

Proportionality: Comparative Perspectives on Israeli Debates

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I. INTRODUCTION

PROPORTIONALITY IS A pervasive feature of contemporary constitutional practice under most systems of rights-protection. Although its textual underpinnings are diverse, this diversity in constitutional forms has been overwhelmed by the emergence of a doctrine of proportionality with a common legal structure. After decades of doctrinal development marked by self-conscious and deliberate constitutional convergence, we are now witnessing the rise of a scholarly literature on proportionality that is genuinely comparative, and which is trying to catch up with constitutional practice. Its centre of gravity is proportionality in the strict sense. This may reflect the fact that it is at this stage where the bulk of legal analysis tends to take place in the jurisdictions that command central academic attention, notably Israel and Germany (and now perhaps even Canada).¹

Proportionality in the strict sense has generated intense academic controversy on a range of issues. There have been questions over the exact methodology of balancing, with Robert Alexy and Aharon Barak setting out proposals that reconstruct and systematise German and Israeli constitutional doctrine.² This, in turn, has raised the issue of whether this methodology is rational and hence qualifies as a form of legal reasoning, or whether it is a form of intuitionist ad hocery. These debates are analytically distinct from, but closely related to, a set of institutional concerns regarding the capacity of courts to apply proportionality in a manner that is consistent and predictable across judges and cases and is appropriately shielded from the corrupting influence of judicial preference, questions regarding comparative institutional competence, and the difficulties in adducing and assessing the evidentiary materials seemingly required by the demands of justification. These institutional concerns have spawned a series of doctrinal

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¹ A Barak, 'Proportional Effect: The Israeli Experience' (2007) 57 *University of Toronto Law Journal* 369; D Grimm, 'Proportionality in Canadian and German Constitutional Law' (2007) 57 *University of Toronto Law Journal* 383; *Alberta v Hutterian Brethren of Wilson Colony* [2009] 2 SCR 567 (Can).

² R Alexy, *A Theory of Constitutional Rights* (Oxford, Oxford University Press); A Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge, Cambridge University Press, 2012).

proposals that systematically under-enforce proportionality, in Larry Sager's sense of that term.³

Yet another set of debates concerns whether proportionality undercuts the very idea of rights themselves. Habermas tells us that rights are 'firewalls', and draws a sharp distinction between 'law defined through a system of rights' that 'domesticates, as it were, the policy goals and value orientations of the legislator through the strict priority of normative points of view', and a proportionality analysis under which rights are merely 'goods and values' which 'must compete with the others at the same level for priority'.⁴ To these critics, proportionality in the strict sense embodies everything that is wrong with the very idea of permitting proportional limits on constitutional rights.

By contrast, the question of legitimate objectives has suffered from relative neglect in the literature. This too may reflect constitutional practice, because laws easily clear this step, and judicial scrutiny is relatively minimal. Indeed, courts have sometimes said that legislative objectives are off-limits, and will therefore accept any plausible objective offered by the government without gazing behind it. Why is this the case? David Beatty has offered the most well-developed answer, and argues that proportionality sets up an institutional division of labour between legislatures and courts, where legislatures can pursue whatever policy they want, and courts confine their role to policing legislative means.⁵ The policy of near complete judicial non-intervention on legislative purposes is accordingly a response to the counter-majoritarian dilemma. Closely related is the idea – set out by Grégoire Webber among others – that proportionality is a strategy to depoliticise judicial review by bracketing deep disagreement over fundamental questions of political principle.⁶ It purports to lower the stakes of these disagreements by refusing to set boundaries on the acceptable modes of argument in politics, and channelling disagreement into a highly contextualised enquiry rooted in the particularities of an individual case, often turning on questions of instrument choice and empirical evidence. On this view, it is important that there be few if any limits set on the range of permissible legislative objectives, and that statutes whose purposes appear to be unconstitutional be given a sympathetic reconstruction in order to permit the proportionality analysis to occur.

But the difficulty is that these goals contradict the very terms of the proportionality test itself. There is an important distinction between the different elements of a proportionality analysis. Steps one and two accept the legitimacy of the objective, and scrutinise the instrumental relationship of means to ends. By contrast, proportionality in the strict sense re-engages the objective itself, and, *inter alia*, assesses its relative importance in relation to the limitation of rights. Now there is an intramural debate over the extent of the analytical overlap between the initial search for a legitimate objective and the final prong of proportionality.⁷ But if we put that debate to one side and concede that these two enquiries are not coextensive, it is nonetheless true that they raise similar questions,

³ LG Sager, *Justice in Plainclothes: A Theory of American Constitutional Practice* (New Haven, Yale University Press, 2004).

⁴ J Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, MIT Press, 1998) 259.

⁵ DM Beatty, *The Ultimate Rule of Law* (Oxford, Oxford University Press, 2004).

⁶ GCN Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge, Cambridge University Press, 2009).

⁷ For competing views, see Barak, 'Proportional Effect' (n 1); PW Hogg, *Constitutional Law of Canada* (Toronto, Thomson/Carswell, 2007).

and do similar work. So the choice is not whether to bracket the scrutiny of legislative objectives entirely, but whether to front end or back end their consideration.

What unites the chapters by Ben-Shemesh⁸ and Kremnitzer⁹ is that they make the case for front-ending the examination of legitimate objectives, prior to engaging in proportionality analysis. Ben-Shemesh terms this the rejection of balancing in favour of categorical answers at the legitimate objective stage, and trains his sights on the Israeli jurisprudence on offensive expression to argue that the fact that speech causes offence to feelings should not count at all as a legitimate reason for restricting expression. Kremnitzer devotes considerable attention in his chapter to the idea of judicial scrutiny of pretextual purposes that serve as cover for illegitimate objectives. The chapters raise three questions:

1. What purposes are illegitimate, and hence terminate the limitations analysis before one proceeds to proportionality?
2. Can we reinterpret those elements of proportionality that describe themselves as not concerned with the scrutiny of ends and which take those ends as givens – suitability and necessity – as tools to uncover illegitimate purposes?
3. When the state acts in response to the demands of some private parties to restrict the rights of other private parties, how should a court characterise the purposes underlying its actions?

II. ILLEGITIMATE REASONS

The chapters set out reasons for state action that are illegitimate and therefore cannot serve as a basis for justifiably limiting constitutional rights. But the reasons offered vary in where they lie on the continuum from the highly specific to the very abstract. Ben-Shemesh focuses narrowly on why the protection of feelings should not count as a legitimate reason to limit free speech – because such feelings are unavoidable in pluralist democracies committed to freedom of expression; because regarding such feelings as legitimate reasons to limit rights creates the perverse incentive to politically mobilise to create these feelings, putting pressure on the state to limit expression and to provide a constitutional case for these limitations; and because only politically powerful interests will be able to conscript the state to limit expression. Kremnitzer is highly abstract. He does not reason up from particulars, and instead starts at the other end from the constitutional order itself, and posits that an illegitimate purpose is one that is inconsistent with the values of the state.

The next step in this collective project among Israeli constitutional scholars is to fill the gaps between these positions, and provide a general account of illegitimate reasons that is both based in more abstract principles and explains, justifies and organises answers in particular cases. This is not just an Israeli problem. The question of illegitimate reasons, or unconstitutional motives, has arisen in India, South Africa, Germany, Canada and the United States (and no doubt in other jurisdictions). Israeli constitutional scholars might want to mine comparative constitutional experience for argumentative strategies on how to frame this problem and approach this issue.

⁸ Ch 16 in this volume.

⁹ Ch 15 in this volume.

For example, one could take up Kremnitzer's proposal and infer illegitimate purposes from the very structure of the state – what Indian constitutional jurisprudence calls its basic structure. For example, if the state's basic structure encompasses a Bill of Rights protected through judicial review, one can infer a commitment to the project of liberal constitutionalism that underlies a Bill of Rights, and hence conditions its interpretation. One could argue that judicial review and Bills of Rights institutionalise the Dworkinian commitment to equal respect and concern, which forbids the state from acting on reasons that evince such a lack of concern or respect – for example, on the basis of sexual orientation, sex, religion or race.¹⁰ This kind of commitment underlies the jurisprudence of the Supreme Court of Canada, which per se prohibits sectarian, sexist, homophobic and racist preferences as reasons for the limitations of constitutional rights.¹¹ Or one could reason, as has the Constitutional Court of South Africa, that the very idea of a constitution committed to the rule of law prohibits the enactment of laws for what Cass Sunstein has termed naked preferences. Although Sunstein defines naked preferences narrowly as the 'distribution of resources or opportunities to one group over another simply because they held and exercised the requisite raw political power',¹² which would render constitutionally suspect any legislation that rewards groups engaging in rent-seeking behaviour, the reach of the South African conception of naked preferences is broader, and encompasses any legislative purpose that is arbitrary, capricious and does not plausibly bear further any notion of the public good (and indeed, is a free-standing ground of judicial review that need not be triggered by the infringement of a constitutional right).¹³

The South African jurisprudence on unconstitutional motives illustrates another point – the importance of history. The notion that the state should be prohibited from acting on the basis of naked preferences is based on a barely concealed view that this is how the South African State conducted itself under apartheid. And so the constitution can be understood as a sort of remedial document, whose foundational premises involve a decisive rejection of the constitutional order on whose ashes it sits – what can be termed the 'never again' principle. The idea of the past as a negative, anti-model of constitutional experience, that defines a contemporary constitution by what it is not, is an under-recognised and under-utilised resource that bridges the gap between universalistic principles of political morality and particular national experiences. Another example of this way of distilling illegitimate purposes emerges from Indian constitutional jurisprudence. In *Naz Foundation v Government of NCT of Delhi*,¹⁴ the Delhi High Court has set out the notion of a 'constitutional morality' which it derives from a reading of the history of the framing of the Indian Constitution. One element of that history is the idea of the constitution as an instrument of social revolution that obliges the state to dissolve existing social, political and economic hierarchies based on caste, especially with respect to untouchables. *Naz Foundation* reasons from these premises to declare illegitimate any

¹⁰ R Dworkin, *A Matter of Principle* (Cambridge, Harvard University Press, 1985).

¹¹ *R v Big M Drug Mart Ltd* [1985] 1 SCR 295 (Can).

¹² CR Sunstein, 'Naked Preferences and the Constitution' (1984) 84 *Columbia Law Review* 1689.

¹³ *Pharmaceutical Manufacturers Association of South Africa: Re ex p President of the Republic of South Africa* 2000 (2) SA 674 (CC) (S Afr).

¹⁴ *Naz Foundation v Government of NCT of Delhi* (2009) 160 DLT 277 (India). For a detailed discussion of this point, see S Choudhry, 'How to Do Comparative Constitutional Law in India: Naz Foundation, Same Sex Rights and Dialogical Interpretation' in S Khilnani, V Raghavan and AK Thiruvengadam (eds), *Comparative Constitutionalism in South Asia* (Delhi, Oxford University Press, 2013) ch 2.

state action that is designed to reproduce a caste-like status for other social groups, such as homosexuals.

A different approach would identify illegitimate purposes in connection with specific rights. Each right has a point or basic purpose of what sort of interests it is meant to protect. It is per se illegitimate for governments to act for the sole reason of deliberately robbing people of that interest, as opposed to pursuing another social goal that has the incidental effect of infringing the right. The comparative law of democracy furnishes a useful illustration of this idea in practice. One basic goal of the right to vote is to create a system of democratic accountability, whereby citizens choose their representatives through elections. A particular danger faced by democracies is attempts by incumbents to insulate themselves from democratic accountability through the manipulation of the rules governing elections. And so in a series of decisions, the German Constitutional Court has declared that laws enacted for this legislative purpose are unconstitutional, because their very purpose is to subvert the basic objective of the right to vote.¹⁵

I conclude this part on a broader note. One of the main objections to proportionality analysis is that it fails to acknowledge that rights-claims should have a special urgency that requires that they be treated differently from the goods and values pursued by liberal democracy. It is said that proportionality, especially proportionality in the strict sense, fails to take seriously the categorical nature of rights claims. These debates have been given renewed force by constitutional cases brought on the basis of the right to life, and the right to not be subject to torture. The decisions of the German Constitutional Court in the *German Airplane* case,¹⁶ and the Israeli Supreme Court in *Public Committee against Torture in Israel v State of Israel*,¹⁷ suggest that some rights should not be subject to proportionality because they are absolute. Arthur Ripstein, for example, has proposed a hierarchy of rights, some of which are immune from proportionality (eg life, bodily integrity), and the remainder that are not (eg property).¹⁸

But as these examples make clear, there is another way to structure constitutional doctrine that takes seriously the categorical nature of rights-claims even for those rights without a plausible claim to being absolute. Certain reasons for limiting constitutional rights may be per se inadmissible, either because they contradict the basic structure, mission or premises of the constitutional order, or because they deliberately undermine the very purpose of a particular right. This second kind of reason-based restraint emerging from rights is interesting. As Jeremy Waldron and Richard Pildes have argued, it has long been recognised that one dimension of rights is their reason-blocking function.¹⁹ An emerging literature seeks to move this discussion forward, and develop a taxonomy of those rights that connote excluded reasons, and those which do not.²⁰

I cannot develop the point here, but my sense is that *every* right excludes certain reasons to limit it. Moreover, while some rights may have excluded reasons in common, in

¹⁵ S Issacharoff and RH Pildes, 'Politics as Markets: Partisan Lockups of the Democratic Process' (1998) 50 *Stanford Law Review* 643, 690–99.

¹⁶ 115 BVerfGE 118 (2006) (Ger).

¹⁷ HCJ 5100/94 *Public Committee against Torture in Israel v State of Israel* 53(4) PD 817 [1999] (in Hebrew).

¹⁸ A Ripstein, 'Proportionality without Balancing' (unpublished).

¹⁹ RH Pildes, 'Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism' (1998) 27 *Journal of Legal Studies* 725; J Waldron, 'Pildes on Dworkin's Theory of Rights' (2000) *Journal of Legal Studies* 301; RH Pildes, 'Dworkin's Two Conceptions of Rights' (2000) 29 *Journal of Legal Studies* 309.

²⁰ K Möller, 'Two Conceptions of Positive Liberty: Towards an Autonomy-based Theory of Constitutional Rights' (2009) 29 *OJLS* 757.

many cases, those reasons will differ. The implications for proportionality analysis are important. It is often claimed that there is a trend towards a generic proportionality analysis in which rights have disappeared from the picture. This has been fuelled by the proliferation of rights, the expansion of the scope of rights to encompass a broad right to negative liberty, and the trend towards generic proportionality clauses. Bills of Rights, in the view of David Beatty, Moshe Cohen-Eliya, Mattias Kumm, and Iddo Porat, create a general right to justification.²¹ But there is another possibility, in which each right steers the court and orients its proportionality analysis in a different direction that flows from the very nature of that right itself. There may not be a generic proportionality analysis, but rather a family of ‘proportionality’, each with a subtly different character shaped by the scope of permissible reasons permitted by the right in question.

III. REINTERPRETATION OF MEANS/ENDS ANALYSIS AS THE SEARCH FOR OBJECTIVES

Steps two and three of proportionality proceed from the assumption of a legitimate objective, and scrutinise the relationships of means to ends. Step two assesses the suitability of the means to achieve the objective, whereas step three determines its necessity through a search for other equally effective alternatives that meet the same aim. Throughout this analysis, the objective is treated as unassailable. But can we reinterpret these steps in a manner that treats the objective not as a given, but as provisional, and which views the probing of the relationship between means and ends as a tool to uncover illegitimate purposes?

The particular problem here is that of pretextualism, where the government publicly offers as justification a legitimate objective for state action that merely serves to mask its true purpose, which is illegitimate. This is a problem that Kremnitzer addresses in his chapter. The most direct way for a court to flush out and expose illegitimate motives is through a careful examination of the factual record, to see if the evidence adduced supports the existence of the problem the challenged measure purports to address, and the claim that this problem was in fact the mischief that prompted the measure. The absence of evidence for a legitimate objective would be sufficient grounds to hold for the rights-claimant. But in the face of the suspicion that an illegitimate objective was really at work, the absence of evidence may also provide grounds for a court to draw the inference that what really motivated the objective were illegitimate considerations.

But another technique to flush out illicit motives is to take an equally sceptical approach to scrutinizing the relationship between means and ends. The failure of a measure to meet the demands of suitability or necessity does not merely indicate that the government has chosen constitutionally prohibited means to pursue its stated goals. Rather, it is evidence that casts doubt on the credibility of the government’s assertion of its objective, and may point to a hidden agenda that is constitutionally illegitimate. The

²¹ Beatty (n 5); M Kumm, ‘Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement’ in S Paulson and G Pavlakos (eds), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Oxford, Hart Publishing, 2007) 131; M Kumm, ‘The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review’ (2010) 4 *Law and Ethics of Human Rights* 142; M Cohen-Eliya and I Porat, ‘Proportionality and the Culture of Justification’ (2011) 59 *American Journal of Comparative Law* 463.

idea that the lack of suitability between means and stated ends is a sign of constitutional trouble for those ends is an old one. The complete ineffectiveness of means to fulfill stated ends is one scenario in which this arises. Another is where those means produce perverse effects – that is, effects precisely opposite to those intended. The inference is that a government would have known in advance that measures were ineffectual or counter-productive, and that if it nonetheless persisted in adopting them, its true motivations must lie elsewhere.

Much less attention has been devoted to the power of the enquiry into necessity to do the same work. This flows from the way in which courts approach this question – through a static comparison of the comparative effectiveness of alternative means to achieve the legitimate objective. This may be a highly artificial exercise, engaged in strictly for the benefit of the court. But there is another way to conceptualise the judicial enquiry into necessity. As Kremnitzer suggests, the prospect of judicial review should create the incentive to address alternative means and their comparative effectiveness during the policy process, including in legislative debates. If so, the judicial assessment of necessity can be reframed as a probing enquiry into the executive and/or legislative process, and to examine whether and how alternatives were considered. Following David Dyzenhaus, we can think of this as a way of proceduralizing proportionality analysis.²² Dyzenhaus' principal example is the administrative decision at issue in the House of Lords decision in *Begum*,²³ and his target is not legitimate objectives, but the question of necessity itself. But this method can be adapted to the legislative process and reframed around whether the stated objective is pretextual. To be sure, the lack of a serious consideration of alternatives can mean different things. It may simply reveal one or more of Rosalind Dixon's legislative blind spots (of application, perspective, and/or accommodation), and not impugn the credibility of the stated objective.²⁴ But the failure to seriously consider equally effective alternatives to achieving the stated objective may raise the suspicion that this is not the true objective at all. Rather than a lack of foresight, a limited world-view, or indifference to rights, the true problem may indeed be bad faith.

IV. THE STATE AND THIRD PARTIES

Proportionality proceeds on the basis of an account of the state's reasons for action. If there are purposes that are illegitimate, their illegitimacy in many cases flows from the fact that the *state* cannot act upon these considerations. However, the question of whether the constitutional order permits *private* parties to act on the same sort of reasons is much more complex. Where Bills of Rights are principally vertical in their application, parties may often act on the basis of reasons off-limits to the state. Where Bills of Rights have horizontal application, the scope for private actors to act on these grounds is narrower, but still exists, especially if those actions fall within the ambit of a constitutional right. Religion is a useful illustration. The state cannot act for sectarian reasons. However, private parties can, and indeed, their right to do so is protected by freedom of religion.

²² D Dyzenhaus, 'Proportionality and Deference in a Culture of Justification' (unpublished).

²³ *R (Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100.

²⁴ R Dixon, 'Creating Dialogue about Socioeconomic Rights: Strong-Form versus Weak-Form Judicial Review Revisited' (2007) 5 *International Journal of Constitutional Law* 391.

This raises interesting questions when the state acts on behalf of third parties, as it did in the dispute underlying the *Gay Pride Parade* litigation (discussed by Ben-Shemesh). When the state acts in response to the demands of one group of private individuals to restrict the rights of another group of private individuals, because the first group objects on religious grounds to the activities of the second group, how should a court characterise the purposes underlying the state's actions? The answer to this question depends on how the state describes its relationship to the private parties. There are two options. On one account, the state stands above social divisions and adjudicates impartially among them. When the state restricts one party's rights at the other party's behest, the state acts for its own reasons and not those of any private party. But on a second account, the state sides with one private party against another – it represents it, is a front for it, is captured by it, and/or is beholden to it. By siding with one party, it adopts and acts for its reasons.

Which of these two accounts are correct matters when the state acts in response to religious objections raised by private parties, because religious reasons are illegitimate objectives. From an outsider's perspective, this is the issue at the heart of the *Gay Pride Parade* litigation, not the somewhat different question of whether it is legitimate for the state to regulate offensive speech. So the Court had to choose between two accounts of the state's objectives. The state's version would be that it was not acting for religious reasons, but in response to the consequences of other parties holding religious reasons that the state was itself prohibited from holding. The counter-narrative would be that this is precisely what the state was doing. This is the problem of pretextual purposes, with a twist – the state's constitutional case is dependent on the existence of private reasons, yet would fail if those reasons were attributed to it. This is a delicate line to walk.

Ben-Shemesh's arguments for why the state should be constitutionally prohibited from regulating offensive speech provide the beginning of an answer as to how a court should tackle the question of the state's true motives. He writes that the regulation of offensive speech 'is most likely to be used by those who have political power, and against those who lack it'. The question is how one determines who wields political influence. In the liberal constitutional tradition, John Hart Ely provided a highly influential answer to this question.²⁵ For Ely, the central determinant of the intensity of judicial review was the notion of a 'discrete and insular minority', which is permanently excluded from the exercise of political power. In justifying restrictions on speech, the state may assert that it is acting as a third party to protect a minority that lacks political power and cannot commandeer the state to serve its ends. The state is acting as a mediator among the interests of competing groups.

But a court should not accept the state's bare assertion that a discrete minority is necessarily a political minority. To do so would be to conflate a minority's discreteness and insularity – along the dimensions of race, ethnicity, religion or degree of religious observance – with a lack of political power. As Kremnitzer acutely observes, minorities that are discrete and insular may nonetheless be 'politically extremely powerful'. Although he does not develop the point and explain why, the answer is clear to even a casual, outside observer of Israeli politics. In a highly fractured polity such as Israel, discrete and insular minorities may be indispensable coalition partners, which grants them real political

²⁵ JH Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Harvard University Press, 1980).

power. But the precise configuration of political power and influence is a complex empirical question, the answer to which varies across countries and within countries over time. And so to determine the real purposes underlying the state's actions, one would have to engage in a detailed analysis of the political dynamics at play in each case.

Israeli constitutional scholars need to integrate this kind of fine-grained political analysis into the application of the doctrine of proportionality. Indeed, the raw materials of Israeli constitutional politics may provide them with a better opportunity to do so than in perhaps any other rights-protecting liberal democracy. But Israel is not alone in grappling with the issue of how to interpret a Bill of Rights in a divided society, and more precisely, in calibrating the doctrine of proportionality to this kind of political context. As this volume attests to, Israel is a constitutional laboratory in many areas of constitutional law. If Israeli scholars and courts wrestle openly and courageously with the problem of unconstitutional purposes in a fraught and fragmented political context, they will have much to teach the world.

