by the opposition and civil society, the bill was ultimately passed by Parliament in 2013, but – in a rather unusual occurrence – it was not signed into law by the President.

The case study closely tracks the parliamentary deliberations on the bill in order to uncover the nature of the rights-related claims made and the role and impact of the different actors in the policy-making process with regard to the protection of rights. It focuses primarily on the debates regarding three provisions: the definition of the "national interest" for which information could be suppressed; the possibility of including a public interest defence in the law; and the harmonisation of the bill with the pre-existing Promotion of Access to Information Act. While some of these provisions were replaced or amended as a result of the deliberations, others remained as originally proposed.

The picture emerging from the analysis is one of parliamentary deliberations that are not highly legalized. Although the topic of rights was invoked often in the debates, the arguments were based on general logical reasoning

and proportionality analysis was only implicitly referenced. In addition, despite the existence, in the background, of grave concerns regarding the motivation for the bill – especially the question of whether the proposed rights limitations were for the sincere purpose of state security or the illegitimate governmental interest in covering up corruption – the deliberations in Parliament tended towards the pragmatic, focusing on the possibility of narrowly tailoring the clauses of the bill.

The case study reveals a complex picture of fundamental rights argumentation and its power in the legislative process in a democracy dominated by one party. The commonly held view is that in such democracies the legislature cannot act as a substantial check on the power of the executive branch. The case study demonstrates that although the ruling party still maintains the power to push through provisions even when they seem likely to be in violation of fundamental rights, a rights-based parliamentary debate can impact legislation: there seems to be a willingness to compromise in some circumstances, leading to a slightly more moderate law. In addition, the criticism arising in the parliamentary debate, while ineffective in preventing the passage of the bill, did seem to have the indirect effect of bringing about the Presidential veto.

Overall, the case study demonstrates the limited capability of the legislative process to prevent extreme rights limitations, and sadly shows that a state which may have endured abuses of security considerations in the past does not become immune to the potential of similar types of abuses. However, it also indicates that policy can be contested on the basis of its effects on rights and that the constitutional system does impose some meaningful constraints on a dominant party.

Behavioral Examination of Proportionality

Facts, Preferences and Doctrine: An Empirical Analysis of Proportionality Judgement

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Raanan Sulitzeanu Kenan | Mordechai Kremnitzer | Sharon Alon

Proportionality is one of the central principles for adjudicating among conflicting values. However, rather little is known about the factors that play a role in the formation of proportionality judgements by legal experts. Two main questions are explored in this study: the extent to which these judgements are informed by the factual circumstances in which the conflict of values arises; and the impact of legally irrelevant preferences on proportionality judgements.

To test these questions we conducted a survey-embedded experiment on a sample of 331 practicing lawyers and legal academics. The policy domain addressed by the experiment is the antiterrorist military practice of targeted killings. Respondents were randomly assigned to one of sixteen descriptions of a proposed military plan for a targeted killing, and were asked to evaluate the proportionality of the plan using their legal expertise. The versions differed in referring to one of four levels of importance of the operational goal and one of four levels of severity of the infringement of rights, yielding a four-by-four between-subjects design. After reading the proposed military plan, respondents were asked four yes or no questions: whether the goal was worthy; whether the plan was effective for achieving the goal; whether it entailed a minimal infringement of rights; whether the proportion between the advantage to be gained and the expected infringement is adequate. Respondents were then asked to rate the proportionality of the plan on a scale of 1 to 6. Finally, respondents were asked to indicate their political position on a five-point scale from extreme right to left.

Regarding the factually relevant considerations, we expected that the likelihood of a plan being judged proportional would never decrease when moving to a scenario with a more important goal or with a lower potential for rights infringement. Regarding the effect of ideological preferences, these can manifest in two ways: directly, where the prior inclination to judge an operation involving targeted killings as proportional depends on one's ideology; or indirectly, where ideology affects the weight assigned to different factual conditions.

Our experimental findings suggest that legal experts' proportionality judgements are receptive to normatively relevant factual considerations, and that they tend to judge the proposed plan as more proportional as the normative importance of its goal increases and the infringement of human rights decreases. This suggests that proportionality judgements are receptive to doctrinally relevant factual variation.

However, we also find strong correlational evidence for the effect of ideological preferences on such judgements. Even if we ignore the two extreme categories on the ideological spectrum, the mean difference in the probability of judging a given operation as proportional decreases significantly from 90.9 percent for "hawks" to 78.1 percent for "centrists" and to 52.1 percent for "doves". There is no indication, however, that the factual variation had systemically different effects on the judgement of hawks versus doves. Thus, these results do not indicate that the information processing is ideologically biased, but rather that ideological preference affects experts' inclination to judge a plan as proportionate, while factual considerations regarding the importance of the goal and the extent of rights limitation lead them to adjust their initial judgement. The findings suggest that proportionality judgements are anchored jointly in the experts' policy preferences and the facts of the case.

Unreliable Protection: An Experimental Study of Experts' Proportionality Decisions Regarding Civilian Casualties in War

Daniel Statman | Raanan Sulitzeanu Kenan | Micha Mendel
Michael Skerker | Stephan de Wijze

The proportionality principle is an international requirement of humanitarian law intended to constrain the use of military force in order to protect civilians in armed conflicts. It prohibits the use of force when collateral harm to civilians is expected to be disproportionate to the military value of an attack. In practice, application of the proportionality principle requires balancing the military value against the foreseeable harm. Despite its importance, little is known about the ability of experts to apply the proportionality principle. The present study attempts to offer initial empirical evidence on the reliability of expert proportionality judgements.

Since proportionality judgements are normative in nature, there is no objective benchmark for determining their truth value. Instead, this study experimentally assesses the reliability of experts' applications of the proportionality principle. Reliability was evaluated using three criteria: *inter-expert convergence* (the distribution of judgements regarding a given situation across a set of evaluators); *sensitivity* of the judgement to relevant factors (specifically, variation in the military value expected to be gained by the attack); and *robustness* (the extent to which proportionality judgements are susceptible to irrelevant considerations, i.e., biases).

These measures of reliability were implemented using a novel, vignette-based experimental paradigm, and the reliability of proportionality judgements of three types of respondents was assessed: legal and moral academic experts in the field of just war theory from eleven countries (N=289); military officers from the US and Israel (N=234); and a sample of US non-experts (N=960). The first two groups constitute two types of experts who typically apply the proportionality principle. The last group

provides a baseline for lay people's intuition regarding proportionality in war, thereby facilitating the interpretation of the results and making it possible to identify the role of expertise in forming proportionality judgements.

All participants were asked to read two descriptions of wartime military operations that vary in their respective military value (an attack on the main headquarters of the enemy, or on a relatively small airbase), and answer questions regarding the permissible collateral damage in each case. After reading each of the scenarios, respondents were asked whether the target was a legitimate military target for attack. Those who considered the target legitimate were presented with questions regarding the extent of collateral damage permitted. Respondents were presented with two extreme responses – either that the attack is permitted only if it poses no risk to human life (zero), or that it is permitted with almost any risk to human life (any number of casualties). The third option was to specify that the attack is permitted only if civilian casualties do not exceed a specified number, and the fourth option was not to give any substantive response ("I cannot offer a reasoned answer"). Since the scenarios involved legitimate military targets with non-negligible military value, we would expect experts to refrain from the two extreme options and opt for providing a numerical response.

Comparing the distribution among the four categorical responses enabled us to assess respondents' understanding of the proportionality principle in the abstract. The figures provided by respondents who chose the numerical option served as the basis for assessing the respondents' reliability in implementing proportionality based on testing the levels of convergence and sensitivity. We also varied normatively irrelevant attributes, including the order in which the targets were presented, exposure or lack thereof to a numerical anchor, and the temporal perspective – prospective or retrospective. This allowed us to assess respondents' susceptibility to biases.

Examination of the distribution among the categorical responses demonstrated the expected pattern of proficiency among experts as compared to non-experts. While the distribution of categorical choices among lay respondents was relatively uniform across the three substantive options, academic experts and military officers were less likely to choose the extreme responses (zero casualties or any number). The choice to provide a numerical response indicates that experts have a greater understanding of the abstract logic of the proportionality principle and suggests that they, in contrast to lay respondents, systemically employ a distinct theory in coping with such dilemmas in an attempt to apply a proportionate response.

In terms of sensitivity to the military value of the targets presented, experts and military officers performed well, and – unlike lay people – systemically permitted greater collateral damage when the military value of the attack was greater. As for biases, academic experts were no less susceptible to biases than non-experts, while no significant biases were found in the case of military officers.

However, regarding the central reliability criterion of convergence, the distribution of numerical responses was over-dispersed (standard deviations are larger than means) in all three groups for the two targets. The samples also included extreme outliers. Given these distributional characteristics, we utilized the median response and percentiles for assessing convergence. We found that both military and academic experts failed to reach reasonable judgement convergence. For academic experts we found substantial dispersion even among relatively non-extreme percentile ranges. For example, in the case of the attack on the strategic target of enemy headquarters, comparison of the responses of the 40th and 60th percentiles reveals a difference of 100 casualties, while comparison of the 25th and 75th percentiles reveals a difference of 450 casualties – 3.6 times the median response (125). Similar distributions were found for the military officers' sample, although in the case of the headquarters target, both the median response and the inter-quartile range were smaller than

those of the academic experts – 50 (vs. 125) and 183 (vs. 450), respectively. Response distributions of lay respondents were similar to those of the academic experts and military officers in the case of the airbase. However, consistent with the idea that lay respondents' lack sensitivity to the different military values of the two targets, their response distribution in the case of the headquarters was nearly identical to their response distribution in the case of the airbase, demonstrating lower median response and dispersion. To conclude, none of the groups demonstrated a high level of judgement convergence in applying the proportionality principle.

Interestingly, cultural differences in the application of proportionality were found in both types of expert groups. The median response of American academic experts and military officers was higher (i.e., more permissive) and their level of convergence was lower, compared to their respective non-American counterparts. We also found a consistent relationship between the median proportionality judgement of a group and its judgement convergence. These findings are in line with previous research regarding "psychic numbing" that occurs in the valuation of human lives, according to which sensitivity to quantities diminishes when people evaluate increasingly large values.

The results of this study carry important implications for the ethics and law of armed conflicts. The apparent inability of experts – both military officers and academics – to agree on the correct application of the proportionality principle implies that the protection afforded to civilians during warfare is unreliable, even when warring parties attempt to abide by the proportionality principle.

Does Civil Rights Discourse Moderate or Escalate Political Bias? Experimental Evidence Regarding Contrasting Effects in Israel and Canada

Raanan Sulitzeanu Kenan | Lior Sheffer | Talya Steiner | Shiran Barzilai

This study explores the behavioural implications of civil rights discourse – specifically, freedom of speech – on citizens' decision-making in societies with varying levels of polarization and political contention. We examine the interaction between civil rights considerations and motivated reasoning in protecting the political rights of ideologically proximate and distant activists.

Generally speaking, rights reflect protected interests that are afforded equally to all citizens. In particular, freedom of speech is meant to ensure pluralism of views and permit the challenging of the status quo. Therefore, framing a policy dilemma as one that involves free-speech considerations should increase the likelihood of protecting expressions of political opponents, and this has indeed been established by previous empirical research. However, empirical research has also established the prevalence of motivated reasoning in public policy decisions, in which the ideological desire to reach a specific conclusion leads to selective processing of information. Since policies are evaluated through an ideological lens, decision-makers seek out arguments that support the desired result and discount arguments that oppose it. Thus they are less likely to consider rights of political opponents when determining whether to protect or enable their actions, and conversely, they incorporate them more readily into justifications for protecting similar actions by political allies.

Civil rights reasoning and motivated reasoning seem to pull in opposite directions, and the interaction between them – how rights considerations are processed from a motivated-reasoning perspective – has not yet been

explored. Does the civil rights framing uniformly increase tolerance for controversial views, or is the rights discourse treated instrumentally, so that individuals are more likely to incorporate the logic of rights when it supports their preferred conclusion than when it leads to an undesirable outcome?

We consider factors of social context that may affect this interaction. One such factor is the constitutional culture and the level of consensus surrounding the civil rights discourse. If civil rights are embedded in a nation's constitutional culture as a set of universally shared values, citizens are less likely to treat them instrumentally, and framing dilemmas in terms of rights would be expected to mitigate the effect of motivated reasoning. In contrast, if the constitutional protection of civil rights is itself a highly contentious political issue, citizens should be more likely to think about them instrumentally, thus amplifying the effects of motivated reasoning in policy dilemmas.

We identify variation in these aforementioned factors in Israel and Canada, making them good comparative cases for testing the effect of enhanced awareness of rights on policy decisions and its interaction with ideological preferences. Israel is a highly divided society in which questions of constitutional protection of civil rights are at the centre of political dispute. In contrast, Canada is an example of a multicultural society that largely manages its internal differences using the values enshrined in the Charter of Rights and Freedoms, which enjoy high levels of consensus. On average, Israelis exhibit a substantially lower level of support for protecting basic civil rights like freedom of speech than do Canadians.

To evaluate these divergent patterns, we conducted survey experiments in both Israel (N=1,756) and Canada (N=1,335). Participants were tasked with either approving or denying a demonstration request, based on a scenario in which prior history establishes a certain level of threat to public order if the demonstration is approved. Following a 2x2 treatment design, participants were presented with a request by either a right-wing

or a left-wing organization, and the scenario either did or did not state that permitting the demonstration would allow the protestors to realize their constitutional right to demonstrate.

In both experiments, enhancing awareness of the constitutional right increased the overall likelihood of approving the demonstration. However, the two countries differed in the moderating effect of awareness of rights on motivated reasoning. In Canada, the largest effect of rights awareness on protest approval was when respondents initially disagreed ideologically with the protesting organization. In Israel, in contrast, rights awareness made respondents more likely to support protests by groups with which they identified and had no effect on the likelihood of approving protests by ideological opponents. That is, while awareness of civil rights decreased levels of motivated reasoning in Canada, in Israel it increased the biasing effect of ideological preferences.

These findings suggest that the effects of the constitutional rights discourse are not uniform, and are dependent on the constitutional culture and consensus surrounding rights. While awareness of rights may mitigate ideological effects in a context in which the universality of rights is highly internalized, it may also have the opposite effect, exacerbating ideological effects where the rights discourse itself is politically contentious. We discuss theoretical consequences and the implications of expectations regarding civil rights awareness and education.

Best to Be Last: Serial Position Effects in Legal Decisions in the Field and in the Lab

Ori Plonsky | Daniel Chen | Liat Netzer | Talya Steiner | Yuval Feldman

Legal officials often spend their days making sequences of similar decisions. Such decisions may require a similar balance to be struck between promotion of the public interest and the protection of an individual right, in varying factual circumstances. For example, parole judges sequentially decide whether to deny or grant parole, police officers sequentially decide whether to fine or just warn traffic offenders, and prosecutors sequentially decide whether to press charges for certain offences or not. In theory, since cases are independent, only the characteristics of each case in the sequence should guide each decision. In practice, however, ample research, including in the domain of legal decisions, suggests that making a decision in the context of other supposedly independent decisions may be different than making the decision in isolation. In this study we focus on the effect of the serial position of a legal decision within a sequence of similar decisions.

Most empirical evidence on the effects of serial position in non-legal contexts, when cases are judged step by step (i.e. each case is decided before the judge faces the next case), suggests that items appearing later in the sequence are judged more leniently (favourably) than items appearing early in the sequence. Therefore, we may expect legal decisions appearing later in a sequence of decisions to be more lenient as well. Interestingly, a previous analysis of sequential parole decisions by Israeli judges suggests the opposite pattern: more denials of parole later in a decision session. These findings have been criticized, however, on several grounds.

To rigorously evaluate the effects of serial position in legal cases, we used a dual strategy. First, we analyzed a large dataset of real-world refugee asylum court decisions in the US. We found that asylum requests appearing later in a daily sequence of requests were granted at much higher rates than those appearing early in the sequence. While we found that the asylum

court cases were likely to be randomly ordered, we cannot be certain that they were. Therefore, to complement the analysis, we performed three controlled experiments in which lay people made decisions in sequences of randomly ordered legal scenarios. The results of all three experiments echo the results of the real-world data: decisions tend to become more lenient the later they are in the sequence.

We began by considering real-world, sequential judicial decisions, based on administrative data on US refugee asylum cases adjudicated in immigration courts between 1980 and 2013. Focusing on applications for asylum, our sample includes 386,109 cases in which the decisions determined whether an asylum-seeker could stay in the US or would be deported. Within each court, cases were randomly assigned to judges, who would then handle the cases on a first-in-first-out basis. Therefore, cases were likely randomly ordered within a day.

We investigated how the average grant rate (the probability of approving an asylum application) changes as a function of the serial position of a case within a sequence of daily cases. If indeed case order is not related to case characteristics, legal formalism dictates that the serial position of the case within the sequence of daily cases should have no effect, and therefore the average grant rate should be constant. However, if asylum court judges are also prone to make more lenient rulings the later in the sequence a case appears, we should observe an increase in the average grant rate as a function of order. We find that the average grant rate increases from just 33% for the first case on a given day to nearly 60% for the sixth case. A mixed effects logistic regression with random intercept for judge reveals that the odds of "grant" increase by 5.4% for each additional unit of position in the sequence ($p<0.001$). This effect is even slightly greater (6.5% higher grant rate for each unit of serial position) when we control for the judge's prior experience and demographics.

To examine if the effect replicates when we *know* that the order of legal cases in the sequence is unrelated to characteristics of the cases, we

conducted three controlled experiments. In each experiment, participants recruited from the general Jewish population in Israel were presented with a sequence of legal vignettes involving conflicts between the public interest and an individual's rights. Specifically, in Experiments 1 and 3 the vignettes described scenarios in which the Israeli security forces ask the court to issue an administrative restraining order (without trial) against Jewish settlers in the West Bank due to suspicion of involvement in terrorism, while in Experiment 2 the vignettes described scenarios in which the prosecution asks the court to hold a juvenile detainee in custody without bail while he awaits trial. In all the experiments, participants were asked to decide whether to approve or reject each request before they faced the next vignette in the sequence. Importantly, the order of vignettes was randomized across participants. Thus, any effects of serial position on the average likelihood of rejecting the request (choosing more leniently) cannot be a result of an unknown confounder related to case characteristics.

Experiment 1 examined how making a legal decision as part of a sequence differs from making it in isolation. Specifically, 218 participants were presented with a sequence of six vignettes, and their decisions were compared to those of 220 participants presented with only a single vignette (randomly chosen from among the six). We find that whereas the average rate of rejection of a rights-infringing request does not differ between the two groups if the comparison includes only the first case presented to each member of the sequential decision group , later cases tend to be judged more leniently.

The experimental setting from Experiment 1 differs in many ways from the real-world situations faced by judges. Experiments 2 and 3 were designed to check if the observed serial position effect survives after accounting for some of these differences. For example, Experiment 2 (N=901) shows that the serial position effect replicates when participants are familiar with the type of cases they face (as in the real world but unlike in Experiment 1).

Experiment 3 (N=501) shows that the effect replicates in longer sequences (12 vignettes) in which some cases are clearly more extreme than others (again, as in the real world but unlike in Experiment 1).

These results add to the body of literature demonstrating that irrelevant situational factors can have surprising effects on judicial decisions, and demonstrate that decisions tend to become more lenient over time. Uncovering these effects is the first step to designing mechanisms that will correct for the biases. One potential explanation for the serial position effect is the "direction of comparison" hypothesis: When making sequential judgements, each new item is compared to the previously observed items and evaluated primarily based on novel features. As negative features (whether novel or familiar) are recalled more easily, positive features are more likely to be considered novel, and therefore a trend towards favourable judgements emerges. If this explanation is true, then taking measures ensuring all previous items are accurately recalled may diminish the bias. Future research should investigate this prediction. Until then, however, it appears that from the point of view of the affected individual, it is best to be last.

The Slippery Slope of Temporary Measures: An Experimental Analysis

Marina Motsenok | Talya Steiner | Liat Netzer, Raanan Sulitzeanu-Kenan | Yuval Feldman

Policy-making is classically understood as a long-term endeavour in which legislation is designed to last unless circumstances arise that require it to be amended or repealed. Sunset clauses, however, are a parallel mode of policy-making in which a measure is adopted temporarily and expires after a predetermined time frame unless actively renewed. Temporary measures are often adopted in times of emergency when there is uncertainty as to the best response, with a prominent example being counter-terrorism policies put into place shortly after terror attacks. Since an urgent response is needed but the proposed policies may have severe impacts on human rights, proponents of temporary legislation hope to mitigate some of the harm caused by these severe measures by restricting the policy's duration.

However, policy that is initially approved as a temporary, short-term measure is often extended for longer periods, at times even becoming permanent. This may be tied to two psychological mechanisms: prospectively, support for a temporary policy may be higher due to a compromise effect, since it is viewed as a "middle ground" between action and inaction. Retrospectively, status quo bias increases the chances of the temporary policy being serially renewed. Taken together, these two mechanisms result in a slippery slope: approving a rights-restricting measure for a short period of time that might not have been approved for the long term opens the door to gradual escalations, through recurring extensions, which might result in the permanent adoption of a policy. The significant infringement of fundamental human rights that this slippery slope effect may cause raises concerns about the introduction of temporary rights-restricting measures.

Despite the scholarly debate over sunset clauses, our studies are to our knowledge the first attempt to empirically test whether temporary legislation lends itself to a slippery slope phenomenon. We examine both the effects of retrospective temporality (the pre-existence of the policy for a period of time) and prospective temporality (approval of a policy for a specific, limited period of time) on willingness to approve the policy.

In a series of three experimental studies, respondents were presented with a policy proposal permitting the use of physical interrogation measures in anti-terrorism interrogations – an extremely rights-restricting measure that according to international human rights law is a breach of an absolute prohibition that must never be violated. Respondents were asked to decide whether to approve or reject the proposal.

In Study 1 respondents were randomly assigned to one of 20 experimental conditions which varied both retrospectively in the duration of time the policy had already been in place, if at all, and prospectively in the duration of time the proposed policy was to last. Our findings show an increase in willingness to approve the proposal when the policy was already in place and about to expire, regardless of how long it had been in place, compared to when it was presented as a new policy. Regarding new policies, there were no differences in approval rates between temporary and permanent policies. However, respondents who rejected the proposed policy were subsequently asked whether they would be willing to approve it for a shorter period of time. Some of these respondents were willing to approve the policy in the follow-up question.

This finding was replicated in Study 2, in which approval rates did not significantly differ between respondents asked to approve a temporary policy and respondents asked to approve a permanent policy. However, when those asked to approve the policy permanently were subsequently asked whether they would approve it as a temporary measure, some of

the respondents who had rejected the policy permanently were willing to approve it temporarily.

While Study 1 supports the effect of status quo bias on increasing willingness to extend temporary rights-restricting measures once already in place, both studies seem to demonstrate that temporary policies enjoy higher approval rates, but only when the temporary nature is emphasized, such as when other possible durations are mentioned through a follow-up option. To further investigate whether the possibility of adopting a policy temporarily indeed triggers a compromise effect between action and inaction, in Study 3 respondents were presented with the option of temporarily adopting a rights-restricting measure in tandem with permanent approval and complete rejection. Participants were asked to choose between rejecting the policy entirely, enacting it temporarily for one of three durations of time, or approving it permanently. The results indicate that when choosing among several options the temporary options are more frequently selected than either rejection or permanent approval.

Taken together, our findings support the "sunset clause paradox": temporary policy-making may lead, through an incremental slippery slope, to the perpetuation of policy that might not have otherwise been approved. Thus, originally choosing a temporary design to help mitigate the rights infringement may ultimately end up facilitating graver infringement.

Necessity or Balancing: The Protection of Rights under Different Proportionality Tests – Experimental Evidence

Talya Steiner | Liat Netzer | Raanan Sulitzeanu Kenan

Proportionality is the leading analytical framework implemented by constitutional courts worldwide for the judicial resolution of conflicts between human rights and public interests. In its fully developed form, proportionality includes a four-stage sequential inquiry: the worthy-purpose test, inquiring whether the right-limiting action promotes a legitimate objective; the suitability test, inquiring whether the means are rationally connected to the objective; the necessity, or less-restrictive-means, test to determine whether alternative means could achieve the same objective in a less restrictive manner; and the strict-proportionality, or balancing, test, ensuring that the benefit achieved by the policy outweighs the harm caused by the right limitation. Despite its popularity, there is no canonical formulation of proportionality analysis, and variations can be found among the many jurisdictions that have adopted proportionality. These variations include ending with the necessity test and doing without a distinct balancing stage, applying a balancing test but no necessity test, and applying the full four-stage inquiry, but placing the emphasis in the analysis on either the necessity element or the balancing element.

The global spread of proportionality has been accompanied by fierce theoretical critique and debate, including about the ramifications of proportionality for the privileged status of human rights. Critics of the doctrine have raised the concern that proportionality acts to undermine the very nature of rights, and that the act of balancing rights erodes the very notion of human rights. Theorists seeking to defend the compatibility of proportionality with rights enjoying special status differ in their understanding of which of the proportionality subtests in fact ensures

this. While some have pointed to the initial worthy-purpose requirement, the main difference in opinion seems to lie between those who interpret the balancing component as affording special weight to rights, and those who see this role being carried out by the necessity requirement.

This study presents the first experimental exploration of whether different formulations of the proportionality principle shape how the doctrine is perceived and acted upon in relation to the protection of rights. In particular, we test whether formulating proportionality in terms of balancing results in a different perception of the doctrine and different outcomes in application relative to formulating it in terms of necessity. In three experiments we found strong evidence that thinking of proportionality in terms of the necessity test enhanced the perception of the doctrine as protective of rights relative to thinking of it in terms of balancing. Furthermore, analyzing proportionality in terms of necessity led participants to decisions that were more protective of rights when resolving public policy dilemmas.

The first two studies (N=440; N=474) examined the effect of different formulations on the perception of lay people with no prior knowledge of the doctrine. Participants were presented with an explanation of the proportionality principle in terms of either necessity, balancing, necessity and balancing combined, or a reference condition based on suitability, or no explanation at all. Participants were then asked to rate the extent to which they perceived the proportionality doctrine as being protective of rights. We found that when they were exposed to proportionality in terms of the necessity test, participants tended to perceive the doctrine as affording the highest level of protection of rights. Exposure to a balancing formulation did not enhance the conception of the doctrine as protective of rights more than a formulation in terms of the suitability test (but it did so relative to the no-explanation reference condition).

The third study examined the effect of emphasizing necessity versus balancing on respondents with both prior knowledge of the doctrine and experience in applying it in practice. Participants in the study were practicing lawyers and law school students (N=322), who were presented with a proposal for a legislative amendment that involved a conflict between public safety and suspects' rights to due process. Participants were then asked to conduct a proportionality analysis in terms of either the necessity test or the balancing test in order to decide whether to approve or reject the proposal. Finally, they were asked to describe their analysis in writing and rate the extent to which they perceived the proportionality doctrine as being protective of rights. We found that a higher proportion of those who applied the proportionality analysis in terms of the necessity test rejected the rights-restricting proposal compared to those who applied the proportionality analysis in terms of balancing. Moreover, emphasizing the necessity component when applying proportionality analysis led participants to perceive the doctrine as more protective of rights than emphasizing balancing when applying it. This is surprising considering that all participants shared a background of legal training, and therefore could be expected to share a common perception of the level of rights protection provided by the doctrine.

Our findings point to the dominant role played by the necessity test in shaping the perception of the doctrine as being protective of rights and in increasing the protection of rights in practice when the doctrine is applied to a rights-restricting policy. Tentatively, our findings suggest that emphasizing the necessity test can increase the perception of the doctrine as being protective of rights and can shift its application towards a more rights-respective interpretation. These findings apply to legally trained actors who most commonly apply proportionality analysis as judges and legal advisors. Our findings also point to the effect that the formulation of the doctrine can have on non-legal actors' perception of the status of rights and the level of protection they should be afforded. This is of interest

considering the trickledown effect of the standards of constitutional review into the political and policy arenas, and the expectation that non-legal actors in these spheres will internalize the restrictions imposed on them by proportionality. We conclude with some limitations of this first empirical study and directions for further research on the topic.

Ideological Bias in Constitutional Judgments: Experimental Examination of Its Nature and Potential Solutions

Elena Kantorowicz-Reznichenko | Jaroslaw Kantorowicz | Keren Weinshall

A fundamental principle of constitutional rights is that they assure universal equal protection for all, regardless of age, race, gender, beliefs, religion and political inclination. Political rights in particular are by definition meant to be afforded neutrally, to all parties and political affiliations. However, empirical research suggests that ideological inclinations do unduly affect the assessment and application of political rights, such as freedom of speech and the rights to protest, vote and stand for election.

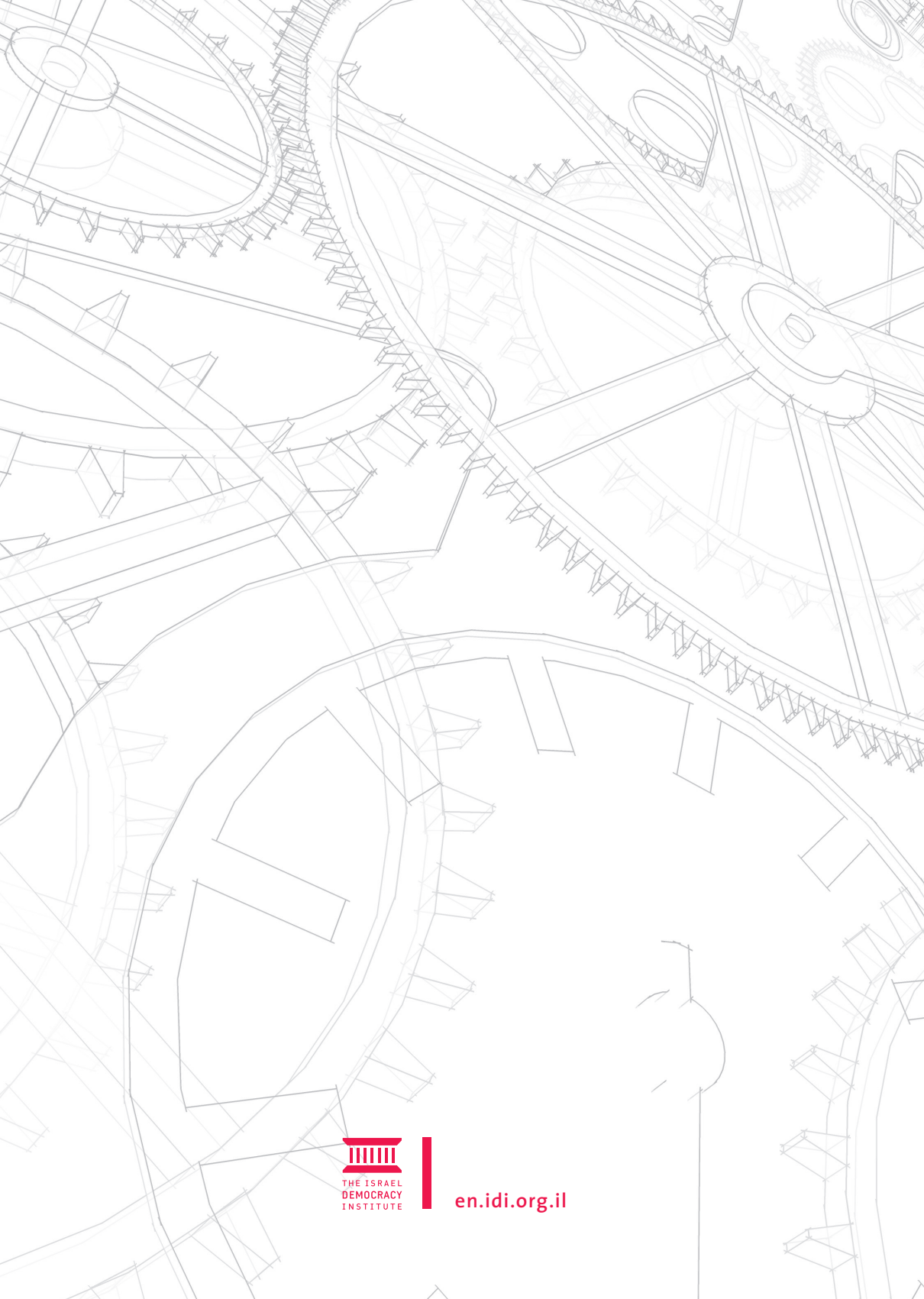
How do ideological preferences bias the weight allocated to constitutional rights? What is the mechanism behind biased decision-making and how can it be mitigated? To investigate these questions, we perform two vignette-based survey experiments in the context of freedom of speech, freedom of assembly and the right to demonstrate in Poland, a setting with extreme, mounting political polarization where the status of constitutional rights is under challenge. In both experiments we manipulate the ideological distance of the participants from a protesting organization, as well as the decision-making procedure for approving or banning the demonstration. In the first experiment, the identity of the protesting organization is revealed to half the participants only in the later stages of the decision-making process, after they have rated their general perception of the importance of the right to demonstrate. This partial blinding is intended to reveal an unbiased, neutral preference, and the rating assignment is expected to alleviate a final biased decision by anchoring the initial, unbiased preference and striving to avoid cognitive

dissonance. In the second experiment, we randomly select participants either to read or to read and sign a declaration prior to making a decision, stating that their decision will be impartial or that they will give appropriate weight to constitutional rights. The intervention is aimed at stimulating a self-monitoring mechanism by making the "morality" of the decision more salient.

Findings from both experiments show that respondents who are ideologically proximate to the protesting organization are much more likely to approve the protest than respondents who are ideologically distant. Results from the first experiment (N=359) suggest that the ideological bias mechanism is driven by "in-group love" and not "out-group hate". When participants were not told the identity of the protesting group, they rated the importance of its right to demonstrate at the same relatively low level that was awarded to the ideological group most distant from participants exposed to the protesting group's identity. In other words, the default unbiased perceived importance of the right is relatively low and increases as the participants' ideology approximates that of the protesting organization. In spite of significant differences in the perceived importance of the right to protest, the "nudge" ultimately failed. After being informed of the group's identity, even if only in the final stages of the decision, all participants demonstrated equally strong ideological biases. However, the nudge employed in the second experiment (N=1,651) was able to mitigate the ideological bias for participants who read and signed a declaration of impartiality or constitutional rights, or even those who just read the declaration of constitutional rights.

The study contributes to the existing literature in two ways. First, it expands our theoretical understanding of the nature of political bias. To the best of our knowledge, experiment 1 is the first to use a blinding mechanism to compare politically neutral and politically charged decision-making. Second, it offers a more practical contribution, as the nudge developed in experiment 2 was able to significantly mitigate ideological biases.

We also discuss the policy implications, offering a simple intervention that can mitigate ideological bias in decision-making processes regarding the application of constitutional rights. However, before policy reforms are adopted, we suggest addressing the limitations of the study through future research designed to enhance external validity, chiefly by expanding the countries studied, the context and the type of participants.



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