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Proportionality and the Right to Equality

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Abstract

This Article focuses on the overlap and interaction between the doctrine of proportionality and the doctrines used to assess the constitutionality of state violations of the right to equality. The Article has three main contributions to comparative constitutional literature. First, the Article pinpoints the difficulty that arises when courts try to apply the doctrine of proportionality on claimed violations of the right to equality. Analytically, as shown in this Article, the overlap and interaction between these two doctrines is problematic, because they are both relational measures between means and ends. The second contribution of this Article is in categorizing two models adopted by courts in the application of proportionality in the context of the violation of the right to equality. The third contribution of this Article is in pointing out that the choice of the model used by each court is relevant to the ongoing discourse on the advantages and disadvantages of proportionality.

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A. Introduction

This article focuses on the overlap and interaction between the doctrine of proportionality and the doctrines used to assess the constitutionality of state violations of the right to equality. Proportionality is a doctrine that more and more courts use to determine the constitutionality of the limitations of rights. Generally, this doctrine calls for the examination of all rights in a similar one-size-fits-all manner. This Article examines this doctrinal contention, through focusing on how the courts of Canada, Germany, Israel, and South Africa as well as the European Court of Human Rights (the "ECtHR") apply proportionality with regard to claimed violations of the right to equality.

The Article has three main contributions to comparative constitutional literature. First, the Article shows that all the courts examined herein face the same pathology in trying to apply the doctrine of proportionality on claimed violations of the right to equality. These two doctrines are relational normative measures between 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 is thus problematic.

The second contribution of this Article is in surveying two models that courts use in applying proportionality in the context of the violation of the right to equality: (1) a doctrine or practice of constitutional review focusing on the scope of the right and its infringement; (2) and, inconsistency in the application of the doctrine or a sliding scale. The third contribution of this Article is in pointing out that the choice of the model used by each court is relevant to the ongoing discourse on the advantages and disadvantages of the use of proportionality. Some of the criticisms directed toward the doctrine of proportionality are exactly its one-size-fits-all treatment of all rights; its inherent perception of all rights as principles susceptible to optimization. The findings of this Article suggest that some of these criticisms have merit, because of the exceptional problematic application of proportionality in the context of the right to equality. Namely, 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. Thus, proportionality doctrine is not so easily applied consistently and universally. On the other hand, the existence of the two models identified in this Article also show that it is possible nonetheless to accommodate the doctrine of proportionality with the substantive definitions of the right to equality. Indeed, the usage of tests akin to proportionality in the substantive definition of the right to equality, as detailed below, perhaps hints at the inherent value of the sub-tests of proportionality.

The Article proceeds as follows. Section B surveys discussions on the proportionality doctrine. Section C shows analytically why the tests used to examine the constitutionality of claimed violations of the right to equality interact badly with the proportionality doctrine. Section D surveys and analyzes five comparative examples of this problematic interaction between the doctrines, detailing the two models used by jurisdictions: focusing on the scope of the right and its infringement or a sliding scale. Section E discusses the implications of the findings and of the choice of models. The last Section concludes.

B. Proportionality

The use of proportionality in judicial review is hotly debated in academic discourse. Indeed, as proportionality spreads to more and more jurisdictions and is being utilized by more and more courts who perceive that it is "essential to the performance of their duties," its usage also becomes more and more contested partly because of the expansion it entails to judicial authority.[1] In constitutional contexts, proportionality refers to a set of standards used to decide upon the constitutionality of an infringement on constitutionally protected rights. Proportionality generally involves a two-stage review. First, the court examines if the state action in question infringes, interferes with, or limits a constitutionally protected right. Such an examination involves determining what the scope of the right is. Second, the court examines if the state action in question limits the right in a way justifiable through the sub-tests of the doctrine of proportionality (of course, there is some variation on the exact content of these tests). The first two preliminary

[1] Alec Stone Sweet and Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72, 160-161 (2008-2009). For more on the spread of proportionality, see: AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 175-210 (2012); Moshe Cohen-Eliya and Iddo Porat, *American Balancing and German Proportionality: The Historical Origins*, 8 INT'L J. CONST. L. 263 (2010).

requirements are that the action is: (1) according to law or prescribed by law; and (2) for a proper or legitimate purpose. The three sub-tests of proportionality itself then follow, and are that the state action is: (1) with a rational connection between the means and the ends; (2) the means are necessary without an alternative measure that may achieve the same end with a less onerous limitation of the right; and, (3) a balancing of the benefits to the purpose of the measure and the detriments of the limitation of the right.[2]

Some scholars hail proportionality as no less than the new "ultimate rule of law."[3] According to proponents of proportionality, courts should use this legal tool in reviewing infringements of human rights, since it is the best indispensable analytical tool to ensure the protection of human rights in a just, rational and systematic manner.[4] Opponents of the use of proportionality as a legal tool in such contexts see it as a detriment to human rights. According to such scholars, proportionality is too universally applied even though it is not always appropriate for all rights. It also inhibits legal certainty, because of its focus on the circumstances of each particular case to determine the result of the judicial review. Furthermore, they argue, the use of proportionality vainly and wrongly attempts to depoliticize constitutional rights, it is incommensurable in comparing values that could not be measured and balanced, and it does violence to the very idea of human rights and the constitution.[5]

The debate on proportionality is related to another debate regarding the nature of rights themselves and the question: what are rights? Are all rights the same? Are at least some rights based on deontological rules of morality (e.g., it is strictly forbidden to torture someone, no matter what) or are they all utilitarian principles, and thus relate to the overall public utility (e.g., freedom of expression should be balanced with public safety)? This difference is derived from the analytical opposition of rights versus principles. Principles (or, standards) are either applicable or not, but may not derive a specific outcome. They need to be weighed according to the circumstances of the case and optimized accordingly.[6] Rules, on the other hand, have a direct consequence. They may have exceptions, conflicting rules, etc., yet they act differently than principles.[7] If rights are utilitarian principles, balancing rights and public interests is appropriate (arguably, through proportionality).[8] Yet, according to many critics, rights are not primarily (or, according to some critics, not only) principles that could be optimized and balanced with various public interests. If rights are deontological moral rules, any infringement due to any public interest is not allowed. According to this understanding of rights, they should act as firewalls against other considerations, trumps against contending public interests. They are absolute or have a core that should be absolutely protected.[9]

Returning to the opposing views of the usage of proportionality, the opponents ultimately see proportionality in similar (though not identical) analytical terms. Generally speaking, scholars view proportionality as an analytical tool or a criterion, used for the optimization of principles. The issue of its appropriateness depends, at least analytically, on the view of the nature of rights (ignoring, for the moment, other previously mentioned criticisms aimed at proportionality, such as the doctrine's incommensurability, its vain de-politicization of human rights, rising judicial power, etc.). In purely analytical terms, the view one has on the nature of human rights on a continuum between pure rules and pure principles, influences the view one would have on the appropriateness of the usage of proportionality: either way, balancing of principles is more appropriate than the balancing of rules.

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[2] See, e.g., Barak, *supra* note 1.

[3] DAVID M. BEATTY, THE ULTIMATE RULE OF LAW (2004).

[4] NIELS PETERSEN, PROPORTIONALITY AND JUDICIAL ACTIVISM: FUNDAMENTAL RIGHTS ADJUDICATION IN CANADA, GERMANY AND SOUTH AFRICA 53-69 (2017); Barak, *supra* note 1; Kai Möller, *Proportionality: Challenging the Critics*, 10(3) INT'L J. CONST. L. 709 (2012); Matthias Katt and Moritz Meister, *Proportionality – a Benefit to Human Rights? Remarks on the I·CON Controversy*, 10(3) INT'L J. CONST. L. 687 (2012); Aharon Barak, *Proportionality and Principled Balancing*, 4 LAW & ETHICS OF HUMAN RIGHTS 1 (2010); Mattias Kumm, *The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review*, 4 LAW & ETHICS OF HUMAN RIGHTS 141 (2010); Beatty, *supra* note 3; ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 66-69 (2002).

[5] Ariel L. Bendor and Tal Sela, *How Proportional is Proportionality?* 13(2) INT'L J. CONST. L. 530 (2015); Grégoire C. N. Webber, *Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship*, 23 CAN. J. L. & JURISPRUDENCE 179 (2010); Stavros Tsakyrakis, *Proportionality: An Assault on Human Rights?*, 7(3) INT'L J. CONST. L. 468 (2009); Vicki C. Jackson, *Being Proportional About Proportionality*, 21 CONST. COMMENTARY 803 (2004).

[6] See, e.g., Alexy, *supra* note 4, at 66.

[7] *Ibid*.

[8] Matthias Klatt, *An Egalitarian Defense of Proportionality-Based Balancing: A Reply to Luc B. Tremblay*, 12 INT'L J. CONST. L. 861 (2014); Barak, *supra* note 1; Mattias Kumm, *Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice*, 2 INT'L J. CONST. L. 574 (2004); Alexy, *supra* note 4, at 66.

[9] Kai Möller, *Balancing and the Structure of Constitutional Rights*, 5(3) INT'L J. CONST. L. 453 (2007); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 92 (1977).

Proponents of the proportionality doctrine premise it on a clear definition of the scope of rights and on its appropriateness as a standard analytical tool. Critics of the use of proportionality argue that its' use trivializes a clear definition of the scope of individual rights.[10] Without accepting or negating such criticism, two related premises of the doctrine of proportionality are important in our context. The first premise of the doctrine that I wish to emphasize is that one should be able to clearly define each right in the first stage of the judicial review, when the judge determines if an action has infringed or interfered with that right. Otherwise, the second stage of reviewing the justification of the infringement is not possible. The second premise to emphasize in the doctrine of proportionality is its one-size-fits-all nature. The result of the judicial review varies according to the circumstances of the cases, yet the content of the tests themselves is more or less constant. These two premises are of course based on a somewhat simplified view of the doctrine of proportionality, while the actual doctrinal application varies and is more complex.[11] Yet, these premises are nevertheless part of the idealized doctrine of proportionality.

What happens when the right in question is not so easily defined? What happens when standard definitions make the sub-tests of proportionality redundant? To these questions we now turn, with regard to the right to equality, or, non-discrimination.

C. The Right to Equality

The right to equality evades clear definitions perhaps more than other rights. Usually, the right to equality signifies a right to a certain type of treatment in comparison to others.[12] As such, the right to equality is more difficult to define than other rights, such as the right to life, liberty or freedom of speech, and even to other rights that are also claims (in the Hohfeldian system of analysis) such as a right to minimum wage, which are not comparative as the right to equality.

When we say that there should be equality between two or more people, we still beg the question, equality in what sense? When Aristotle defined distributive justice according to the principle of equal treatment, i.e. "treating like cases as like,"[13] his underlying premise was that people are essentially different. According to Aristotle, it was just to give unequal treatment to people of different natures. Men and women, slaves and free people, citizens and non-citizens, all deserved different treatment based on their different natures. While political justice, according to Aristotle, exists between equal citizens, not everyone in the best polity are citizens, excluding slaves, women, and vulgar persons (*banausos*) and laborers (*thēs*) who perform necessary work.[14]

The modern conception is different. While for Aristotle and for other writers at least through the end of medieval times, the reigning conception was that people had different natures and were thus unequal, the modern legal conception, as exemplified in Thomas Hobbes' *Leviathan*, is that "nature hath made men […] equal in the faculties of body and mind."[15] Generalizing on the modern conception of man as equal is of course simplistic, as one can readily see in modern racist discourse, justifying for instance the enslavement of other "races," or in modern justifications for not granting women equal rights of citizenship. Emmanuel Kant, for instance, held a conception of the "complete equality of men as subjects in a nation," due to their natural capacity to use reason and will to act according to a self-imposed duty: moral or political. Yet at the same time Kant distinguished between men who were completely rational and other people in society who were not completely rational, such as women, who were thus unable to act through only self-imposed moral or political duties.[16]

Notwithstanding the limitations of this generalization, the presumption of the equal nature of all humans complicates the Aristotelian formula of equal treatment as "treat like cases as like." Each person is unique in his or her physical, mental and other traits (color of hair, manner of speech, preferences in music, etc.). No person is exactly the same as another. In contrast, since we assume as a matter of law that all human beings share the same nature and thus

[10] Bendor and Sela, *supra* note 5; Tsakyrakis, *supra* note 5.
[11] On the varied application of the doctrine of proportionality, see, e.g., Petersen, *supra* note 4; Barak, *supra* note 1.
[12] Stefan Gosepath, *Equality* in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2011).
[13] ARISTOTLE, *Nicomachean Ethics* in THE BASIC WORKS OF ARISTOTLE 1006 (Richard McKeon ed., 1941).
[14] ARISTOTLE, THE POLITICS 93 (trans. Carnes Lord, 1984).
[15] THOMAS HOBBES, LEVIATHAN 74 (ed. Edwin Curley, 1994).
[16] Immanuel Kant, *Theory and Practice* in PERPETUAL PEACE AND OTHER ESSAYS ON POLITICS, HISTORY, AND MORALS 73, 76 (trans. Ted Humphrey, 1983).

deserve the same legal treatment, what kind of different cases deserve different treatment? While for Aristotle the difference in nature between types of persons was self-evident (men versus women; free people versus slaves), we have more of a trouble discerning "relevant differences." Thus the Aristotelian formula, which was relatively simple in an ancient conception of the normatively different natures and legal statuses of men, has become extremely complicated in a modern conception of the normatively equal nature of man. This problem has produced a lot of discussion in political philosophy on the issue that has been called the "equality of what?" debate: equal rights, equal opportunities, the capabilities approach, etc.[17]

The "empty" character of the right to equality has been widely recognized also in law. In legal doctrines of constitutions and courts as well as in legal theory of writers, this problem has produced a wide-ranging difficult search for a substantive definition of the right to equality. Putting aside the more general right to equality, even the more specific right to non-discrimination has remained problematic. Problems remain even when constitutions specify a lengthy rule (as opposed to a principle) prohibiting discrimination. The question that courts and writers ask is generally summed up as "which differential treatment amounts to discrimination?"[18]

Constitutions and courts have found various solutions to imbuing substance to the right to equality, or, more accurately, to the rule of non-discrimination, through various tests examining when differential treatment amounts to discrimination. Yet these solutions are problematic in terms of using them in the regular two-step constitutional review according to the doctrine of proportionality. One solution is specifying suspect grounds for differentiation, such as race, ethnicity, or sex, and then examining their justifications, often through proportionality tests.[19] Yet there is something uniquely rule-like and deontological in a prohibition against discrimination on such suspect grounds. As shown below, even if courts try to analyze such cases as if such a prohibition is a "principle of non-discrimination" to be optimized through proportionality analysis, it acts more like a rule rather than a principle. Thus, as shown below, courts tend to use proportionality not as an analytical tool to optimize principles, but rather as a way to define the right to equality and ascertain its scope, seeking to see if the rule prohibiting discrimination applies in a given case. In other words, the prohibition against discrimination on suspect grounds (or groups) acts not as a balancing of principles, but rather as a categorical prohibition (an absolute right, such as the right against torture), or as a core of a right that cannot be infringed. If we deem the right to have been infringed, we will disallow the act of infringement. If not infringed, it will be allowed. There will be no area of allowed infringement due to a balancing with other rights or interests. Thus, even if proportionality is applied to non-discrimination, courts, as shown below, tend to analyze it as a rule: has the rule been infringed, and if so, it is illegal.

Other cases, in which suspect grounds are not involved, are actually even more problematic. Since in such cases we lack a strictly clear categorical definition of the right in question, in this case the right to equality, any solution that involves relational measures to define the right would make the uses of the tests of proportionality redundant or cumbersome. Such a definition of the right to equality would be cumbersome because it involves using one relational optimization measure (is a given differential treatment discrimination in certain circumstances) after another (is this discrimination justified in these circumstances according to the doctrine of proportionality). Indeed, such definitions of the right to equality make proportionality redundant, because when trying to imbue some substantive quality to the right to equality, jurisdictions often resort to tests that sound very close to proportionality. Some jurisdictions simply import the whole proportionality test into the definition of equality.[20] In other cases, a test of infringement of human dignity is imported into the right to equality. The conceptual manner in which an infringement of human dignity becomes also an infringement of the right to equality depends on the court's conception of human dignity, at times not clearly explained and at times varied. Such an infringement may occur, for instance, through humiliation by treatment of individuals as inferior, through discrimination that disregards a person's autonomy and free will, or

[17] For a survey of this debate, see: Ian Carter, *Respect and the Basis of Equality*, 121(3) ETHICS 538, 542 (2011). Some of the important contributions to this debate include: MARTHA C. NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH (2011); AMARTYA SEN, INEQUALITY REEXAMINED (1992); Richard. J. Arneson, *Equality and equality of opportunity for welfare*, 56 Philosophical Studies 77 (1988).

[18] See, e.g.: Sandra Fredman, *Substantive Equality Revisited*, 14(3) INT'L J. CONST. L. 712 (2016); Rory O'Connell, *The Role of Dignity in Equality Law: Lessons from Canada and South Africa*, 6 (2) INT'L J. CONST. L. 267 (2001); Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 545, 547 (1982).

[19] As David Beatty notes, despite a wide disparity of language in the way that the right to equality is phrased in constitutions, courts mostly apply proportionality analysis in assessing its infringement in matters of discrimination against women. See: Beatty, *supra* note 3, at 80-81. See also *infra* Section D. (the examples of Canada and the ECtHR.)

[20] See *infra* section D on the ECtHR.

through unequal distribution of social goods, which fails to recognize the equal intrinsic value of all human beings.[21] In any case, such an infringement of human dignity may become such an onerous test, as to make proportionality redundant. If the right to equality is qualified by the right to human dignity, for instance in the sense that an infringement of the right to equality is such that the ground for differentiation has "the potential to impair the fundamental human dignity of persons as human beings," what type of discrimination could be justified in such a case?[22]

Even if we resort to the formal Aristotelian test for discrimination, it becomes redundant when used to define the right to equality for the purposes of the proportionality doctrine. The reason for the redundancy is that the formal Aristotelian "relevant difference" formula is a relational means-ends test or measure, much like proportionality. The similarity becomes apparent if we look at the sub-tests of proportionality. At least the first two are the same as the first two tests of the classic formal Aristotelian non-discrimination formula: rational relation between means-ends and necessity of the means used (for proportionality) and relevant distinction (for discrimination). Indeed, both the general principle of proportionality and the Aristotelian formula have a common origin in Aristotle's perception of distributive justice as a proportionate ratio between two people (or between the ends and the means).[23] It is thus at least partly redundant to examine through the proportionality doctrine a violation of the right to equality or non-discrimination in its formal Aristotelian definition. How can we examine if there is an illegitimate disproportion in the distribution of something between two groups of people, through a test which only shows the existence of such a disproportion? If the first stage of the test, i.e. the Aristotelian formula, has shown us already that there is a disproportion between two groups of people, there is then little use for a second stage looking to examining justifications for this disproportion, through another test of disproportion. Returning to the attempts to give substance to non-discrimination, some of the moral bases for the wrongfulness of discrimination describe it as a mistake in moral or rational deliberation and reasoning. Discrimination is wrongful, in this description, since it takes account of "irrational," "irrelevant" or "morally insignificant" facts.[24] In other words, again, we recognize discrimination, in this account, through a means-ends test, not unlike proportionality.

In order to demonstrate these problems of the relationship between the definition of the right to equality and the proportionality doctrine, we will now turn to a comparative examination of the ways that some jurisdictions do so.

D. A Comparative Study

The comparative study below focuses on five jurisdictions: Canada, The European Court of Human Rights (ECtHR), Germany, Israel and South Africa. In each jurisdiction, the examination is on the doctrine of proportionality and its specific application with regards to the right to equality. In each jurisdiction, textual examples are analyzed to show the problematics of applying these two doctrines in tandem.

As shown below, the five jurisdictions examined herein are divided into two distinct models of accommodating the doctrine of proportionality and the right to equality. In the first model, the doctrine or practice of constitutional review focuses on the scope of the right and its infringement, either doctrinally (in the case of the ECtHR) or in practice (in the cases of Canada and South Africa) through simply almost never accepting in the second stage of proportionality a justification of an infringement of the right to equality. In the second model the doctrine with regard to the application of proportionality with the right to equality is either explicitly inconsistent, supporting a sliding scale as in the case of Germany, or implicitly inconsistent in the practice of the courts, as in the case of Israel.

I. Focus on the Definition of the Right to Equality

First, let us examine the ways that Canada, South Africa and the ECtHR apply proportionality in the context of the right to equality. As shown below, these three jurisdictions apply the first model, i.e. the doctrine or practice of constitutional review focuses on the scope of the right and its infringement. As elaborated herein, in the case of the

[21] O'Connell, *supra* note 18; Tamar Hostovsky Brandes, *Human Dignity as a Central Pillar in Constitutional Rights Jurisprudence in Israel: Definitions and Parameters*, ISRAELI CONSTITUTIONAL LAW IN THE MAKING (Gideon Sapir, Daphne Barak-Erez and Aharon Barak, eds., 2013); and see *infra* section D. I.1, I.2, and II.2.

[22] See *infra* section D.I.2 on South Africa.

[23] As shown in Eric Engle, *The History of the General Principle of Proportionality: An Overview*, 10 DARTMOUTH L.J. 1 (2012).

[24] Re'em Segev, *Making Sense of Discrimination* 27 RATIO JURIS 47, 62-67 (2014).

ECtHR this model is manifest in the doctrine of proportionality itself and its different application than in other rights. In the cases of Canada and South Africa the model is manifest in the practice of the courts, in which they almost never accept in the second stage of proportionality a justification of an infringement of the right to equality.

In all three cases, courts practice constitutional review differently in the context of the right to equality than in the context of other rights. In this model, courts discard the two-step constitutional review, of first defining the scope of the right and its infringement, and then analyzing the justifications for this infringement. Rather, in this model courts apply a single-step constitutional review, focused on defining the scope of the right and its infringement. In such a model, the prohibition against discrimination acts more like a categorical prohibition; a deontological rule rather than a principle. As explained above in section C, the courts do so, because of the problematic analytical relationship between the right to equality and proportionality. I will illustrate this phenomenon through particular cases elaborated upon in this section.

1. Canada

The Canadian Charter of Rights and Freedoms protects the right to equality in section 15:

> (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
> (2) [...]

Section 1 of the Charter sets out the justifiable limitations of this right:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Section 1 thus prescribes a proportionality test for the purposes of determining if a challenged law, which has been determined as limiting the right to equality according to section 15, is justified. Initially, the Supreme Court of Canada explicitly sought to retain roles for both section 15 and section 1. The first stage involved an examination if distinctions are made according to the grounds "enumerated" in section 15 or analogous grounds, and an examination of their effect; the second stage involved examining the justification of this discrimination according to section 1:

> Where discrimination is found a breach of s. 15(1) has occurred […] any justification, any consideration of the reasonableness of the enactment; indeed, any consideration of the factors which could justify the discrimination and support the constitutionality of the impugned enactment would take place under s. 1.[25]

As formerly determined by the Supreme Court of Canada (before 1999), the starting point of justifying such a limitation is "an assessment of the objectives of the law to determine whether they are sufficiently important to warrant the limitation," followed by "a proportionality test in which the objective of the impugned law is balanced against the nature of the right, the extent of its infringement and the degree to which the limitation further other right or policies of importance."[26] This proportionality test includes three aspects: rational connection to the objective; little as possible impairment of the right; and the effects must not so severely trench on rights that the objective is outweighed by the abridgement of rights.[27]

Despite the Charter's prescription of a proportionality test for the determination if a limitation on the right to equality is justified, in practice the Supreme Court of Canada has not consistently done so. Since 1999, the Court has focused on the determination of violation of rights according to section 15, and not on the proportionality test according to section 1. This focus has been manifest since in 1999 the Court added an additional element to proving violation of the

[25] *Andrews* v. *Law Society of British Columbia* [1989] 1 S.C.R. 143, 182.
[26] *McKinney* v. *University of Guelph* [1990] 3 S.C.R. 229, 280.
[27] *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, 768.

right according to section 15 besides showing legislative distinctions or differential impact based on a listed or analogous ground: violation of the purpose of the Charter. This latter element for the purposes of determining whether a violation has occurred, involves generally an examination if there has been an impairment of human dignity, or, more recently, rephrased as an open list including "some important contextual factors influencing the determination whether s. 15(1) has been infringed" including:

> (A) Pre-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the individual or group at issue. […] (B) The correspondence, or lack thereof, between the ground or grounds on which the claim is based and the actual need, capacity, or circumstances of the claimant or others [...]
> (C) The ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society [...] and (D) The nature and scope of the interest affected by the impugned law. The more severe and localized the consequences of the legislation for the affected group, the more likely that the differential treatment responsible for these consequences is discriminatory[…][28]

These factors, introduced in the Court's landmark 1999 *Law v. Canada* case (in which the Court rejected a woman's appeal against the constitutionality of her denial of survivor's benefits under the Canadian Pension Plan based on her young age), are very reminiscent of proportionality analysis, making it somewhat redundant, as will be shown in more detail below.[29]

As shown also by other scholars, since 1999, in almost all cases, the court seems to focus on the first stage of examining whether the right to equality has been infringed according to section 15, and does not focus on section 1 by justifying such infringements or limitations. In other words, when the court applied the Charter, it's determination of a violation of section 15 was mostly followed by a decision that it was unjustified under section 1. Once an infringement of the right to equality under section 15 of the Charter has been shown, in practice it is almost impossible to prove that it is a justifiable infringement under the proportionality test.[30]

In 2011 the Supreme Court of Canada (in a case described below) slightly revised the test determining whether a law limits the right to equality according to section 15, eliminating the "mirror comparator analysis" that was part of it formerly, and focusing on "discrimination on suspect grounds" analysis (see more on section 15 tests, below).[31] Since then, the court has not found any case of a violation of section 15 justified under section 1.

Recent cases since 2011 show the problematic nature of the factors considered for determining whether there has been a violation of the right to equality under section 15, which make a proportionality analysis practically redundant. Take for instance a recent court decision, in which the court decided that there was no violation of section 15 in a case involving a chief of the Kahkewistahaw First Nation, arguing against the constitutionality of a new requirement of Grade 12 education in order to become a candidate for chief. In describing the type of test and factors used, the court explained the stages of the analysis:

> The focus of s. 15 is therefore on laws that draw discriminatory distinctions — that is, distinctions that have the effect of perpetuating arbitrary disadvantage based on an individual's membership in an enumerated or analogous group […]The first part of the s. 15 analysis therefore asks whether, on its face or in its impact, a law creates a distinction on the basis of an enumerated or analogous ground […]The second part of the analysis focuses on arbitrary — or discriminatory — disadvantage, that is, whether the impugned law fails to respond to the actual capacities and needs of the

[28] *Law v. Canada* [1999] 1 S.C.R. 497, 550-551.
[29] See: PETER HOGG, CONSTITUTIONAL LAW OF CANADA 1201-1202 (2009 student edition), and the literature cited therein.
[30] See, e.g., *Tétreault-Gadoury* v. *Canada (Canada Employment and Immigration Commission)* [1991] 2 S.C.R. 22; *Miron* v. *Trudel* [1995] 2 S.C.R. 418. For similar analyses, see: Vicki C. Jackson, *Proportionality and Equality* PROPORTIONALITY: NEW FRONTIERS, NEW CHALLENGES 171, 187 (Vicki C. Jackson and Mark Tushnet eds., 2018); PETER HOGG, CONSTITUTIONAL LAW OF CANADA 1226 (2009 student edition); Mary C. Hurley, *Charter Equality Rights: Interpretation of Section 15 in Supreme Court of Canada Decisions*, LAW AND GOVERNMENT DIVISION, PARLIAMENT OF CANADA (March 2007), *available at* http://www.lop.parl.gc.ca/content/lop/researchpublications/bp402-e.html; Richard Moon, *Justified Limits on Free Expression: The Collapse of the General Approach to Limits on Charter Rights*, 40 OSGOODE HALL L.J. 337, 365-366 (2002).
[31] *Withler v. Canada (Attorney General)*, [2011] 1 S.C.R. 396.

> members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage.[32]

In describing these tests, the court ascribed an analysis focused on the **disproportionate effect** of the law on the claimant in order to prove discrimination:

> To establish a prima facie violation of s. 15(1), the claimant must therefore demonstrate that the law at issue has a disproportionate effect on the claimant based on his or her membership in an enumerated or analogous group […]The question in this case is which "enumerated or analogous group" faces discrimination, and whether Mr. Taypotat has established that the education requirement set out in the Kahkewistahaw Election Act has a disproportionate effect on the members of any such group.[33]

This type of analysis is so similar to the proportionality test, that it is clear why it is difficult to use one after the other. Yet it is this kind of proportionality-type analysis, the disproportionately negative impact test, which the court endorsed in its recent 2011 leading case on equality, *Withler v. Canada (Attorney General)* (involving widows who argued unsuccessfully against the constitutionality of the reducing of their federal supplementary death benefits because the age of their husbands at the time of death exceeded a prescribed age):

> In some cases, identifying the distinction will be relatively straightforward, because a law will, on its face, make a distinction on the basis of an enumerated or analogous ground (direct discrimination). This will often occur in cases involving government benefits, as in Law, Lovelace and Hodge. In other cases, establishing the distinction will be more difficult, because what is alleged is indirect discrimination: that although the law purports to treat everyone the same, it has a disproportionately negative impact on a group or individual that can be identified by factors relating to enumerated or analogous grounds.[34]

In other words, the analysis used to examine a violation of the right to equality according to section 15 of the charter is itself based on a proportionality-type analysis, making the proportionality analysis of section 1 of the charter redundant. It is not just the general relational, or, proportional analysis used with regard to the right to equality that is similar to the proportionality test, but also the specific sub-tests of proportionality that find resonance in the equality test that the court endorses of equality:

> The analysis at the second step is an inquiry into whether the law works substantive inequality, by perpetuating disadvantage or prejudice, or by stereotyping in a way that does not correspond to actual characteristics or circumstances.[35]

This aforementioned passage is practically identical to the rational relation sub-test of proportionality, making it redundant. Such redundancy and similarity to the sub-tests of proportionality are apparent also in this "second step" of section 15 right of equality analysis:

> [T]he contextual inquiry at the second step of the s. 15(1) analysis will typically focus on the purpose of the provision that is alleged to discriminate, viewed in the broader context of the scheme as a whole […] In determining whether the distinction perpetuates prejudice or stereotypes a particular group, the court will take into account the fact that such programs are designed to benefit a number of different groups and necessarily draw lines on factors like age. It will ask whether the lines drawn are generally appropriate, having regard to the circumstances of the persons impacted and the objects of the scheme. Perfect correspondence between a benefit program and the actual needs and circumstances of the claimant group is not required. Allocation of resources and particular policy goals that the legislature may be seeking to achieve may also be considered.[36]

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[32] *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548.
[33] *Ibid*.
[34] *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396, par. 64.
[35] *Ibid*, at par. 65.
[36] *Ibid*, at par. 67.

To reiterate, all these sub-tests are very similar to the proportionality sub-tests,[37] helping to explain why in recent years, the court has not found any case of a violation of section 15 justified under section 1.

In previous years some exceptions to this empirical generalization have occurred. The court had then explicitly maintained an onerous proportionality test in equality cases: "given that s. 15 is designed to protect those groups who suffer social, political and legal disadvantage in our society, the burden resting on government to justify type of discrimination against such groups is appropriately an onerous one."[38] Yet despite applying this onerous proportionality test, in some cases, such as a 1990 case of an application of professors against a mandatory retirement age, the court ruled that an infringement of the equality right was justified according to the proportionality test. Yet in these cases, the charter was either not applicable (to universities in the aforementioned case),[39] or it was doubtful if there was any violation of section 15,[40] and so the issue was theoretical.

The analysis of the court in these cases is especially revealing. For instance, in a case involving a claim of discrimination between heterosexual couples and homosexual couples (a homosexual person was denied spousal allowance under the Old Age Security Act because his homosexual partner of several decades was not perceived as his "spouse"), the court ruled that for the purposes of that law (old age benefits) the distinction was relevant (because according to the court the idea was to help couples with the ability to procreate). Relevance was analyzed by the court in that case through an examination of the connection between the measure (of the distinction and its effect) and the purpose (of the law). Thus it was decided that no violation of the right to equality was made. And even if there were, continued the court, it would have been justified under section 1: "for the considerations set forth in my reasons in McKinney […] as well as for those mentioned in my discussion of discrimination in the present case." In other words, the court in this case explicitly analyzed s. 15 violation of the right to equality and s. 1 justification of this violation, using the same considerations.[41]

To give another example, in the McKinney case mentioned by the court (the aforementioned case of the application of professors against a mandatory retirement age, in which the Charter was determined not to apply), the court declined to use a similar rational connection test in its section 15 analysis, rejecting an argument to that effect: "it seems difficult to argue […] that [these policies] are not discriminatory […] since the distinction is based on the enumerated personal characteristic of age." Thus the court focused in that case on its (theoretical, since the Charter did not apply) section 1 analysis, and found the section 15 violation justified because of a rational connection between the measure and the objective and an impairment of the right, which was as little as possible.[42]

In practice, there have been only two exceptions in which the court found a violation of section 15 that was justified according to section 1 (and not in a theoretical case in which the Charter does not apply). In 2002, in *Lavoie v. Canada*, a case involving an application against the preferential treatment of Canadian nationals in public service employment,[43] the court ruled that there was a violation of section 15 but that it was justified as a reasonable limit on equality according to section 1 of the Charter. This was the ruling despite the fact that proportionality-type tests were applied in examining violation of section 15, i.e. lack of "a genuine relationship between the ground upon which the claim is based and the nature of the differential treatment," and even though section 1 justification was made in similar terms ("rational connection"; "close relationship"). Another exception was a case in 2004, which found justified for financial reasons (namely, a financial crisis of the Province's government) a few years deferment of a "pay equity" measure in favor of female employees in the health sector.[44] Yet these two exceptions prove the rule, and they have not been repeated since the Court revised the equality test in 2011. As well articulated by Peter Hogg:

> In the great majority of cases, the new element of human dignity in s. 15 [since 1999] leaves no role for s.1. It is obviously hard to justify a law that imposes a disadvantage on the basis of a listed or

[37] See also: *Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61.
[38] *Andrews* v. *Law Society of British Columbia* [1989] 1 S.C.R. 143.
[39] *McKinney* v. *University of Guelph* [1990] 3 S.C.R. 229.
[40] *Weatherall* v. *Canada (Attorney General)* [1993] 2 S.C.R. 872; *Rodriguez* v. *British Columbia (Attorney General)* [1993] 3 S.C.R. 519.
[41] *Egan* v. *Canada* [1995] 2 S.C.R. 513, 535-538, 540.
[42] *McKinney* v. *University of Guelph* [1990] 3 S.C.R. 229, 278-9, 282-9.
[43] *Lavoie* v. *Canada* [2002] 1 S.C.R. 769 2002 SCC 23.
[44] *Newfoundland (Treasury Board)* v. *N.A.P.E.* [2004] 3 S.C.R. 381 2004 SCC 66.

> analogous ground and also impairs human dignity. When the Court uses the "correspondence" factor to decide the issue of human dignity, it considers whether the purpose of the law is legitimate and the use of a listed or analogous ground to accomplish the purpose is reasonable. This inquiry is really a loose form of the inquiry into justification under s. 1. It is not surprising that s. 1 has become less important in equality cases since the human dignity element was introduced by the Court in 1999.[45]

2. South Africa

Equality is enshrined in the South African Constitution in section 9 of chapter 2:

> 1. Everyone is equal before the law and has the right to equal protection and benefit of the law.
> 2. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
> 3. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
> 4. No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
> 5. Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

This right is limited by the South African general limitation clause in section 36 of chapter 2:

> 1. The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including
> a. the nature of the right;
> b. the importance of the purpose of the limitation;
> c. the nature and extent of the limitation;
> d. the relation between the limitation and its purpose; and
> e. less restrictive means to achieve the purpose.
> 2. Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

In other words, the right to equality is subject in South Africa to limitations that include proportionality analysis.

The Constitutional Court of South Africa has specified a four-step test to examine if a law infringes upon the right to equality. First, the court examines the question of a rational connection between the difference prescribed by the state and a legitimate government purpose. Second, the court asks if the differentiation is discrimination. The Constitutional Court ruled that differentiation is discrimination if it focuses on a specified ground in section 9(3) of the constitution (race, gender, sex, etc.) or if "the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner." Third, the court asks if the discrimination is "unfair." It will be presumed unfair if it is on one of the specified grounds and otherwise it can be established as unfair based on "the impact of the discrimination on the complainant and others in his or her situation." In assessing this impact and the question of whether the discrimination is "unfair," the Court has determined that the focus should be on the protection against invasions that impair human dignity. These first three steps establish a violation of the right to equality. The violation could then be justified, in the fourth step, based on the limitation clause and its tests of proportionality.[46]

[45] PETER HOGG, CONSTITUTIONAL LAW OF CANADA 1226 (2009 student edition).
[46] *Harksen v. Lane* 1997 (11) BCLR 1489 (CC); *Robinson v. Volks* 2005 (5) BCLR 446 (CC).

In practice, as shown by Richard Stacey, the Court has never accepted a justification based on proportionality of a violation of the right to equality. The Court either finds that the right to equality has not been infringed (in the first three steps), or holds the infringement unjustifiable (in the fourth step).[47] I think that the reason for this practice is in the definition of the right to equality. In pursuit of a substantive definition of the right to equality,[48] the constitutional provisions made the definition of equality redundant with the proportionality limitations. It did so in three senses. First, and foremost, the constitution prohibits "unfair" discrimination, imbuing "unfairness" with the idea of human dignity. If presumed unfair (because it is on one of the specified grounds) then the state goes already the length of trying to justify it. If rejected, what is the point of trying to justify it again, based this time on proportionality analysis? Second, the first step in examining infringement of the right to equality is already a "rational connection" test, which is part of the proportionality analysis. Third, part of the second step in examining infringement of the right (defining "discrimination") includes an impairment of dignity. How can a court accept a justification of "unfair" discrimination that impairs human dignity? As Stacey writes: "The section 9 right to be protected against unfair discrimination […] import[s] a proportionality analysis into the first stage of the rights inquiry. Where discrimination is found be to fair […] there is no infringement of the right. However, the inquiry into fairness or arbitrariness relies on much of the same logical musculature as the inquiry into proportionality. Where discrimination is unfair […], it is difficult to see how the infringement could be justified as reasonable, justifiable or proportionate despite the initial finding of unfairness […]."[49]

The point can aptly be demonstrated through one of the Court's most famous equality cases: the *National Coalition for Gay and Lesbian Equality & Others v Minister of Justice & Others*.[50] In that case, the Court declared the constitutional invalidity of offenses banning homosexual sexual acts. Specifically illuminating is the similarity between the Court's methodology in examining the question of whether the discrimination of homosexuals is "unfair," and the methodology in examining the justification of it through proportionality. As to fairness, Justice Ackerman explained: "the discrimination has, for the reasons already mentioned, gravely affected the rights and interests of gay men and deeply impaired their fundamental dignity." He added that the "above analysis confirms that the discrimination is unfair. There is nothing which can be placed in the other balance of the scale."[51] This "other balance of the scale," to which Justice Ackerman referred, is mentioned in another case, which he quotes, namely: "the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all."[52] This type of methodology, a balancing of values or purposes, is distinctly close to proportionality analysis in the narrow sense (the third sub-test of proportionality). As illustrated in Justice Ackerman's treatment of the proportionality analysis in this case:

> The balancing of different interests must still take place. On the one hand there is the right infringed; its nature; its importance in an open and democratic society based on human dignity, equality and freedom; and the nature and extent of the limitation. On the other hand there is the importance of the purpose of the limitation […] The criminalisation of sodomy in private between consenting males is a severe limitation of a gay man's right to equality in relation to sexual orientation […] Against this must be considered whether the limitation has any purpose and, if so, its importance. No valid purpose has been suggested […] There is accordingly nothing, in the proportionality enquiry, to weigh against the extent of the limitation and its harmful impact on gays.[53]

The similarity of balancing in terms of the fairness of discrimination and in terms of proportionality analysis is very clear. This similarity makes proportionality analysis virtually redundant when used in tandem with fairness analysis. This redundancy explains the focus in South Africa on the first stage of judicial review, i.e. has the right to equality been infringed, rather than on the second stage of justifying the infringement.

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[47] Richard Stacey, *Rights Limitation and Transformative Constitutionalism: Proportionality Analysis in the Service of Constitutional Values,* in PROPORTIONALITY IN ACTION: COMPARATIVE PERSPECTIVES ON PROPORTIONALITY ANALYSIS (Mordechai Kremnitzer, Talya Steiner and Andrej Lang, eds., forthcoming book manuscript).

[48] On the substantive meaning of the right to equality in South Africa, see: SHADRACK B. O. GUTTO, EQUALITY AND NON-DISCRIMINATION IN SOUTH AFRICA: THE POLITICAL ECONOMY OF LAW AND LAW MAKING 128-130 (2001)

[49] Stacey, *supra* note 47.

[50] *National Coalition for Gay and Lesbian Equality & Others v Minister of Justice & Others* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC).

[51] *Ibid*, at para. 26-27.

[52] *Ibid*, at para. 19.

[53] *Ibid*, at para. 35-37.

3. The European Court of Human Rights

The right to non-discrimination is enshrined in article 14 of the ECHR and in Protocol 12. Non-discrimination could be protected by either the ECtHR (the court in Strasbourg established by the ECHR) or by the ECJ (the court of the European Union).[54]

Generally, the ECtHR uses a two-stage review in examining violation of rights enshrined in the ECHR. First, has there been an "interference" with the right; second, "a further examination is required to determine whether this meets the three standards established in case law,"[55] including that the interference is according to law or prescribed by law, for a legitimate purpose, and "necessary in a democratic society" – in other words, a limitation clause that includes proportionality. The ECtHR has consistently used the principle of proportionality in balancing the rights of individuals versus the interests of society,[56] although in some cases it has used versions of absolute rights or core of rights.[57]

In terms of non-discrimination according to Article 14, the European Court of Human Rights uses proportionality not to ask whether an interference to a right is justified, but to examine if a differentiation infringes on the right to equality.[58] The right to equality does not stand alone, but must be "parasitic" to another right.[59] Thus, the ECtHR has defined discrimination under Article 14 of the ECHR as a difference in treatment in the exercise of another right (besides equality) between categories of persons without "an objective and reasonable justification."[60] As summarized in the "Belgian Linguistic" case (1968) (in which French speaking parents applied against the lack of French-language education in the Belgian municipalities in which they lived, considered by the Belgian government to be Dutch speaking):

> It is important, then, to look for the criteria which enable a determination to be made as to whether or not a given difference in treatment, concerning of course the exercise of one of the rights and freedoms set forth, contravenes Article 14 (art. 14). On this question the Court, following the principles which may be extracted from the legal practice of a large number of democratic States, holds that the principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 (art. 14) is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.[61]

In other words, **the justification for the difference of treatment is already within the definition of the scope of the right.** The notion of discrimination according to the ECHR includes a restriction clause in the sense that only differentiations that are not justified are seen as discrimination. As explained, "case-law has made clear that not every distinction or difference of treatment amounts to discrimination […]," only if it "has no objective and reasonable justification," meaning that it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means and the aim.[62] That is why Article 1 of Protocol 12, which was meant to have the same meaning as Article 14 of the ECHR, did not include a restriction clause. "Since not every distinction or difference of treatment amounts to discrimination, and because of the general character of the principle of non-discrimination, it

[54] JAMES D. DINNAGE AND JOHN F. MURPHY, THE CONSTITUTIONAL LAW OF THE EUROPEAN UNION 947-948 (2nd ed., 2008).
[55] YUTAKA ARAI-TAKAHASHI, THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR 9 (2002).
[56] *Ibid*, at 14; STEVEN GREER, THE EUROPEAN CONVENTION ON HUMAN RIGHTS: ACHIEVEMENTS, PROBLEMS AND PROSPECTS 203, 217 (2006).
[57] Greer, *supra* note 56, at 209-211. Cf. Shlomit Stein, *In Search of 'Red Lines' in the Jurisprudence of the ECtHR on Fair Trial Rights*, 50 ISRAEL LAW REVIEW 177–209 (2017).
[58] Luisa Conesa, *The Tropicalization of Proportionality Balancing: The Colombian and Mexican Examples*, Cornell Law School Inter-University Graduate Student Conference Papers, paper 13 (2008).
[59] CHARILAOS NIKOLAIDIS, THE RIGHT TO EQUALITY IN EUROPEAN HUMAN RIGHTS LAW: THE QUEST FOR SUBSTANCE IN THE JURISPRUDENCE OF THE EUROPEAN COURTS 51-55 (2015). For some exceptions to this parasitic nature of the right to equality, see *ibid,* at 59.
[60] Greer, *supra* note 56, at 221.
[61] *Belgian Linguistic case (no. 2)* (1968) 1 EHRR 252.
[62] ALASTAIR MOWBRAY, CASES AND MATERIALS ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS 620 (2001).

was not considered necessary or appropriate to include a restriction clause in the present Protocol."[63] In this way, as explained by Charilaos Nikolaidis, the right to equality is an absolute right according to the ECtHR, because any justified differentiation is not seen as infringement of the right, and, conversely, no infringement is allowed.[64]

According to ECtHR case law, it first examines if a distinction is found *prima facie* to violate Article 14 with regard to equal treatment. Such distinction is assumed a *prima facie* violation in need of proportionality examination when applicable to suspect categories (race, sex or illegitimacy).[65] Yet there is a double standard, since in cases of non-suspect categories, "the standard of proportionality may also be lowered."[66] If it is thus found in violation, the court examines if it is justified under the proportionality test of the European Charter of Human Rights:[67]

> a difference of treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.[68]

The justifications include mainly four factors: (1) less favourable treatment compared to comparable groups, "determined objectively by the complaint itself"; (2) the state has to show that "the practice is reasonable and rational";[69] (3) disproportion between the effect of the treatment and the policy objective and the effect failed to strike a just balance between rights and interests; (4) is the practice regarded as discriminatory in other democratic states.[70]

To sum-up, the ECtHR usually pursues a two-step examination of an infringement of human rights, in which proportionality analysis is utilized in the second stage examining the justification of the infringement. Yet, with regard to the right to equality, ECtHR doctrine requires that proportionality is used differently, in a single-stage constitutional review, in order to examine if an infringement occurred in the first place.

II. Flexible Systems

The cases of Germany and Israel manifest a different model of applying proportionality in cases of the right of equality: namely, a sliding scale. In the case of Germany, the courts explicitly prescribe the flexibility in doctrine. In the case of Israel, flexibility is manifest in practice rather than prescribed by doctrine. In both cases, this inconsistency is a symptom of the problematic overlap of the doctrine of proportionality with the right to equality.

1. Germany

The right to equality is enshrined in the German Constitution in section 3, which states:

> 1. All persons shall be equal before the law.
> 2. Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.
> 3. No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavoured because of disability.

Proportionality analysis is not enshrined in the German Constitution. Rather, the German Federal Constitutional Court (FCC) developed the principle of proportionality in its constitutional doctrine.[71] Yet, it has not applied it similarly in all of the rights detailed in the Constitution. Significantly for our purposes, the Court's proportionality analysis doctrine

[63] *Ibid*, at 621.
[64] Cf. Nikolaidis, *supra* note 59, at 55.
[65] Greer, *supra* note 56, at 222; Yutaka, *supra* note 55, at 169.
[66] Yutaka, *supra* note 55, at 169, 174-175.
[67] Yutaka, *supra* note 55, at 169.
[68] *Religionsgemeinschaft der Zeugen Jehovas* v *Austria*, application no. 40825/98 (2008).
[69] Greer, *supra* note 56, at 221.
[70] Greer, *supra* note 56, at 222.
[71] Barak, *supra* note 1, at 179-180; Sweet and Mathews, *supra* note 1, at 98-112.

with regard to the right to equality has been markedly different than its application of proportionality analysis with regard to other rights such as freedom and property rights. As explained by Judge Gertrude Lübbe-Wolff:

> The basic question here is whether equal treatment rights should be construed as open to restrictions (rather than seeing justified differentiations – like those attached to specific vulnerabilities such as may result from pregnancy or youth – as not constituting unequal treatment at all).[72]

And so, the Court has not always used proportionality analysis. At times, it has simply applied an interdiction of arbitrariness, while at other times it has applied stricter standards, up to a strict proportionality test. In other words, "in cases involving legislative review, the equality doctrine has developed into a refined system of flexible multi-level tests," described as "a flexible system of sliding tests."[73] Yet, as explained by Judge Lübbe-Wolff: "In which cases exactly a proportionality standard applies and what exactly it means in the context of the right to be treated equally is, however, unclear."[74] As the Court explained in a 2010 decision, in which it ruled that an amendment to the Genetic Engineering Act is constitutional (in response to a claim that it discriminated against users of genetic engineering in comparison to other farmers):

> The general principle of equality […] demands that all people be treated equally before the law. However, this does not prohibit the legislature from all discrimination. Depending on the area of regulation and the distinguishing elements, the legislature is confronted with different limits, reaching from the mere prohibition of arbitrariness to a strict requirement of proportionality.[75]

In that case, the Court applied only a standard of arbitrariness as limiting the legislature, because "the concern here is the different treatment of different factual situations." Thus the court ruled that "the legislature based this discrimination on pragmatic criteria […] by discriminating along these lines, the legislature pursues the legitimate public-interest aims set out above […] These are so important […] that they do also justify unequal treatment […]."[76] In other words, the Court applied only a standard of relevance (or, lack of arbitrariness) in order to justify the unequal treatment. Thus, despite using a language of "justification" of some violation of equality, in using a standard of relevance it seems the court was in practice examining the actual violation of the right, because if the differential treatment is relevant as it relates to different factual circumstances, in Aristotelian terms it is not really an unequal treatment. The Court treated this issue similarly also in a ruling that the "Civil Partnerships Act violates neither the special prohibition of discrimination […] nor the general principle of equality," because of relevant differences between the types of couples.[77] In other cases, the Court used such a standard to rule that an act is unconstitutional.[78]

The distinction between violation of right analysis and the justification of this violation is made clearer in another 2013 case, in which the Court ruled that the unequal treatment of children and civil partners in a law was unconstitutional since it denied one civil partner the right to adopt the adopted child of the other civil partner while permitting the adoption of an adopted child of a spouse and the adoption of a biological child of a civil partner. In deciding the matter, the Court explained: "The general right to equality requires the legislature to treat matters that are essentially the same in the same manner and those matters that are essentially different in a different matter." In other words, enunciating the Aristotelian definition of the right to equality. The Court continued then to explain that: "Depending on the subject of regulation and the characteristics used to differentiate, constraints imposed upon the legislature to justify unequal treatment vary, ranging from a relaxed standard that is limited to a prohibition of arbitrariness to a standard of strict proportionality […] A stricter standard may result, in particular, from the liberty rights affected."[79]

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[72] Gertrude Lübbe-Wolff, *The Principle of Proportionality in the Case-Law of the German Federal Constitutional Court* 34 HUMAN RIGHTS LAW JOURNAL 12, 13 (2014).
[73] Susanne Baer, *Equality: The Jurisprudence of the German Constitutional Court*, 5 COLUM. J. EUR. L. 249, 258, 262 (1998-1999).
[74] Lübbe-Wolff, *supra* note 72, at 13. See also Petersen, *supra* note 4, at 99.
[75] BVerfG, 1 BvF 2/05 of 24 November 2010, 313.
[76] Ibid, 314-316.
[77] BVerfG, 1 BvF 1/01 of 17 July 2002, 104-108.
[78] See, for instance, in a taxation context: BVerfG, 2 BvL 17/02 of 9 March 2004.
[79] BVerfG, 1 BvL 1/11 of 19 February 2013, 72.

In that particular case, the Court applied a stricter standard of review than a prohibition of arbitrariness, but refrained from applying proportionality: "The unequal treatment is not justified […] the difference between a registered civil partnership and a marriage is not of a quality that could justify unequal treatment with regard to successive adoption, the general exclusion of which may serve a legitimate purpose." The Court examined the considerations and their consistency with the objectives, but did not call the analysis "proportionality" nor did it apply all of the regular sub-tests of proportionality.[80]

Two areas thus remain somewhat murky. First, is the focus of the Court on the violation of the right? The limits that the legislature is confronted with, either with regard to arbitrariness or to a strict requirement of proportionality, could be construed as relating to the issue of the violation of the right or the issue of justifying this violation. This question has not been made entirely clear. Second, it is also murky when each limit applies (from prohibition of arbitrariness to proportionality). At least in this point in time, the Court seems to prefer flexibility of standards, opting sometimes on lax standards focused on the violation of the right, while opting at other times on stricter standards focused on examining the justifications of such violations.

2. Israel

Moving to the final case, Israel also manifests the second model, i.e. an inconsistent or flexible application of the proportionality doctrine. As a matter of doctrine, at least in the constitutional review of legislation, the proportionality doctrine applies in Israel with regard to the right to equality just the same as in any other right. Yet, as pointed out by commentators in Israel, the doctrine is not, in fact, consistently applied in equality contexts. Indeed, in some cases, as noted by Barak Medina, the courts tend to use sometimes a single-stage constitutional review (as elaborated below), essentially focusing on the first stage of the constitutional review.[81] Another way of seeing the Israeli case is that it manifests an attempt to ignore the pathology of the problematic interaction between the doctrines of proportionality and equality. At least when reviewing the constitutionality of legislation, the courts attempt to apply proportionality in contexts of the right to equality the same as any other right. Yet, the pathology referred to above is still manifest in the courts' decisions, in their inconsistency in constitutional review of such cases and in administrative law.

The right to equality, or, non-discrimination, is protected in several Israeli statutes, but it is not literally mentioned in the two basic laws in which in 1992 Israel constitutionally enshrined a few human rights. Yet, since a few years after their enactment, the Israeli courts have partially read the right to equality into the right to human dignity ("There shall be no violation of the life, body or dignity of any person as such"), which is enshrined in section 2 of the Basic Law: Human Dignity and Liberty. The Israeli courts recognized that some infringements of the right to equality also infringe the right to human dignity, and see the Basic Law as protecting against such infringements. The Basic Law also includes in section 8 a limitation clause: "there shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required." The Israeli courts have read the standard tests of the proportionality doctrine into this limitation clause, namely: (1) the violation is according to law or prescribed by law; (2) it is for a proper or legitimate purpose; (3) with a rational connection between the means and the ends; (4) the means are necessary without an alternative measure that may achieve the same end with a less onerous limitation of the right; and, (5) a balancing of the benefits to the purpose of the measure and the detriments of the limitation of the right.[82] It should be mentioned, that the courts in Israeli apply the doctrine of proportionality in a uniform manner with regard to all rights enshrined in the two basic laws enacted in 1992. The focus in Israel is to a large extent on proportionality analysis, as infringement of rights (not just the right to equality) is easily proven in court.[83]

The courts have expanded through interpretation the constitutional protection accorded to the right to equality in Israel in the past two decades. The first test applied to examine a government infringement of the administrative right to equality (as opposed to the constitutional right), used also before the legislation of the basic laws in 1992, was the Aristotelian test of relevant differences, which focused particularly on the relevant "equality group," i.e. to whom one should be equal to. This test is still considered by the courts to be the main definition of the right to equality. Yet, since

[80] *Ibid*, 74-76.
[81] Barak Medina and Assur Weizman, *The Constitutional Revolution or the Human Rights Revolution? On the Constitutional Basis of Institutional Norms* (Article manuscript forthcoming at *Iunei Mishapt*) [*Hebrew*].
[82] Barak, *supra* note 1, at 208-210.
[83] BARAK MEDINA, HUMAN RIGHTS LAW IN ISRAEL 273 (2016) [*Hebrew*].

1995, the courts in Israel have added a constitutional right to equality based on the right to human dignity. Since the right to equality is not actually mentioned in the Basic Law (rather, the courts have read it into the right to human dignity), it is unclear what is the exact scope of this right.[84]

At first, the courts saw the constitutional right to equality as infringed in cases where the state differentiates between individuals based on their being part of a distinct social group, such as gender or race. The court explained at the time in the case of *Alice Miller* in which a woman argued successfully that Army policy to refrain from enlisting women as army pilots was unlawful, that such a differentiation humiliates since it treats women as an inferior group and thus violates their right to human dignity (the right protected by the Basic Law).[85] Yet, for over a decade now the courts in Israel have expanded the test used to examine if the state differentiates between groups of people in a way that infringes human dignity in a "materially tight" manner.[86] Such an infringement occurs, according to the Supreme Court, where the ability of a person to manage her own life is hurt; to act autonomously, to preserve her physical and mental integrity; to develop her personality and to enjoy a non-discriminatory treatment.[87] Thus, discrimination is possible not only based on the formerly narrow social grounds, such as race or gender, but also based on other less defined grounds. The courts' doctrine in Israel is not completely consistent, and both former tests (the narrower definition applied only to suspect groups and the Aristotelian test of relevant differences) are still used.[88]

Generally speaking, the doctrine of the court states that it follows with regard to infringements of the right to equality the same two-step proportionality doctrine in constitutional review of legislation.[89] In numerous cases the court has found an infringement of the right to equality in the first step, and then declared it justified according to proportionality analysis. A case in point involves a petition of a single woman against a law allowing only couples the benefit of a state regulated process legalizing surrogate motherhood. The Supreme Court stated that the law discriminates against her. The Court saw the differentiation between single mothers and couples as irrelevant for the purposes of the law; it saw it as discrimination without justification. Yet, continued the Court, in light of the novelty of both the process and the attempt to regulate it, the law was nonetheless constitutional. The Court explicitly stated that even if the discrimination of single women infringed upon their right to equality and human dignity, such infringement was proportional.[90] Some commentators have argued that affirmative action should be similarly analyzed, being seen as an infringement of the right to equality and then examined for its justification (and justified in certain cases) according to the proportionality doctrine.[91]

Commentators in Israel have taken notice that when the court applies proportionality, it sometimes tends to focus on the second step of the proportionality doctrine. Some commentators in Israel have critically noted that the lack of clear definitions of the exact scope of the right to equality have been responsible for a lack of focus on the first step of the question of violation of the right. They have called for a clearer or more substantial definition of equality, which would give greater respect to the right to equality and to the legislature.[92] Why has the court focused on the second-stage of constitutional review when applying proportionality? I suggest two reasons for this practice: First, the vague definition of the right to equality. This vague definition is due to the fact that the right to equality has not been mentioned in the Basic Law on which the Supreme Court bases its jurisprudence. Second, this court-based development of the scope of the right has become rather wide and non-substantive. While connected to human dignity, the Supreme Court has explicitly rejected a narrow definition of this connection (linked to humiliation and the core of human dignity) and instead opted for a wide and rather diffuse definition of the scope of the right to equality.[93]

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[84] Cf.: Brandes, *supra* note 21.
[85] HCJ 454/94 *Miller v. Minister of Defence* ISRLR 1 (1995).
[86] HCJ 7052/03 *Adalah, The Legal Center for Arab Minority Rights in Israel v. the Minister of the Interior*, paragraph 39 of Chief Justice Aharon Barak's decision (14.5.2006) [Hebrew].
[87] HCJ 6427/02 *The Movement for the Quality of Government v. The Knesset* (11.5.2006) [Hebrew].
[88] AHARON BARAK, HUMAN DIGNITY 696 (2014) [*Hebrew*]; Medina, *supra* note 83, at 285; Sigal Kugot and Efrat Hakak, *Has a Constitutional Right been Infringed? The Need to Set Clear Limits to a Constitutional Right – the Right to Equality as an Example*, 7 SHA'AREI MISHPAT 99 (2004) [*Hebrew*]; HCJ 8300/02 *Nasser v. The Government of Israel* (2012).
[89] HCJ 1877/14 *The Movement for the Quality of Government v. The Knesset*, paragraphs 41 and 51-52 of Chief Justice Miriam Naor's decision (12.9.2017) [*Hebrew*]. Cf. the *Miller Case*, *supra* note 85.
[90] HCJ 2458/01 *New Family v. The Committee for the Approval of Fetus Carrying Agreements* (2002).
[91] Suzie Navot and Moran Kandelshtein-Haine, *Affirmative Action as "Constitutional Discrimination"*, in ELIAHU MAZZA BOOK 145 (Aharon Barak, Ayala Procaccia, Sharon Hannes, Raanan Giladi eds., 2015).
[92] Kugot and Hakak, *supra* note 88. Cf. Barak Medina, *The Right to Equality in the Supreme Court Case Law: Human Dignity, the Public Interest and Distributive Justice*, 17 MISHPAT U'MIMSHAL 63 (2016) [Hebrew].
[93] Cf. Brandes, *supra* note 21.

Such a definition lets the plaintiffs prove relatively easily that a state action violates their right to equality in the first stage of constitutional review, granting the court discretion to decide if this violation is justified in the second stage of constitutional review.

All of the above is true when the court applies proportionality to review legislative infringements of the right to equality. However, as already noted, the court has not been completely consistent with regard to the application of the right to equality and its definition. Often it has not applied proportionality at all. Israeli courts' doctrine on the right to equality is notoriously inconsistent. In some cases the courts justify violations of the constitutional right to equality with minimal or no mention of proportionality. In some cases the courts use "relevant differences" tests both in the administrative law right to equality and in the constitutional right, and in some cases they do not. Barak Medina has claimed that in a few cases the Supreme Court has implicitly, without actually saying so, used a one-step test, seeing a violation of the right to equality as categorically forbidden. As Medina demonstrates, these cases involved allocation of state funds to select groups of people based on irrelevant political considerations, such as in cases of tax benefits to particular towns and not to others, or state support of students from religious educational institutions and not of other students.[94]

In sum, as a matter of doctrine Israeli courts say that the proportionality doctrine applies in cases of claimed violations of the right to equality just as it applies in the context of other rights. The problems of application in Israel are manifest in the inconsistent application of proportionality in right to equality contexts, and especially in the tendency to use sometimes a single-stage constitutional review.

E. Discussion

To sum up the findings, in the first model, courts practice constitutional review differently in the context of the right to equality than in the context of other rights. The courts in the first model discard the two-step constitutional review but rather apply a single-step constitutional review, focused on defining the scope of the right and its infringement. The proportionality tests are essentially submerged in the first stage of the constitutional review and are used – if at all – to define the scope of the right and see if it had been infringed, rather than to question the justification of the infringement in some optimization of principles. In the cases of Canada and South Africa the court essentially uses tests that make proportionality analysis redundant, because of their similarity to its three sub-tests (rational connection between means and ends, the means are necessary, and a balancing of benefits and detriments). In such a model, the prohibition against discrimination acts more like a categorical prohibition; a deontological rule rather than a principle. In the second model, courts basically 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). Either way, inconsistency or flexibility is a manifestation of the problematic overlap of the doctrine of proportionality with the right to equality.

What is the significance of the choice of one model over another? If we return to the criticisms to or the disadvantages of proportionality (mentioned above in Section I), the first model mitigates many of them. In such a model, the courts show more respect to the concept of human rights. The courts examine the scope of the right to equality in detail, and if they deem it infringed, they in essence view the right in categorical deontological terms. It is, in a way, strictly prohibited to discriminate in the first model; one cannot in practice justify such a violation of the right to equality, once the court determines that it was infringed.[95] Such a model treats equality as a trump or a firewall, rather than a principle to be optimized. Thus, such a model has the advantage over the second model in terms of the criticism that proportionality deflates the idea of human rights.[96]

The main empirical observation of the Article, namely pointing out the problematic application of the doctrine of proportionality in cases of infringement of the right to equality, supports one of the criticisms directed at the doctrine. Despite the purported one-size-fits-all analysis of proportionality, the findings of this Article suggest that this doctrine indeed is difficult to apply consistently and universally, at least with regard to the right to equality.

[94] Medina and Weizman, *supra* note 81.
[95] Cf.: Fredman, *supra* note 18; O'Connell, *supra* note 18.
[96] See *supra*, section C.

Is this legal inconsistency problematic? Is the second model surveyed here better than the first model, in which proportionality is not applied in a way consistent in its application with other rights? That is not necessarily the case. We tend to admire legal consistency as it promotes certainty in parties applying to the court and legitimizes court decisions. Yet if the doctrine of proportionality varies in application among rights, that in itself is not problematic in terms of the promotion of certainty and clarity, as long as the doctrine is explicitly and clearly stated in such terms. The problems in terms of certainty is perhaps greater when the doctrine itself is unclear or flexible (in the second model surveyed here), or if its application in fact differs from its normative explication (as in Canada and South Africa).

Moreover, the fact that some sub-tests of proportionality are in practice used to define the right to equality may itself be significant. The usage of these tests outside the regular two-step doctrine of proportionality, may attest to some inherent benefit imbued in them for the analysis of the legitimacy of state action. This view of the findings rather than supporting the arguments of opponents of proportionality, actually buttresses the proponents of proportionality as a manifestation of the rule of law.

A question that remains unanswered in this Article is which model better protects against discrimination. Does the first model grant less protection to the right to equality? Is it the other way around, as the efficacy of the courts' protection is better that way? This question remains open to discussion, as it relates to the wider debate on the efficacy of the doctrine of proportionality in its protection of human rights in general, and to the issue of the substantive definition of the right to equality and does it afford better protection against discrimination. In essence, one's position for or against proportionality would relate to where one stands in the choice of one of the models. If one accepts the criticisms directed at the doctrine of proportionality, then clearly the first model would seem superior to the second model. If one rejects these criticisms, then the second model may be deemed equal to the other or better. Similarly, one's position with regard to the substantive definition of the right to equality determines where one would stand on these issues. Supporters of a thick substantive definition of equality, would perhaps support the first model. In this context, and in terms of the relations among the Judiciary, the Executive and the Legislature, perhaps a trade-off of sorts occurs in the choice of the first model over the second. A thicker and more substantive definition of equality in the first model may perhaps result in a higher hurdle for petitioners to prove that their right has been infringed by the state. This practice may be interpreted as the court's deference toward the political branches, yet once proven – that ends discussion. The court does not allow any type of justification, but rather absolutely protects the right to equality. The first model could be perceived in this light as a stronger protection of equality with less deference to the political branches. Indeed, in this light, the first model respects the right to equality more than the second model does. Thus, in educational terms and in terms of providing guidance to authorities, the first model could have the advantage over the second model. Lastly, the tendency of some courts to adopt the first model despite the language of their jurisdictions' constitutions could also lend support to the case of the advocates for the protection of human rights under the understanding of them as absolutely protected.

F. CONCLUSION

This Article has focused on the overlap and interaction between the doctrine of proportionality and the right to equality. As shown herein, proportionality and the tests applied to examine a claimed violation of the right to equality do not work well together. Both doctrines are relational normative measures between the ends and the means of state policies, and as such their overlap and interaction is problematic. The various tests used by courts to examine when differential treatment amounts to discrimination are not easily compatible with the regular two-step constitutional review according to the doctrine of proportionality. Tests involving suspect grounds for discrimination are problematic since they often act as a categorical prohibition. Thus, even if proportionality is applied in such cases to non-discrimination, courts tend to utilize it as a rule rather than as an analytical tool to optimize principles. When suspect grounds are not involved in tests for discrimination, any definition of the right to equality involves relational measures that make the uses of the tests of proportionality redundant or cumbersome. Indeed, when trying to imbue some substantive quality to the right to equality, jurisdictions often resort to tests that sound very close to proportionality or are otherwise a relational means-ends test or measure, much like proportionality.

The Article has three main contributions to the comparative constitutional literature. First, as shown in the Article, the courts examined herein, namely the courts of Canada, Germany, Israel, and South Africa as well as the European Court of Human Rights, face the same pathology in trying to apply the doctrines of proportionality and the right to equality.

The second contribution of this Article is in surveying the two models that courts use in applying proportionality in the context of the violation of the right to equality: a doctrine or practice of constitutional review focusing on the scope of the right and its infringement and a sliding (or inconsistent) scale. As shown herein, the courts in the first model (Canada, South Africa and the ECtHR) discard the two-step constitutional review usual in proportionality doctrine, and apply instead a single-step constitutional review, focused on defining the scope of the right and its infringement. In their single-step review, the courts of Canada and South Africa use tests that make proportionality analysis redundant, because of their similarity to its three sub-tests. The courts of Israel and Germany utilize the second model, i.e. they basically 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). In both cases, their inconsistency or flexibility is another manifestation of the problematic overlap of the doctrine of proportionality with the right to equality.

The third contribution of the Article is to the ongoing discourse on the merits of the doctrine of proportionality. As explained above, there are advantages and disadvantages to each choice of models. The choice of the model used by each court is relevant to the ongoing discourse on the advantages and disadvantages of the use of proportionality and to some extent such choice depends on one's position in this debate. On the one hand, the empirical findings of the Article, namely the problematic overlap between proportionality and the right to equality, suggest that some of the criticisms directed at the doctrine of proportionality are justified. Despite the claimed one-size-fits-all analysis of proportionality, this Article shows that the doctrine indeed is difficult to apply consistently and universally, at least with regard to the right to equality.

On the other hand, the flourishing of these two models of accommodation to the problem shows that solutions exist. Proportionality does not have to work exactly the same with regard to every right. Indeed, perhaps the utilization of some of the tests of proportionality within the right to equality point out to some inherent intuitive value in sifting illegitimate and legitimate state actions. Perhaps these tests have some inherent rational utility. One may argue that this utilization of these norms, shows that a rational connection between the means and the ends of state actions, their necessity and greater benefits to their purpose than detriment to rights are somehow indeed part of the basic idea of the rule of law, as argued by proponents of proportionality.