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THE BENEFITS AND DANGERS OF PROPORTIONALITY REVIEW IN ISRAEL'S HIGH COURT OF JUSTICE

In the landmark case *Beit Sourik Village Council vs. the Government of Israel*, the Israeli Supreme Court, sitting as the High Court of Justice (HCJ), grappled with a highly charged question: should a state have to sacrifice its own security to improve human rights?¹ The Court answered in the affirmative and held that certain sections of Israel's controversial security fence could not be built as planned.² In these sections, the loss of human rights outweighed the security benefit of placing the fence through certain villages.³ Scholars from both sides of the political spectrum have voiced strong opinions about this case,⁴ and many of these debates have centered on the determinative aspect of the case: the court's proportionality review.⁵ This Comment will not grapple with politics, nor will it focus exclusively on the *Beit Sourik* case. Rather, it will analyze this case and similar cases to argue about the theoretical implications of proportionality review in HCJ decisions. Through an analysis of these cases, this Comment will determine the best way that a court could grapple with the issue of balancing security and the right to life and bodily integrity against other human rights.

This Comment argues that the method of proportionality analysis implemented in earlier HCJ decisions should have been implemented in later decisions where the Court balanced the property, dignity, and free movement rights of West Bank Palestinians against the security, right to life, and bodily integrity rights of Israeli citizens. In earlier cases, notably *Horev v. The Minister of Transportation*, the Court evaluated and weighed the conflicting

¹ HCJ 2056/04 *Beit Sourik Village Council v. The Gov't of Israel* PD 24 [2004], http://elyon1.court.gov.il/Files_ENG/04/560/020/A28/04020560.A28.pdf. The Court stated that as a general principle, the HCJ would require the government to implement an alternate act, "whose [security] benefit will be somewhat smaller than that of the former one," if the alternate act "ensures a substantial reduction in the injury caused by the administrative act." *Id.*

² *Id.* at 30–43.

³ *Id.*

⁴ Moshe Cohen-Eliya, *The Formal and the Substantive Meanings of Proportionality in the Supreme Court's Decision Regarding the Security Fence*, 38 *ISR. L. REV.* 262 (2005); Aeyal M. Gross, *The Construction of a Wall Between The Hague and Jerusalem: The Enforcement and Limits of Humanitarian Law and the Structure of Occupation*, *LEIDEN J. INT'L L.* 393, 395 (2006) (arguing for greater human rights); Jason Litwack, *A Disproportionate Ruling for all the Right Reasons*, 31 *BROOK. J. INT'L L.* 857 (2006) (arguing for greater security).

⁵ See Moshe Cohen-Eliya, *supra* note 4, at 263.

rights in a systematic and consistent way before proceeding to balance those rights against one another.⁶ This method ensured that the balancing was rooted in legal precedent and rationality. However, in later decisions balancing the right to life and bodily integrity against other rights, the Court demonstrated a less disciplined approach where it balanced the conflicting rights without determining the comparative value of those rights beforehand.⁷ This Comment argues that in these later decisions, the Court should have more carefully evaluated the relative value of the conflicting rights before proceeding to balance them against each other.

Part I of this Comment presents a brief overview of proportionality review and its benefits. Part II analyzes an earlier HCJ decision to show how it demonstrates those benefits, and also how it employs proportionality in a way that should have been employed in later decisions. Finally, Part III examines later HCJ decisions that weigh the right to life and bodily integrity against other human rights. It will critically examine the reasoning in these cases and argue that the Court should have followed precedent and evaluated the relative importance of the conflicting rights before beginning its proportionality review.

I. AN OVERVIEW OF PROPORTIONALITY

Proportionality review is a “widely diffused . . . [o]verarching principle of constitutional adjudication” that courts worldwide use to balance conflicting rights claims.⁸ Proportionality review comes into play when a government limits an individual’s rights for a supposedly more important public right.⁹ Through this review, courts determine whether the government or legislative body properly compared the benefit of the public good against the detriment to

⁶ HCJ 501/96 Horev v. Minister of Transp. 51(4) PD 153, 211 [1997] (Isr.) (citing HCJ 153/83 Levi v. Commissioner of the Israel Police Southern District 38(2) PD 393, 401–02 (“The variety of potential situations necessitates a multi-shaded balancing approach. We must refrain from adopting a single standard for all matters . . . conflicting interests are not always of identical normative import.”)), http://elyon1.court.gov.il/files_eng/96/160/050/A01/96050160.a01.htm.

⁷ HCJ 10356/02 Hass v. IDF Commander in West Bank 443 [2004] (Isr.), <http://www.dindayan.com/rulings/02104970.r15.pdf>.

⁸ Alec Stone Sweet & Jud Matthews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT’L L. 72, 73–74 (2008) (alteration in original).

⁹ See, e.g., *Sunday Times v. The United Kingdom* (No.1), App. No. 6538/74, 30 Eur. Ct. H.R. (ser. A) at 5 (1979) (balancing the right to a non-prejudiced trial through limitation on the freedom of press against the freedom of press).

individual or group rights, and if not, it will rule the act unconstitutional.¹⁰ The method has become so popular and widespread that it “has come to dominate the dockets of constitutional and supreme courts around the world,”¹¹ so much so that theorists claim that a pervasive “balancing consciousness” has replaced the question of whether to balance individuals rights against government action with the sole question of how to balance properly.¹²

Israel has been recognized as a world leader in consistently employing proportionality review in constitutional disputes. As early as 1992,¹³ Israel's HCJ has applied the principle of proportionality to hold that any government action that limits human rights must be proportional to the detriment to human rights; or, in other words, that “a decision of an administrative authority must reach a reasonable balance between communal needs and the damage done to the individual.”¹⁴ The HCJ's version of the proportionality test breaks down into three parts. First, the Court determines whether the action had a rational connection to the government's stated purpose (the “rational means test”).¹⁵ Next, the Court determines if the government employed the least restrictive means possible to achieve the stated goal (the “least injurious means test”).¹⁶ Finally, the Court determines if there were alternative measures that would have achieved a slightly diminished version of the goal while significantly reducing damage to the other party's rights.¹⁷ The Court has called this last test the “proportionate means” test, or “proportionality in the narrow sense.”¹⁸ This

¹⁰ See Sweet & Matthews, *supra* note 8, at 75–76 (“the analysis involves . . . judicial verification that, with respect to the act in question, the means adopted by the government are rationally related to stated policy objectives . . . [Next] the judge ensures that the measure does not curtail the right any more than is necessary for the government to achieve its stated goals . . . The last stage, ‘balancing in the strict sense,’ is also known as ‘proportionality in the narrow sense’ . . . In the balancing phase, the judge weighs the benefits of the act—which has already been determined to have been ‘narrowly tailored,’ in American parlance—against the costs incurred by infringement of the right, in order to determine which ‘constitutional value’ shall prevail, in light of the respective importance of the values in tension, given the facts.” (alteration in original)).

¹¹ *Id.* at 74.

¹² Iddo Porat, *The Dual Mode of Balancing: A Model for the Proper Scope of Balancing in Constitutional Law*, 27 CARDOZO L. REV. 1393, 1394 (2006). See also Sweet & Matthews, *supra* note 8, at 76 (2008) (“In many polities today, proportionality is treated as a taken-for-granted feature of constitutionalism, or a criterion for the perfection of the ‘rule of law.’”).

¹³ HCJ 2056/04 Beit Sourik Village Council v. The Gov't of Israel 1, 23 [2004] (Isr.) (citing HCJ 987/94 Euronet Golden Lines [1992]), http://elyon1.court.gov.il/Files_ENG/04/560/020/A28/04020560.A28.pdf.

¹⁴ *Id.* at 34.

¹⁵ *Id.* at 24.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ HCJ 2056/04 Beit Sourik Village Council v. The Gov't of Israel PD 1, 25 [2004] (alteration in original).

last test represents the upper limit of judicial activism in constitutional law in the world.¹⁹ The Court recognizes a legitimate governmental goal that could not have been performed with any less damage, yet the Court may require a different action to increase the rights of the damaged party.²⁰

Israel is not the only nation that employs proportionality review that includes the third narrow proportionality test.²¹ Proportionality review has “spread like wildfire” to become a powerful and influential constitutional doctrine worldwide.²² One scholar described proportionality as “the central standard today for judicial decisions dealing with competing values and interests in the public law of many democratic states.”²³ Yet, scholars have recognized the State of Israel as a worldwide leader of proportionality review in constitutional issues;²⁴ one scholar argues that the Israeli Supreme Court applies proportionality “more consistently and rigorously than any other judicial body in the world.”²⁵

Despite the virtues of proportionality review in general,²⁶ some scholars, such as Moshe Cohen-Eliya, have argued that the HCJ sometimes oversteps its bounds and applies the test in inappropriate ways, especially in regards to the third test.²⁷ According to Cohen-Eliya, the third proportionality test may present a “lack of democratic legitimacy in the granting of sweeping powers to judges to weigh the balance between societal goals and individual rights.”²⁸ This sort of balancing properly belongs with a democratically elected government, he argues, and not with democratically unaccountable judges.²⁹

¹⁹ Sweet & Matthews, *supra* note 8, at 79. (“[S]o many new courts, operating in environments traditionally hostile to judicial review, have so quickly and successfully embraced what is, inarguably, the most intrusive form of review found anywhere.”).

²⁰ HCJ 2056/04 Beit Sourik Village Council v. The Government of Israel PD 24 [2004]

²¹ Sweet & Matthews, *supra* note 8, at 74–75.

²² Moshe Cohen-Eliya & Iddo Porat, *Proportionality and Justification*, 64 U. TORONTO L.J. 458, 461 (2014).

²³ Moshe Cohen-Eliya, *supra* note 4, at 264.

²⁴ Sweet & Matthews, *supra* note 8, at 132.

²⁵ *Id.*

²⁶ Cohen-Eliya & Porat, *supra* note 22, at 459, 462.

²⁷ Moshe Cohen-Eliya, *supra* note 4, at 265.

²⁸ *Id.*

²⁹ *Id.*

A. *Positive Aspects of Proportionality*

Despite the dangers of proportionality, the doctrine, when properly used, offers substantial benefits to democratic societies.³⁰ In Israel and abroad, these benefits have included an expanded array of protected rights, which results in a diffusion of political strife as less popular rights nevertheless draw judicial protection. Proportionality review also creates a constitutional culture that holds government accountable for theoretically any limitation on rights. This culture thereby prevents government institutions from deflecting judicial scrutiny by hiding within “legal black holes,” or limitations on rights held as “off limits” from judicial scrutiny. Finally, proportionality review allows for a second look from judges, wherein legally trained eyes can critique and improve on the way that the executive or legislative branch chose to limit some rights for the sake of others.

1. *Expanded Array of Rights*

Proportionality review allows judges to reconsider the balancing of rights that elected officials perform even when those officials stayed “in bounds” and did not breach a fundamental right.³¹ For instance, in *Horev v. Minister of Transportation*, the government allowed restrictions on a fundamental right—freedom of movement—for the sake of protecting religious feelings (not freedom of worship), an admittedly non-fundamental right.³²

Proportionality review grows naturally out of an expanded set of constitutionally protected rights.³³ According to Cohen-Eliya and Porat, “the broader the conception of rights becomes, the greater the likelihood that these rights will at some point conflict with other rights or interests; therefore there will be a need to balance the rights . . . in order to arrive at the most reasonable solution.”³⁴ Thus, proportionality review allows judges to double-check the balancing already performed by officials in a theoretically limitless array of situations, not just those that involve the most fundamental rights. For instance,

³⁰ Cohen-Eliya & Porat, *supra* note 22, at 461–62.

³¹ See e.g., HCJ 73/53 Kol Ha'Am Company v. Minister of the Interior 2 [1953] (Isr.), <http://www.dindayan.com/rulings/53000730.z01.pdf>; HCJ 153/83 Levi v. Southern District Police Commander [1984] (Isr.), <http://www.dindayan.com/rulings/83001530.z01.pdf> (conflict between freedom of expression and preserving public peace).

³² HCJ 501/96 Horev v. Minister of Transp. 51(4) PD 153, 246–47 [1997] (Isr.), http://elyon1.court.gov.il/files_eng/96/160/050/A01/96050160.a01.htm.

³³ Cohen-Eliya & Porat, *supra* note 22, at 481.

³⁴ *Id.* (alteration in original).

the German Constitutional Court, one of the forerunners of proportionality analysis, considered riding horses in forested areas, feeding pigeons, smoking marijuana, and obtaining the permission to import certain breeds of dogs, as interests that should be protected as constitutional rights.³⁵ Thus, proportionality review expands the rights that a national court will protect by affording protection for rights beyond strictly “fundamental rights.”

By contrast, in the American constitutional system, one of the few jurisdictions that still does not fully use proportionality review,³⁶ Supreme Court justices will only consider government infringement on rights preserved in the Bill of Rights or in Supreme Court jurisprudence that defines a given right as fundamental.³⁷ American constitutional culture declares that government officials have the publicly granted right and authority to limit non-fundamental rights; non-democratically elected judges have no power to second guess government decisions that steer clear of fundamental rights.³⁸ If the American Supreme Court would choose to expand protected rights beyond only those “fundamental rights,” its analysis of upcoming cases could look different. In upcoming cases, the Court will analyze the issue of forcing objecting business owners to purchase insurance for contraception devices against their religious convictions.³⁹ These cases may turn on whether forcing such insurance coverage is actually a violation of freedom of religion or another fundamental right. However, if the Court would employ a proportionality scheme that expands protected rights beyond strictly

³⁵ *Id.* at 478–79.

³⁶ Sweet & Matthews, *supra* note 8, at 74.

³⁷ See generally *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965) (holding that right to privacy in marriage is a fundamental right protected by the Constitution).

³⁸ Cohen-Eliya & Porat, *supra* at 22, at 476 n.45, 479 (2011) (“A culture of authority implies a political division of labor: the existence of distinct institutions for distinct spheres of public life, each best equipped to act in its sphere, and accountable for its actions within that sphere.”). See Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 869 (2009) (describing the U.S. governmental system as one “whose hallmark is supposed to be the separation of powers”); see also *Secretary of State v. Rehman*, [2001] UKHL 47 ¶ 62 (“[I]n matters of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security. It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove.”).

³⁹ Frederick Mark Gedicks, *Exemptions from the ‘contraception mandate’ threaten religious liberty*, WASH. POST (Jan. 15, 2014), http://www.washingtonpost.com/opinions/exemptions-from-the-contraception-mandate-threaten-religious-liberty/2014/01/15/f5cb9bd0-7d79-11e3-93c1-0e888170b723_story.html.

fundamental rights, then answering the question of whether forcing this insurance coverage breaches a fundamental right would not prevent the case from moving forward.

2. *A Second Look at Controversial Decisions*

Even when the American government tampers with a fundamental right, the Supreme Court's greatest check on government power involves strict scrutiny, which requires that the ends are narrowly tailored to the means.⁴⁰ This compares to the "least restrictive means test"⁴¹ in proportionality: did the government achieve its compelling goal in a way that restricted rights in the least possible way?⁴² However, the American Supreme Court will not consider *reducing* that compelling goal if harm to rights can be further reduced.⁴³

This reluctance to reduce the government's goal—in essence, this reluctance to correct the government on how it chooses to balance different rights and values—stems from the American "culture of authority," where the Court authorizes narrowly tailored policy decisions on the theory that the American populace authorized their officials to make that balance.⁴⁴ In a culture of authority, non-elected judges do not have the authority to reconsider balances between rights, and so they do not tamper with those who had the authority to make this balance.⁴⁵ On the other hand, in nations that employ proportionality review, the Court has the freedom to re-evaluate controversial decisions of the executive or legislature to determine whether the government reached such decisions through rational deliberation or political coercion.

⁴⁰ See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 546 (1997).

⁴¹ See, e.g., *id.* at 529.

⁴² See, e.g., *Gutter v. Bollinger*, 539 U.S. 306, 339–43 (2003) (holding that considering race in school admissions passes the least restrictive means tests where the purpose is to achieve student body diversity, which is a compelling state interest).

⁴³ *But see* *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 388 (2002) (Breyer, J., dissenting) ("[The Court] has examined the restrictions' proportionality, the relation between restriction and objective, the fit between ends and means.").

⁴⁴ Cohen-Eliya & Iddo Porat, *supra* note 22, at 475. *But see* HCJ 5016/96 Horev v. Minister of Transportation 51(4) PD 153, 207 [1997] (Isr.) ("[A] democratic system prioritizes human rights above all else. Democracy is not merely formal democracy—the 'rule book conception,' according to which decisions are left to majority will. Rather, democracy is substantive—the 'rights conception,' according to which the majority is precluded from infringing on human rights.").

⁴⁵ Cohen-Eliya & Porat, *supra* note 22, at 479.

3. *Diffusing Political Strife*

By expanding the set of protected rights, proportionality review also helps diffuse national political strife. A constitutional court may be drawn to usurp certain “foreign” rights for the sake of other more homegrown rights based on text, tradition, and the authority of democratically elected officials.⁴⁶ When certain values categorically trump others, the losing party feels unrepresented and perhaps disrespected.⁴⁷ By requiring a balance of *all* values and rights, proportionality review prevents certain more culturally entrenched rights from swallowing newer, imported rights and needs.⁴⁸ Proportionality review thereby diffuses politically charged conflicts by examining the facts and circumstances of every case where rights have been limited and avoids “rhetorical exaggeration” of which right a society cherishes more.⁴⁹

In a related way, proportionality review diffuses political strife by transforming a debate about values into a rational trade-off between factual issues.⁵⁰ For example, the *Sunday Times Case*, heard in the European Court of Human Rights, balanced the right of the government to prevent the publication of information that would prejudice an ongoing lawsuit with the principle of freedom of expression and the public’s right to access important information (the case concerned a deadly drug that caused deformed births in much of the British population).⁵¹ In its review, the Court refused to determine the case based solely on which value was more important. Instead, the Court looked at the facts of the case: on the one hand, the potentially prejudiced case was essentially finished and in a “legal cocoon,”⁵² on the other hand, the facts of the case at issue involved a “disaster”⁵³ and a “matter of undisputed public concern.”⁵⁴ Thus, the Court ruled that, based on proportional standards, the

⁴⁶ *See id.*

⁴⁷ *See id.* at 466, 472.

⁴⁸ *See id.* at 469–70; H CJ 5016/ 96 Horev v. Minister of Transportation 51(4) PD 153, 207 [1997] (Isr.) (“[T]he stricter the separation between religion and state under a given system, and the more that the rights are set out in more ‘absolute’ terms, the more likely that such a system will prefer human rights to human feelings. Conversely, the more permeable the boundaries between religion and state, and the more a legal culture is predicated on a ‘relative’ conception of human rights, the greater significance it will attach to feelings as a proper ground for limiting human rights.”).

⁴⁹ Cohen-Eliya & Porat, *supra* note 22, at 470.

⁵⁰ *Id.* at 466.

⁵¹ *Case of the Sunday Times v. The United Kingdom (No.1)*, App. No. 6538/74, 30 Eur. Ct. H.R. (ser. A) at 34 (1979).

⁵² *Id.* ¶ 31.

⁵³ *Id.*

⁵⁴ *Id.* at 6.

British government must allow publication about the facts of the case, not solely because freedom of speech was fundamentally more valuable than the values of a fair trial, but because factually there was a much greater public benefit achieved by allowing the information to be published compared to the small detriment of releasing information about a defunct case.⁵⁵ Through this ruling, the Court helped diffuse any political strife in British society between free speech values and the values of a fair trial. Instead, the Court deconstructed the issue into its basic components and allowed for the dispute to be resolved through a factual assessment.⁵⁶

4. *Legal Black Holes*

Nations that do not use proportionality review tend to authorize infringements on rights based on technical discussions of standing and separation of powers.⁵⁷ The United States has denied protections based on these technical situations.⁵⁸ Former HCJ Chief Justice Aharon Barak describes this legal practice as creating “black holes” in the law.⁵⁹ A court practicing proportionality review largely fills in these black holes.⁶⁰ For instance, Justice Barak stated in a more recent case that the HCJ “does not

⁵⁵ *Id.* ¶ 67.

⁵⁶ *See* Case of the Sunday Times v. The United Kingdom (No.1), App. No. 6538/74, 30 Eur. Ct. H.R. (ser. A) ¶ 65 (1979).

⁵⁷ *See generally* Ex parte McCardle, 74 U.S. 506 (1868); Medellín v. Texas, 552 U.S. 491 (2008).

⁵⁸ *See generally* Ex parte McCardle, 74 U.S. 506 (1868); Medellín v. Texas, 552 U.S. 491 (2008). On the question of whether certain foreign nationals had a constitutional right to retrial after being denied rights to access their foreign consul, the Court held that such rights were not guaranteed because only a presidential memorandum demanded such a retrial, and “the President’s Memorandum [does not] constitute directly enforceable federal law that pre-empts state limitations on the filing of successive habeas petitions.” Because of an arguably technical aspect of the separation of powers, the Court was comfortable denying these foreign nationals a basic right of customary international law, memorialized by the Vienna Convention on Consular Relations. *Id.*

⁵⁹ AHARON BARAK, A JUDGE IN A DEMOCRACY 194 (2006). *See also* Eileen Kaufman, *Deference or Abdication: A Comparison of the Supreme Courts of Israel and the United States in Cases Involving Real or Perceived Threats to National Security*, 12 WASH. U. GLOBAL STUD. L. REV. 95, 96 (2013) (“The Israeli Supreme Court summarily rejects the political question doctrine and treats challenges to the legality of military conduct as justiciable, whereas the United States Supreme Court typically declines to hear cases involving ongoing military actions. Additionally, the Israeli Supreme Court rarely utilizes a state secrets privilege, whereas the United States Supreme Court embraces the doctrine, which often immunizes illegal governmental action.”); John P. Blanc, *A Total Eclipse of Human Rights—Illustrated by Mohamed v. Jepsen Dataplan, Inc.*, 114 W. VA. L. REV. 1089, 1090 (2012) (“[T]he federal judiciary has allowed human rights to be eclipsed by the national security interests pursued by the Executive Branch. . . . In giving excessive deference to the Executive Branch’s claims of privilege under the judicially-created ‘state secrets doctrine,’ the federal judiciary has undertaken a ‘complete abandonment of judicial control . . . lead[ing] to intolerable abuses.’”) (quoting *United States v. Reynolds*, 345 U.S. 1, 8 (1953)).

⁶⁰ Cohen-Eliya & Porat, *supra* note 22, at 477.

refrain from judicial review merely because the military commander[']s . . . actions have political and military ramifications.”⁶¹ A great number of HCJ decisions have unswervingly followed this approach.⁶² Cohen-Eliya and Porat attribute the HCJ’s tenacity in reviewing even the most controversial issues and policies of Israeli national security under the judicial microscope to Israel’s culture of proportionality review.⁶³

Such constitutional culture stands in contrast to judicial attitudes in the United States. For instance, in *Al-Aulaqi v. Obama*, a dual U.S.-Yemenese citizen was placed on a targeted killing “kill list” allegedly authorized by the United States and its Central Intelligence Agency, despite that he had been charged with no crime and was only suspected of conspiring with the terrorist group *Al Qaeda*.⁶⁴ The plaintiffs brought the charge against the U.S. Government, but the District Court for the District of Columbia declined to hear the case on the grounds that “any judicial determination as to the propriety of a military attack on Anwar Al-Aulaqi would “require this court to elucidate the . . . standards that are to guide a President when he evaluates the veracity of

⁶¹ HCJ 7957/04 Mara’abe v. The Prime Minister of Israel 60(2) PD 477 1, 23 (2005).

⁶² Guy Davidov & Amnon Reichman, *Prolonged Armed Conflict and Diminished Deference to the Military: Lessons from Israel*, 35 L. & SOC. INQUIRY 919, 921 (2010) (noting a “dramatic decline in the deference accorded to the military commander by the Supreme Court.”).

⁶³ Cohen-Eliya & Porat, *supra* note 33, at 470. See also Eur. Consult. Ass., *Guidelines of the Comm. of Ministers of the Council of Europe on Human Rights and the Fight Against Terrorism*, 804th Meeting 8–9 (2002) (“All measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment, and must be subject to appropriate supervision. . . . When a measure restricts human rights, restrictions must be defined as precisely as possible and be necessary and proportionate to the aim pursued. . . . Within the context of the fight against terrorism, the collection and the processing of personal data by any competent authority in the field of State security may interfere with the respect for private life only if such collection and processing, in particular: (i) are governed by appropriate provisions of domestic law; (ii) are proportionate to the aim for which the collection and the processing were foreseen; (iii) may be subject to supervision by an external independent authority. . . . Measures used in the fight against terrorism that interfere with privacy (in particular body searches, house searches, bugging, telephone tapping, surveillance of correspondence and use of undercover agents) must be provided for by law. It must be possible to challenge the lawfulness of these measures before a court. Measures taken to fight terrorism must be planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force and, within this framework, the use of arms by the security forces must be strictly proportionate to the aim of protecting persons against unlawful violence or to the necessity of carrying out a lawful arrest.”); *McCann and Others v. United Kingdom*, App. No. 18984/91, 21 Eur. Ct. H.R.48 (1995) (“[T]he Court must carefully scrutinise, as noted above, not only whether the force used by the soldiers was strictly proportionate to the aim of protecting persons against unlawful violence but also whether the anti-terrorist operation was planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force.”).

⁶⁴ *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 4, 6 (D.D.C. 2010).

military intelligence,” an undertaking forbidden by the American “political question doctrine.”⁶⁵

Thus, the benefits offered by proportionality review include expanding the array of constitutional rights; increasing sensitivity to minority values by reframing issues as factual disputes, thereby avoiding alienating minority values; and filling in legal “black holes.”⁶⁶

II. HOREV

The HCJ’s decision in *Horev* illustrates these benefits of proportionality review.⁶⁷ In *Horev*, the HCJ examined the constitutionality of a government ban on driving through a religious neighborhood on the Sabbath.⁶⁸ The traffic municipality instituted this ban because commuters greatly offended the religious feelings of the neighborhood dwellers.⁶⁹ This ban only added a two-minute detour to travel time for commuters, besides those living on Bar Ilan street.⁷⁰ Nevertheless, the issue sparked “bitter debate” between religious and secular Israelis and aggravated “deep-seated political disputes” about the separation of religion and state in Israel.⁷¹ The Court held that the ban passed Constitutional muster and was proportional because the detriment of the two-minute detour was minimal when compared to the great harm to religious feelings that would result if the ban were lifted.⁷²

The case presents a clear example of the ways in which proportionality review can expand the array of rights that a court will consider, thereby diffusing political strife by including and giving voice to minority or fringe values.

⁶⁵ *Id.* at 70 (quoting *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 846 (D.C. Cir. 2010)). See also Stephanie Blum, *Preventative Detention in the War on Terror: A Comparison of How the United States, Britain, and Israel Detain and Incapacitate Terrorist Suspects*, 4 HOMELAND SECURITY AFFAIRS 3 (2008) (“[B]oth Israel and Britain have almost always had an explicit role for judicial review before subjecting the suspect to prolonged preventive incapacitation whereas President Bush has asserted that the executive branch can alone resolve factual disputes and determine whether an individual is an enemy combatant based on intelligence reports without any opportunity for the detainee to respond.”).

⁶⁶ Cohen-Eliya & Porat, *supra* note 22, at 477.

⁶⁷ HCJ 5016/96 *Horev v. Minister of Transp.* 51(4) PD 153, 214 [1997] (Isr.).

⁶⁸ *Id.* at 165.

⁶⁹ *Id.*

⁷⁰ *Id.* at 172.

⁷¹ *Id.* at 161.

⁷² *Id.* at 246.

A. *Expanded Rights and Diffusing Political Strife*

First, the Court held that a broad array of rights earned protection under HCJ scrutiny, even rights not formally enshrined in the Basic Laws (Israel's equivalent of a Bill of Rights).⁷³ According to Chief Justice Barak "whether the violation relates to rights 'covered' by the two Basic Laws or not is equally irrelevant."⁷⁴ This statement demonstrates the HCJ's default approach of expanding the array of constitutionally protected rights beyond those explicitly mentioned in text.⁷⁵ The Court takes the position that it must protect all values of the State of Israel, a "Jewish and democratic state."⁷⁶ This position flows from the text of the Basic Laws, which states that its purpose "is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state."⁷⁷ The Court reads this clause as permission to scrutinize any legislation or order that conflicts with a broad set of values. As mentioned, by expanding the set of protected values, the Court invites proportionality review, as "[t]he broader the conception of rights becomes, the greater the likelihood that these rights will at some point conflict with other rights or interests; therefore there will be a need to balance the rights and interests involved in order to arrive at the most reasonable solution."⁷⁸

In the Court's view, the Sabbath traffic did not restrict the worshippers' freedom of religion but rather their religious feelings.⁷⁹ The Basic Laws did not specifically protect religious feelings.⁸⁰ Nevertheless, the Court analyzed

⁷³ HCJ 5016/96 Horev v. Minister of Transp. 51(4) PD 153, 200 [1997] (Isr.).

⁷⁴ *Id.* See also Stavros Tsakyrakis, *Proportionality: An Assault on Human Rights?* 7 (Jean Monet Program, Working Paper No. 09/08, 2008) ("It should be noted that in the crudest balancer's view, there cannot be any concept of fundamental rights having priority over other considerations.")

⁷⁵ HCJ 5016/96 Horev v. Minister of Transp. 51(4) PD 153, 200 [1997] (Isr.) ("[I]t has always been our position that legislation includes both general and specific purposes. The general purposes are the values of the State of Israel as a Jewish and democratic state; the specific purposes refer to the specific proper purpose specified by the limitation clause).

⁷⁶ Basic Law: Human Dignity and Liberty 5752–1992, 1391 LSI 150, § 10 (1992) (Isr.), available at http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm.

⁷⁷ *Id.*

⁷⁸ Moshe Cohen-Eliya & Iddo Porat, *Proportionality and the Culture of Justification*, 59 AM. J. COMP. L. 463, 481 (2011).

⁷⁹ HCJ 5016/96 Horev v. Minister of Transportation 51(4) PD 153, 218 [1997] (Isr.) ("[L]et it be emphasized that I am not convinced that Sabbath traffic on Bar-Ilan Street infringes the freedom of religion of the residents. These residents are free to observe the religious commandments. Sabbath traffic does not serve to deny them this freedom.")

⁸⁰ See Basic Law: Human Dignity and Liberty 5752–1992, 1391 LSI 150, § 10 (1992) (Isr.), available at http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm.

whether religious feelings deserved protection as a Jewish and democratic right. To preserve the peace and quiet of their day of rest, the respondents had requested that traffic be blocked off completely from their street.⁸¹ The Court analyzed their request by looking at the Sabbath in the context of Jewish religion and history:

Deprive Judaism of the Sabbath, and you have deprived it of its soul, for the Sabbath comprises the very essence of Judaism's nature. Over the generations, throughout its blood-soaked history,⁸² our nation has sacrificed many [lives] in the name of the Sabbath.

The Chief Judge is not a religious person,⁸³ yet, he entered into the mindset of religious people to understand and respect the protection that they requested. He described the subjective experience of a religious Sabbath, placed the Sabbath in the context of a national history and ethos, and even looked at the issue through an ancient religious text,⁸⁴ all to look through the lens of the respondent and to respect their position. This move illustrates the Court's willingness to consider all rights and not to allow a majority view to automatically trump minority values.

Next, the Court analyzed whether religious feelings deserved protection as a democratic right. The Court reasoned that since it would restrict certain fundamental rights to prevent physical harm—for instance, limiting the right to protest⁸⁵—then it would also protect religious feelings:

A democratic society, which is prepared to restrict rights in order to prevent physical injury, must be equally sensitive to the potential need for restricting rights in order to prevent emotional harm, which, at times, may be even more severe than physical injury. A democratic

⁸¹ HCJ 5016/96 Horev v. Minister of Transp. 51(4) PD 153, 165 [1997] (Isr.).

⁸² *Id.* at 201.

⁸³ See Ilan Marciano, *MK Ravitz: Barak made secularism a religion*, YNET NEWS.COM (Nov. 1, 2013), <http://www.ynetnews.com/articles/0,7340,L-3303877,00.html>.

⁸⁴ HCJ 5016/96 Horev v. Minister of Transportation 51(4) PD 153, 201 [1997] (Isr.). Later in the opinion, the Court stated: “Our Rabbis, of blessed memory, described this special atmosphere as the additional soul which man is granted upon the entrance of the Sabbath, which leaves him as it exits. Babylonian Talmud, Tractate Beitza 16a, [110]. This rest is intended to bring the routine of daily life to a halt, and relieve man of daily worries. . . . A crowded street that traverses the heart of the neighborhood, with the sounds of honking and engines, stands in stark contrast to the Sabbath atmosphere, as the majority of the local residents understand it.” *Id.* at 224. This analysis through the lens of a religious Judaism shows the Court's sensitivity to a broad range of values, even those not held by the Justices themselves.

⁸⁵ HCJ 153/83 Alan Alevi and Yaheli Amit v. Southern Dist. Police Commander 38(2) PD 1, 1–2 [1984] (Isr.).

society seeking to protect life, physical integrity and property, must also strive to protect feelings.⁸⁶

The Court also noted that protecting this right was in the “public interest in preserving the public peace and public order.”⁸⁷

Thus, the Court determined that the religious feelings of the respondents deserved protection as a Jewish and democratic rights, despite the fact that such feelings were not specifically enshrined in the Basic Laws.⁸⁸ Such analysis helped to “[lower] the stakes of politics” and avoided favoring certain rights over others in a categorical fashion.⁸⁹ The Court recognized a need to protect a right, even if that right was not important to a clear majority of the population, or a fundamental right protected by the Basic laws, and thereby prevented a majority rule from swallowing up minority rights.⁹⁰

B. Systematic Approach and Pre-Balance Weighing of the Rights

Having determined that religious feelings deserved protection, the Court turned next to balancing those feelings against the petitioner’s freedom of movement.⁹¹ The Court’s approach to this balancing act demonstrates a consistent and systematic method and models what proportionality review can achieve. Most notably, the Court engages in a systematic comparison of the conflicting rights before attempting to balance them against one another.⁹² This difference in analytical approach before balancing stands in contrast to the approach in *Beit Sourik* and similar cases, where virtually no discussion of the relative value of rights occurred before the balancing process.⁹³

⁸⁶ HCJ 5016/96 Horev v. Minister of Transp. 51(4) PD 153, 203 [1997] (Isr.).

⁸⁷ *Id.* at 220.

⁸⁸ *See id.* at 206, 207; *see also* *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (finding a constitutionally protected right to privacy despite its absence from the Bill of Rights).

⁸⁹ Cohen-Eliya & Porat, *supra* note 22, at 466 (alteration in original).

⁹⁰ *But see* HCJ 5016/96 Horev v. Minister of Transp. 51(4) PD 153, 203–04 [1997] (Isr.) (“Democracy is not merely formal democracy—the ‘rule book conception,’ according to which decisions are left to majority will. Rather, democracy is substantive—the ‘rights conception,’ according to which the majority is precluded from infringing on human rights.”).

⁹¹ HCJ 5016/96 Horev v. Minister of Transportation 51(4) PD 153, 209 [1997] (Isr.).

⁹² *Id.* at 209–12.

⁹³ *See* HCJ 2056/04 Beit Sourik Village Council v. Gov. Isr. 58(5) PD 1, 24 [2004] (Isr.). Paragraphs 51 through 81 layout a detailed proportionality analysis weighing the security benefits of different sections of Israel’s security fence against the detriment to human rights in each of those sections. *Id.* at 31–43. Neither in these paragraphs nor anywhere else in the opinion where in the opinion does the Court engage in a pre-balance evaluation of the relative importance of those rights.

In this case, the Court recognized the need to assess the relative importance of the rights before balancing them so that the weighing process could be rational.⁹⁴ The Court's decision to proceed in this manner bears explanation.

The Court assessed the relative social importance of the different values before weighing them because different principles and freedoms carry different weight in society. Because the Court was “balancing between conflicting interests and values”⁹⁵ and “placing competing values on the scale”⁹⁶ and weighing them, it had to assess the relative weight of the rights in question before balancing them. As the Court stated, “balance on the basis of weight necessarily implies a social assessment of the relative importance of the different principles” before the balancing process.⁹⁷

For instance, if the value of protecting religious feelings was not so important in the first place, then a significant amount of hurt feelings would not necessarily justify a moderate restriction on the right to free movement. Conversely, if religious feelings were important, then perhaps protecting a moderate degree of hurt feelings would justify a moderate restriction on freedom of movement. Interestingly, this procedure retreats somewhat from the benefit mentioned earlier, that of avoiding political strife by avoiding ranking certain rights over others.⁹⁸ On the other hand, it appears to be a necessary move for courts employing proportionality review, in order to ensure that the process is rational and represents a fair trade-off between benefits and detriments.⁹⁹

The Court would not only have to assess the importance of rights before a proportionality review; the Court would also have to assess these rights relative to one another.¹⁰⁰ As the Court cited from an earlier case: “[a] social value,

⁹⁴ HCJ 5016/96 Horev v. Minister of Transp. 51(4) PD 153, 197–98 [1997] (Isr.) (“[T]he process of placing competing values on the balancing scales . . . does not establish criterion or value weights to assist in performing the interpretative task.”) (citing FH 9/77 Israel Electric Co. v. “Ha’aretz” Newspaper Publications 32(3) PD 337, 361 (Isr.)).

⁹⁵ *Id.* at 193.

⁹⁶ *Id.* “This was the Court’s approach regarding the conflict between freedom of expression and preserving public peace” *Id.*

⁹⁷ *Id.* at 198 (citing HCJ 14/86 Laor v. Film and Play Review Board 41(1) PD 421, 434 (Isr.)).

⁹⁸ See Part I.A.iii.

⁹⁹ See Moshe Cohen-Eliya, *The Formal and the Substantive Meanings of Proportionality in the Supreme Court’s Decision Regarding the Security Fence*, 38 ISR. L. REV. 262, 267 (2005) (“[Proportionality] analysis is in fact based on a calculation of [] the relative importance of the conflicting values and the impact of the infringement on each of these values.”).

¹⁰⁰ HCJ 5016/96 Horev v. Minister of Transportation 51(4) PD 153, 192 [1997] (Isr.).

such as freedom of expression, does not have ‘absolute weight’.”¹⁰¹ The weight of any social principle is relative. The status of any fundamental principle is always assessed in relation to that of other principles with which it is likely to conflict.¹⁰² Thus, the Court determined that a generalized standard for balancing between religious feelings and freedom of movement would have to be found.¹⁰³ The Court would have to determine how to value religious feelings as compared to the freedom of movement before beginning to balance them against each other. This would provide the Court with three fundamental benefits.

First, assessing the relative weights of these rights would provide guidance when facing a similar case in the future.¹⁰⁴ Second, this assessment would allow the Court to formulate a “rational principle” that would guide its balancing process.¹⁰⁵ Deciding a certain trade-off between competing rights and values gains more credibility when judges are realistic and open about the relative importance of those values. Thus, for instance, speed limits aim at protecting life, but they restrict the freedom of speeding on the highway. Any proportionality review that would weigh the benefits of speed limits against the detriment of restricting “speeding rights” would have to assess the relative weight of life and speeding. As many scholars have noted, courts employing proportionality review determine whether a rights-limiting action promotes a given, axiomatic system of constitutional principles; therefore, these courts must first determine the relative weights of the values in question to determine where they fall within that system, to determine the best way to promote the overall constitutional scheme of rights.¹⁰⁶ Third, through this pre-balancing assessment of the relative value of rights, the Court would proceed according to a “substantive criteria, which is neither paternalistic nor accidental.”¹⁰⁷ By assessing, in a standardized and procedural way, the relative importance of goals and rights before balancing, the Court assured that its decision would not merely reflect personal conviction or taste but a fair and objective balance

¹⁰¹ *Id.* at 194 (citing CA 105/92 Reem Engineers and Contractors Ltd. V. Municipality of Upper Nazareth 47(5) IsrSC 189, 205 (Isr.)).

¹⁰² ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 50–56 (Julian Rivers trans., Oxford Univ. Press 2002). *See also The Margin of Appreciation*, COUNCIL OF EUROPE (Feb. 11, 2014), http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/ECHR/paper2_en.asp (“The final decision on how much latitude is to be given to national authorities depends on the weight the Court attaches to . . . the nature of the right[s]”).

¹⁰³ HCJ 5016/96 Horev v. Minister of Transp. 51(4) PD 153, 198 [1997] (Isr.).

¹⁰⁴ *Id.* at 196.

¹⁰⁵ *Id.*

¹⁰⁶ Cohen-Eliya & Porat, *supra* note 22, at 470.

¹⁰⁷ HCJ 5016/96 Horev v. Minister of Transp. 51(4) PD 153, 196 [1997] (Isr.).

between competing claims, rooted in precedent determining the relative importance of rights.

The following discussion of the *Horev* case will highlight how the Court balanced the relative importance of the rights and goals at issue in a systematic way based on reasoning and precedent.

C. *Threshold of Tolerance*

Before beginning to balance the different rights, the Court sought a limiting principle to determine how much protection of religious feelings could limit freedom of movement. When other more fundamental rights infringe on protected feelings, the Court would not restrict those rights so that they “eventually disappear.”¹⁰⁸ Rather, the Court would only restrict more fundamental rights for the sake of feelings when those feelings were hurt beyond a “threshold of tolerance.”¹⁰⁹ The Court cited older cases where it balanced the protection of feelings against the freedom of speech to lay down this “threshold of tolerance” test.¹¹⁰ This threshold represents the risk of hurt feelings that democratic citizens accept in exchange for living in a free culture.¹¹¹

In other older cases, the Court dealt with “a horizontal clash between two conflicting human rights” of equal value¹¹² and therefore did not engage in a preliminary determination of whether the rights could be balanced against each other in the first place.¹¹³ But here, freedom of movement outweighed

¹⁰⁸ *Id.* at 204 (“If we were to restrict freedom of expression each time that feelings were hurt, freedom of expression would eventually disappear.”) (citing HCJ 953/89 *Indoor v. Mayor of Jerusalem* 45(4) PD 683, 690 (Isr.)).

¹⁰⁹ *Id.* at 206.

¹¹⁰ *Id.* at 204, 205. *See also* HCJ 806/88 *Universal City Studios Inc. v. Films and Plays Censorship Bd.*, 43(2) PD 1, 21 [1989] (Isr.) (“It reflects, in my opinion, the conception that a democratic society, by its very nature and content, is based on tolerance of others’ opinions. In a pluralistic society tolerance is the one power allowing for shared existence. Thus, every member of the public takes upon himself the ‘risk’ of suffering some offence to his feelings in the course of free exchange of opinions.”).

¹¹¹ HCJ 5016/96 *Horev v. Minister of Transp.* 51(4) PD 153, 205 [1997] (Isr.).

¹¹² *Id.* at 220.

¹¹³ HCJ 1890/03 *Bethlehem Municipality v. State of Isr.* 59(4) PD 27–28 [2005] (Isr.) (“In the case before us, we are presented with a conflict between two basic rights of equal weight . . . both the freedom of worship and the freedom of movement have been recognized in our case law as being on the highest level of the scale of rights. . . . In addition, with regard to both of them an identical balancing formula has been applied in order to balance them against the same public interests. . . . The result implied by the conclusion that we are concerned with a conflict between two rights of equal weight is that the balance required in this case is a horizontal balance, which will allow the coexistence of both of these rights.”).

protection of feelings in general.¹¹⁴ The Court therefore would have to determine whether the offense to feelings was severe enough even get on the scale against another heavily weighted right.¹¹⁵

In this move, the Court showed that before it balances rights, it focuses on the specific nature of those rights. The Court classified and ranked values to set up the most rational balancing process. Not all rights would deserve equal protection; rather, they would require more or less weight, depending on their nature.¹¹⁶ According to the Court, the nature of protected feelings is that, in general, their value does not even compare to more fundamental rights unless there is breach of the “threshold of tolerance” described above.¹¹⁷ Only then can there even be a discussion of a proportionality review between them.¹¹⁸ Thus, the greater weight of freedom of movement and the lesser weight of protected feelings significantly influenced the Court’s proportionality review.

The Court did not determine the relative weight of these rights arbitrarily. The Court derived the “threshold of tolerance” analysis from earlier cases dealing with balancing feelings against free speech.¹¹⁹ Because free speech and free movement held equal weight as fundamental rights, and because protection of feelings required a threshold of tolerance to limit free speech in a previous case, therefore in the present case, protection of feelings required a threshold of tolerance to limit freedom of movement.¹²⁰ The Court displayed here a principled, almost quantitative method of analysis based on precedent. All questions of balancing hurt feelings against the heaviest fundamental rights would garner similar treatment under a consistently applied “threshold of tolerance” analysis.

The Court further fleshed out this “threshold of tolerance” test and gave it more nuance, holding that only “severe, serious, and grave offenses” to feelings could justify a limitation on certain fundamental rights.¹²¹ By further limiting the situations where hurt feelings could limit the freedom of

¹¹⁴ HCJ 5016/96 Horev v. Minister of Transp. 51(4) PD 153, 192–93 [1997] (Isr.).

¹¹⁵ *Id.* at 193 (“[A] decision’s reasonableness is assessed by balancing between competing values, according to their respective weight” but “there are some interests against which there can be no balancing”).

¹¹⁶ HCJ 5016/96 Horev v. Minister of Transp. 51(4) PD 153, 208 [1997] (Isr.).

¹¹⁷ *Id.* at 204, 206–07.

¹¹⁸ *Id.* at 206.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 208–09.

¹²¹ *Id.* at 209.

movement, the Court further emphasized the great importance of freedom of movement relative to religious feelings.

Again, the Court approached the discussion of the relative importance of the rights in systematic fashion. The Court explained that the “threshold of tolerance” analysis does not apply equally in all situations, but rather is “a function of the right and infringement in question.”¹²² Justice Zamir stated in *Temple Mount Faithful v. Government of Israel*:

The threshold of tolerance for feelings, is neither set nor identical in every situation. The threshold depends, *inter alia*, on the identity of the conflicting right. For instance, the threshold may vary depending on whether the right in question is a basic right, such as freedom of expression, or a material, financial interest. Thus, while the threshold can be quite high if protecting feelings requires infringing the freedom of expression, it may be lower regarding infringements on property.¹²³

Thus, the threshold of tolerance for hurt feelings changes depending not only on whether it is being balanced against a fundamental right, but also on the level of importance of the fundamental right that has been limited to protect such feelings.¹²⁴

In *Horev*, the limited right was the right to freedom of movement. The Court cited earlier cases demonstrating the importance of freedom of movement as “a natural right, recognized as self-evident in every country boasting a democratic regime,”¹²⁵ that was “of equal value and weight” with freedom of expression,¹²⁶ both of which “may be called ‘superior’”¹²⁷ and are granted a “consecrated place of honor in the temple of basic human rights.”¹²⁸ Because freedom of movement is “a freedom at the pinnacle of human rights in Israel”¹²⁹ and is such a basic, fundamental right compared to protection of religious feelings, “only severe, serious, and grave offense to another’s feelings can justify the infringement of a basic human right,” such as freedom of

¹²² *Id.* at 206.

¹²³ *Id.* at 206–07 (citing HCJ 7128/96 *Temple Mount Faithful v. Gov’t of Isr.* 51(2) PD 509, 521 [1997] (Isr.)).

¹²⁴ Implicitly, to the HCJ, not all fundamental rights are of equal importance.

¹²⁵ HCJ 111/53 *Kaufman v. Minister of the Interior* PD 534, 536 [1953] (Isr.).

¹²⁶ HCJ 501/96 *Horev v. Minister of Transp.* 51(4) PD 153, 209 [1997] (Isr.) (citing HCJ 448/85 *Dahar v. Minister of the Interior* 40(2) PD 701, 708 [1986] (Isr.)).

¹²⁷ *Id.* (citing 153/83 *Levy v. S.D. Police Commander* 38(2) PD 393, 398 [1984] (Isr.)).

¹²⁸ *Id.* at 209–10.

¹²⁹ *Id.* at 213.

movement.¹³⁰ Thus, by adding further nuance to the threshold of tolerance test, the Court emphasized the great importance of freedom of movement relative to protected feelings. Moreover, the Court used precedent to determine the relative value of the rights, for instance, by comparing freedom of movement with freedom of expression.

D. Scope, Depth, and Probability

The Court added even further nuances, including scope, depth, and probability requirements, which further emphasized the relative importance of freedom of movement to protected feelings. To deserve protection when very high order fundamental rights are at issue, the affront to feelings must not only be “severe, serious, and grave,” but it must reach an appropriate “scope and depth.”¹³¹ The offense must hurt a sufficiently broad swath of the population, not just extreme minority groups, and it must constitute a deep offense immediately, not just minor irritations that spread out over many years become severely offensive.¹³² Moreover, the occurrence of the offense must be sufficiently probable in a given situation.¹³³ The Court recounted different probability standards for harms that would gain protection at the expense of other more important rights, based on the “magnitude of the various conflicting rights.”¹³⁴ Justice Barak noted in an earlier case:

[W]hen adopting the standard of probability one should not follow a general, universal criterion, since it depends on the force of the different values that come into conflict within a given legal context. . . . The question always is whether the measure of harm, weighed against the possibility that it may not actually occur, justifies violation of a civil right so as to prevent the danger.¹³⁵

Thus, by piling on standards and hurdles limiting the ability of protected feelings to infringe on freedom of movement, the Court emphasized the great importance of freedom of movement relative to protected feelings.

¹³⁰ *Id.* at 209.

¹³¹ *Id.* at 210 (citing HCJ 7128/96 Temple Mount Faithful v. Gov’t of Isr. 51(2) PD 509, 524–25 [1997] (Isr.)) (“The severity of the offensiveness is measured on two levels: its scope and its depth. First, the harm must be broad. It is therefore insufficient that one person or a small group with minority extreme opinions is offended.”).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 211 (citing EA 2/84 Neiman v. Chairman of the Elections Comm. 39(2) PD 225 [1985] (Isr.)); CrimA 126/62 Dissenchick v. Attorney Gen. 17 PD 169, 311 [1953] (Isr.); *id.* at 211–12 [1997] (Isr.) (citing 448/85 Dahar v. Minister of the Interior 40(2) PD 701, 708 [1986] (Isr.)).

¹³⁵ EA 2/84 Neiman v. Chairman of the Elections Comm. 39(2) PD 98 [1985] (Isr.).

Again, the determination of the relative importance of the conflicting values occurred systematically and according to Court precedent. The Court noted that when balancing hurt feelings against freedom of expression¹³⁶ and freedom of worship and freedom of conscience,¹³⁷ the Court required a “near certainty” or “proximately certain” probability of harm.¹³⁸ Likewise, because freedom of movement ranked equally with these other fundamental freedoms, they could only be limited by a “nearly certain” or “proximately certain” offense to religious feelings.¹³⁹ Thus, legal precedent determined the relative value of rights and the way unequal rights should enter the balancing equation. In this case, there was not even a question of probability in determining offense to religious feelings, as “absolute certainty” as to offense of religious feelings “was unequivocally proven.”¹⁴⁰

E. Summary

To summarize, the Court in *Horev* used multiple layers of tests and precedent before it began a proportionality review that balanced offended feelings against freedom of movement. These tests included a “threshold of tolerance,” a magnitude requirement, and a “scope, depth and probability” requirement. First, the court required that the offense to religious feelings passed a “threshold of tolerance” before it would limit any other right: the Court would only limit free movement rights for the sake of feelings if feelings were hurt beyond the normal risk a citizen takes by living in a free culture of conflicting ideas.¹⁴¹ Next, this breach against feelings had to be “severe, serious, and grave” in order to limit more fundamental rights such as freedom of movement and speech.¹⁴² Such fundamental rights were weighted equally based on precedent, and they only get on the scale against “severe, serious, and grave” offenses to feelings, again based on precedent. Finally, offenses to

¹³⁶ HCJ 73/53 Kol Ha'am v. Minister of the Interior 7(2) PD 24 [1953] 871; HCJ 5016/96 Horev v. Minister of Transp. 51(4) PD 153, 211 [1997] (Isr.)(citing HCJ 14/86 Laor v. Film & Play Review Bd. 41(1) PD [1987](Isr.); HCJ 806/88 Universal City Studios, Inc. v. Films & Plays Bd. 43(2) PD 26–27 [1989] (Isr.); HCJ 680/88 Schnitzer v. Chief Military Censor 42(4) PD 25 [1988] (Isr.).

¹³⁷ *Id.* (citing HCJ 7128/96 Temple Mount Faithful v. Gov't of Isr. 51(2) PD 509 [1997] (Isr.)); *id.* (citing HCJ 2725/93 Salomon v. Jerusalem Dist. Commander of Police 49(5) PD 366 [1995] (Isr.)).

¹³⁸ HCJ 680/88 Schnitzer v. Chief Military Censor 42(4) PD 25 [1988] (Isr.); EA 2/84 Neiman v. Chairman of the Elections Comm. 39(2) PD 99 [1985] (Isr.); HCJ 5016/96 Horev v. Minister of Transp. 51(4) PD 153, 211 [1997] (Isr.) (citing HCJ 448/85 Dahar v. Minister of the Interior 40(2) PD [1986](Isr.)).

¹³⁹ *Id.*

¹⁴⁰ HCJ 5016/96 Horev v. Minister of Transp. 51(4) PD 153, 227 [1997] (Isr.).

¹⁴¹ *Id.* at 209.

¹⁴² *Id.* at 210.

feelings could only limit these high order fundamental rights if they have enough “scope,” “depth,” and are “nearly certain” or “proximately certain” to occur. The offense to feelings must pass through four hurdles before the Court balances it against the highest fundamental rights.¹⁴³

These multiple layers of “pre-proportionality tests” are all designed to ensure that the Court determines the relative importance of the conflicting rights and values before balancing them against each other. Again, this determination is necessary, as a balance between rights must account for the relative difference between types of rights, as well as aim at promoting an overall scheme of Constitutional rights with certain rights ranked higher than others.¹⁴⁴ As the *Horev* case shows, the Court has the capacity to perform this pre-balancing analysis of rights in a reasoned fashion based on court precedent.

F. The Holding

The Court determined that the infringement on the respondents’ religious feelings were “severe, grave, and serious”¹⁴⁵ and sufficiently probable.¹⁴⁶ Thus the first sub-test was satisfied, that of a rational connection. Next, the Court analyzed whether the government employed the least restrictive means available.¹⁴⁷ The Court determined that the only way to limit freedom of movement in least restrictive manner while preserving religious feelings was to close Bar-Ilan street exclusively during prayer times, since the harm to religious feelings caused by noisy street traffic is inflicted mainly during prayer times.¹⁴⁸ To close the street for any more time would overly burden the freedom of movement and would not pass the least restrictive means test.¹⁴⁹ Finally, because this limited closure only caused a two-minute detour to

¹⁴³ *Id.* at 208–12.

¹⁴⁴ *See, e.g.,* Cohen-Eliya, *supra* note 4, at 267 n.18 (comparing the proportionality test with a German case: “An example of the way in which the values regime is implemented in Germany, is provided by the Mephisto case. In this case the court discussed the constitutional validity of a prohibition on the publication of a book. The book was based on the authentic image of a deceased theatrical actor. Who had in the past collaborated with the Nazi regime. The court examined the linkage between the conflicting values of freedom of speech on the one hand and of the actor’s reputation on the other and ruled that a person’s reputation is closer to the core of human dignity so that this right supersedes freedom of speech”).

¹⁴⁵ HCJ 5016/96 *Horev v. Minister of Transp.* 51(4) PD 153, 224–25 [1997] (Isr.).

¹⁴⁶ *Id.* at 226–27. In this case, there was not even a question of probability in determining offense to religious feelings: “Beyond ‘near certainty,’ absolute certainty was unequivocally proven. It was proven that the religious feelings and lifestyle of the local Ultra-Orthodox residents are in fact severely, gravely, and seriously offended by reason of traffic going through their neighborhood on Sabbaths and festivals.” *Id.*

¹⁴⁷ *Id.* at 227–28.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

motorists, the restriction against the freedom of movement survived the third narrow proportionality test.¹⁵⁰ The Court saw no need to judicially expand the right to freedom of movement against the right to religious feelings because the offense to freedom of movement was not excessive.¹⁵¹ *Horev* show that the Court will not activate the third proportionality test and re-hash the balance against rights when the damaged right has suffered only minimal damage.

The Court noted that the government was required to leave Bar Ilan street open to emergency security vehicles because Bar-Ilan was a main “traffic artery” to a major hospital.¹⁵² Even those two extra minutes of traffic time are “crucial when it comes to saving human lives.”¹⁵³ This last sentence deserves special attention, because in later cases, the Court showed that it is willing to sacrifice security akin to two “crucial” minutes of time necessary to save human lives.

The following discussion of the *Horev* decision demonstrated some of the main benefits of proportionality review. It showed how proportionality review diffuses political strife by expanding the array of rights that a court will protect. It also showed how proportionality review diffuses political strife by transforming bitter debates about the supremacy of values into a rational assessment of a trade-off between benefits and detriments. Finally, it demonstrates the Court engaging in a pre-balancing evaluation of rights and showed how that process ensures the rationality of proportionality review.

III. THE HCJ, NATIONAL SECURITY, AND HUMAN RIGHTS

The HCJ confronted more highly charged topics when discussing the human rights of Palestinians limited by Israeli security measures.¹⁵⁴ Beginning

¹⁵⁰ *Id.* at 228.

¹⁵¹ *Id.* at 228–29.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *See, e.g.*, HCJ 2056/04 Beit Sourik Village Council v. The Government of Israel PD [2004]. The HCJ's treatment of security/rights tradeoffs in the Israel/Palestinian conflict has stirred up extremely different responses; *see generally* Robert Nicholson, *Legal Intifada: Palestinian NGOs and Resistance Litigation in Israeli Courts*, 39 SYRACUSE J. INT'L L. & COM. 381 (2012) (arguing that litigation brought by Palestinian NGOs “is not just a struggle for human rights, but is in fact a campaign to use the courts to bring about regime change inside the country . . . these Palestinian NGOs work to abolish the Jewish state in favor of a binational “state of all its citizens.”). In contrast, “The decisions of Israel's High Court of Justice illustrate how the introduction of rights analysis into the context of occupation abstracts and extrapolates from this context, placing both occupiers and occupied on a purportedly equal plane. This move upsets the built-in balance of international humanitarian law (IHL), which ensures special protection to people living under occupation, and widens the justification for limiting their rights beyond the scope of a strict interpretation of IHL.” Aeyal M.

as early as 1982 and continuing until today, the HCJ has heard a growing caseload brought by NGOs claiming that military security action taken by the Israeli Defense Forces (IDF) and other actions by Israel's government have violated Palestinian human rights,¹⁵⁵ including home demolitions,¹⁵⁶ forced movement,¹⁵⁷ restriction on the freedom of movement,¹⁵⁸ access to land,¹⁵⁹ torture and inhumane prison conditions,¹⁶⁰ and targeted killings.¹⁶¹ In these cases, the ease of bringing a case (justiciability)¹⁶² despite the political and military implications of the holdings,¹⁶³ the ease of standing, and the sheer volume of cases heard by the HCJ demand attention. In a fairly recent case, the HCJ listed such judgments dealing with military and national security issues in the "thousands."¹⁶⁴

According to the majority opinion in the *Beit Sourik* case, "the principle of proportionality as a standard restricting the power of the military commander is a common thread running through [HCJ] case law."¹⁶⁵ However, the HCJ has not always employed consistent methods of evaluating rights before the balancing process. In some cases, the Court will evaluate the importance of

Gross, *Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?* 18 EUR. J. INT'L L. 1 (2007); see also Barak Cohen, *Democracy and the Mis-Rule of Law: The Israeli Legal System's Failure to Prevent Torture in the Occupied Territories*, IND. INT'L & COMP. L. REV. 35 (2001); Michael Sfar, *The Price of Internal Legal Opposition to Human Rights Abuses*, 1 J. HUM. RIGHTS PRAC. 1, 37, 39 (2009) ("[T]he Israeli Court's jurisprudence has systematically enhanced the power and authority of the Israeli Army and approved a wide range of abuses of the rights of the occupied population.").

¹⁵⁵ HCJ 2150/07 Abu Safiyeh v. Minister of Defense [2007] (Isr.).

¹⁵⁶ See, e.g., HCJ 358/88 Ass'n for Civ. Rights v. C.D. Commander 43(2) PD 529 [1989] (Isr.).

¹⁵⁷ HCJ 7015/02 Ajuri v. IDF Commander in West Bank 56(6) PD 352 [2002] (Isr.).

¹⁵⁸ HCJ 2150/07 Abu Safiyeh v. Minister of Defense PD [2007] (Isr.).

¹⁵⁹ HCJ 9593/04 Rashed Morar v. IDF Commander in Judaea and Samaria, 2 PD 56 [2004] (Isr.).

¹⁶⁰ Text of Supreme Court Decision on GSS Practices, JewishVirtualLibrary.org (Sept. 6, 1999), <http://www.asser.nl/upload/documents/20120419T094118-GSS%20practices%20-%20Judgment%20-%206-9-1999%20-%20Supreme%20Court%20Israel.pdf>.

¹⁶¹ HCJ 769/02 The Public Comm. against Torture in Isr. v. Gov. of Isr. 459 PD [2002] (Isr.).

¹⁶² HCJ 7957/04 Mara'abe v. The Prime Minister of Isr. 60(2) PD 477 (2005) (stating that when the decisions or acts of the military commander impinge upon human rights, they are "justiceable.").

¹⁶³ HCJ 769/02 Public Comm. against Torture in Isr. v. Isr. 459 PD 511 [1994] (Isr.).

¹⁶⁴ *Id.* at 511 ("Thousands of judgments have been given by the Supreme Court, which, in the absence of any other adjudicative instance, has addressed these issues.") Of further note, as the HCJ heard these cases, their deference toward the government and military decreased steadily; see Guy Davidov & Amnon Reichman, *Prolonged Armed Conflict and Deference to the Military: Lessons from Israel*, supra note 151 (finding that a "gradual but dramatic decline in the deference accorded to the military commander by the [Israeli] Supreme Court" based on the "continuation of the armed conflict and its aftermath, namely, the routinization and increase in the number of petitions by the civilian population.").

¹⁶⁵ HCJ 2056/04 Beit Sourik Village Council v. The Gov't of Isr. [2004] ("Indeed, the principle of proportionality as a standard restricting the power of the military commander is a common thread running through our case law.").

rights before balancing them against one another.¹⁶⁶ In other cases, the Court does not enter this discussion.¹⁶⁷

A. *Basis in International Law*

In general, the HCJ has applied the proportionality standard to questions of balancing security interests and human rights relating to Israel's occupation of the West Bank and Gaza by drawing on international law sources.¹⁶⁸ Particularly, the Court has relied on the Fourth Hague Convention Respecting the Laws and Customs of War on Land (1907).¹⁶⁹ The Court derived this proportionality test from Article 43 of the Regulations Respecting the Laws and Customs of War on Land of 1907, which obliges the occupying State to ensure, as far as possible, public order and safety;¹⁷⁰ and Article 27 of the Fourth Geneva Convention, which states that "Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices," but that "the Parties to the conflict [where one State occupies another] may take such measures of control and security in regard to protected persons as may be necessary as a result of the war."¹⁷¹ The HCJ has interpreted Article 27, which allows occupying military forces to limit rights for the sake of security "as may be necessary," to allow a proportionality analysis of such military actions to ensure that they are

¹⁶⁶ See HCJ 1890/03 Municipality of Bethlehem v. State of Israel 1–2 PD [2005].

¹⁶⁷ See HCJ 10356/02 Hess v. IDF Commander in West Bank 53 PD 60 [2004].

¹⁶⁸ HCJ 8276/05 Adalah v. Minister of Defence (2) IsrLR 352, 370–75 [2006] (citing Judith Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391 (1993)); Judith Gardam, *Legal Restraints on Security Council Military Enforcement Action*, 17 MICH. J. INT'L L. 285 (1996); Olivera Medenica, *Protocol I and Operation Allied Force: Did NATO Abide by Principles of Proportionality?*, 23 LOY. L.A. INT'L & COMP. L. REV. 329 (2001); Adam Roberts, *The Laws of War in the War on Terror*, 32 ISR. Y.B. HUM. RTS. 1999 (2002); J. S. Pictet, *Developments and Principles of International Humanitarian Law* 62 (1985). William Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MIL. L. REV. 91, 94 (1982) ("[T]here is a requirement for a subordinate rule to perform the balancing function between military and humanitarian requirements. This rule is the rule of proportionality."). HCJ 4764/04 Physicians for Human Rights v. The Commander of IDF Forces in Gaza, 58(5) PD 385, 391 ("Israel is not an isolated island. It is a member of an international system'. . . . The combat activities of the IDF are not conducted in a legal void. There are legal norms—some from customary international law, some from international law entrenched in conventions to which Israel is party, and some in the fundamental principles of Israeli law—which determine rules about how combat activities should be conducted.").

¹⁶⁹ HCJ 769/02 The Public Comm. against Torture in Israel v. Gov't of Israel (2) IsrLR 459, 467 [2006] (citing Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 27, Aug. 12, 1949).

¹⁷⁰ HCJ 2150/07 Abu Safiyeh v. Minister of Defense 22 [2007] (Isr.) (citing Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land art. 43, Oct. 18, 1907).

¹⁷¹ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 169.

“necessary.”¹⁷² The strict reading of the text allows the occupying power to take measures “necessary” to promote security and control; however, the HCJ has interpreted Article 27 to allow limitations of rights of protected persons as “necessary” measure for control and security to protect not only protected persons, but also to protect Israelis, even those living illegally in the West Bank.¹⁷³

B. Deference to the Military

To “ensure, as far as possible,” the human rights of Palestinians, the Court employs the three-prong proportionality test described above: finding a rational connection between the security measure and its goal, ensuring that the military commander employed the least restrictive means to achieve that goal, and reducing that measure’s scope if the restricted right can be greatly improved while only minimally decreasing the military’s goal. The military has the burden to prove these tests have been satisfied.¹⁷⁴ However, the proportionality of the measure is examined in relation to the purpose that the military commander is trying to achieve,¹⁷⁵ and “when the decision of the military commander relies upon military knowledge, the Court grants special weight to the military expertise of the commander of the area.”¹⁷⁶ Deference to

¹⁷² HCJ 769/02 *The Public Comm. Against Torture in Israel v. Government of Israel* (2) IsrLR 467, 484 [2006].

¹⁷³ HCJ 7957/04 *Mara’abe v. The Prime Minister of Israel* 60(2) PD 477, 14 [2005] (Isr.). (“The authority to construct a security fence for the purpose of defending the lives and safety of Israeli settlers is derived from the need to preserve public order and safety (regulation 43 of *The Hague Regulations*). It is called for, in light of the human dignity of every human individual. It is intended to preserve the life of every person created in God’s image. The life of a person who is in the area illegally is not up for the taking. Even if a person is located in the area illegally, he is not outlawed.”). *See also* HCJ 2150/07 *Abu Safiyeh v. Minister of Defense* PD 22–23 [2007] (Isr.). (“The duty of safeguarding “public order and safety” by virtue of art. 43 of the Hague Regulations is broad. It does not apply only to those individuals who are considered “protected persons”, but rather, to the entire population within the bounds of the Area at any given time, including residents of the Israeli settlements and Israeli civilians who do not reside within a territory under belligerent occupation (citing HCJ 10356/02 *Hess v. IDF Commander in West Bank* [2004] PD 58 (3) 443, 455).

¹⁷⁴ HCJ 9593/04 *Morar v. IDF Commander in Judaea and Samaria* (2) IsrLR 56, 72 [2006] (Isr.).

¹⁷⁵ *See id.*

¹⁷⁶ HCJ 7957/04 *Mara’abe v. The Prime Minister of Israel* 60(2) PD 477, 23 (2005) (Isr.); *see also* HCJ 2056/04 *Beit Sourik Village Council v. The Gov’t of Israel* PD 14 [2004] (“The military commander is the expert regarding the military quality of the separation fence route. We are experts regarding its humanitarian aspects. The military commander determines where, on hill and plain, the separation fence will be erected. That is his expertise. We examine whether this route’s harm to the local residents is proportionate. That is our expertise”); “The Supreme Court, sitting as the High Court of Justice, reviews the legality of the military commander’s discretion. Our point of departure is that the military commander, and those who obey his orders, are civil servants holding public positions. In exercising judicial review, we do not turn ourselves into experts in security affairs. We do not substitute the security considerations of the military commander with our own

the military flows partly from the Court's acute awareness of the actual security situation involved in the decisions. As Justice Barak stated in the *Beit Sourik* case:

We are members of Israeli society. Although we are sometimes in an ivory tower, that tower is in the heart of Jerusalem, which is not infrequently hit by ruthless terror. We are aware of the killing and destruction wrought by the terror against the state and its citizens. As any other Israelis, we too recognize the need to defend the country and its citizens against the wounds inflicted by terror.¹⁷⁷

While the Court affords deference to the military's expertise and knowledge, this deference usually only affects the first proportionality test of finding a rational connection.¹⁷⁸ The Court defers to the military that it has the knowledge and experience to know when a certain measure is rationally required to achieve a certain goal.

Despite this deference in the first stage of analysis, the Court sometimes does not give any added deference to the military for the second or third tests, as the cases below illustrate.¹⁷⁹ This decision speaks partly to the Court's desire to ensure that the rule of law and individual liberty take equal priority with security concerns.¹⁸⁰ However, by not even considering added deference

security considerations. We take no position regarding the way security affairs are run. Our task is to guard the borders and to maintain the boundaries of the military commander's discretion . . . It is true, that the security of the state is not a "magic word" which makes judicial review disappear. Thus, we shall not be deterred from reviewing the decisions of the military commander . . . simply because of the important security considerations anchoring his decision. However, we shall not substitute the discretion of the commander with our own discretion. We shall check the legality of the discretion of the military commander and ensure that his decisions fall within the 'zone of reasonableness.'). *Id.* at 27.

¹⁷⁷ HCJ 2056/04 Beit Sourik Village Council v. The Gov't of Israel PD 44 [2004] (Isr.).

¹⁷⁸ See HCJ 2150/07 Abu Safiyeh v. Minister of Defense PD 30 [2007] (Isr.) ("This Court does not serve as a 'supreme military commander', and does not substitute its own discretion for that of the military commander; it merely examines the legality of his actions. The responsibility and the authority were conferred upon the military commander, and the court does not set itself up as an expert on matters of security in his stead"); see also HCJ 1890/03 Municipality of Bethlehem v. State of Israel, *supra* note 169, at 40) ("There are often several ways of realizing the purpose, all of them proportionate and reasonable. The military commander is given the authority to choose between these methods, and as long as the military commander does not depart from the 'margin of proportionality' and the 'margin of reasonableness', the Court will not intervene in his discretion.").

¹⁷⁹ See, e.g., HCJ 10356/02 Hass v. IDF Commander in West Bank 58(3) PD 73 [2004] (Isr.). (declining to evaluate the relative importance of archeological property or the value of human life and security); HCJ 2056/04 Beit Sourik Village Council v. The Government of Israel *supra* note 1 (the Court did not evaluate the importance of freedom of movement, access to property, and communal development versus the value of human life and security).

¹⁸⁰ For instance, in HCJ 5100/94 Public Committee Against Torture v. Minister of Defence 36-37 [1999] (Isr.) the Court stated: "A democracy must sometimes fight with one hand tied behind its back. Even so, a de-

to military goals, the Court declines to investigate—in a general and objective fashion—the relative importance of security and other liberties.¹⁸¹ The Court thereby compromises the rationality of its decision making,¹⁸² as the discussion below will illustrate.

1. *Haas*

In *Haas*, the HCJ upheld the military commander's decision to take and demolish certain abandoned buildings of cultural and archeological value owned by West Bank Palestinians in order to clear a security road for worshippers walking to the Ma'arat HaMachpeleh (Cave of the Patriarchs).¹⁸³ According to the opinion, large numbers of pedestrians visited this cave on the Jewish Sabbaths and festivals, while murderous attacks on these worshippers and security personnel had been committed in recent years by terrorist groups.¹⁸⁴ At the time, further terrorist attacks constituted a likely and deadly threat.¹⁸⁵ The commander sought to increase security by widening the road to allow security and rescue vehicles to pass alongside the worshippers.¹⁸⁶ The commander's request came on the heels of a recent terrorist attack on security forces and worshippers travelling the narrow path, which resulted in the death of twelve security personnel.¹⁸⁷

mocracy has the upper hand. The rule of law and the liberty of an individual constitute important components in its understanding of security. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties.”

¹⁸¹ Cf. HCJ. 501/96 Horev v. Minister of Transp. PD 59 [1997] (Isr.) (evaluating the relative importance of religious feelings and freedom of movement).

¹⁸² HCJ 5016/96 HCJ. 501/96 Horev v. Minister of Transp. PD 206 [1997] (Isr.) (holding that the rationality of a proportionality decision requires a pre-balance weighing of the relative value of rights).

¹⁸³ HCJ 10356/02 Hass v. IDF Commander in West Bank 58(3) PD 60–62 [2004] (Isr.). For a description of the Cave of the Patriarchs, see The Cave of Machpelah Tomb of the Patriarchs, JEWISHVIRTUALLIBRARY.ORG, <http://www.jewishvirtuallibrary.org/jsource/Judaism/machpelah.html> (last visited Jan. 21, 2014).

¹⁸⁴ HCJ 10356/02 Hass v. IDF Commander in West Bank 58(3) PD 53, 56 [2004] (Isr.).

¹⁸⁵ *Id.* at 59 (“In the original response of the State to the petitions, it was argued that the sole purpose of the requisition order was security-oriented, and it did not serve as a disguise for achieving any other purpose. It was made in direct response to the continuing risk of terrorist acts, which consistently threatened the Jewish inhabitants who used the worshippers’ route, and in view of the responsibility of the IDF commander to ensure their safety.”).

¹⁸⁶ *Id.* at 56.

¹⁸⁷ *Id.* at 57.

a. First Proportionality Test: Rational Connection

Soon after the order to widen the road, the petitioners brought a complaint that protested the order because, among other reasons, archeologically important buildings from the Mamluk period and other houses intended for conservation would be destroyed in order to widen the road.¹⁸⁸ The petitioners also argued that Article 53 of the Fourth Geneva Convention prohibits the destruction of property unless this action is essential and required for military operations.¹⁸⁹ The respondents asserted that Article 23(g) of the Hague Convention allows the occupying power “to destroy or seize the enemy’s property, [only if] such destruction or seizure [is] imperatively demanded by the necessities of war,” and that Article 52 of the Hague Convention allows land to be requisitioned to ensure order and public security even when there is no combat.¹⁹⁰

The Court held that the military commander’s request passed proportionality review.¹⁹¹ The order passed the first test of a rational connection, mainly because the military commander enjoyed a presumption that his purposes did not aim at any ulterior motive.¹⁹² Given the “bitter experience[s]” of multiple and recent attacks on the worshippers, the Court determined that widening the path related only to increasing security for the worshippers using the route.¹⁹³ The worshippers’ (and security officers’) genuine vulnerability, based on the topographic characteristics of the route, further proved the measure was strictly security-based.¹⁹⁴ The Court emphasized that the commander had the right and duty to protect the lives of the worshippers and security officers, even if they were present at that site in contradiction to international law.¹⁹⁵ More controversially, the Court held that

¹⁸⁸ *Id.* at 58. See generally James Waterson, *The Mamluks*, HISTORYTODAY.COM, <http://www.historytoday.com/james-waterson/mamluks> (last visited Jan. 21, 2014).

¹⁸⁹ Geneva Convention Relative to the Treatment of Prisoners of War, art. 53, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

¹⁹⁰ *Hass*, PD 58 at 70 (quoting Hague Convention (V) Respecting the Rights and Duties and Neutral Powers and Persons During War on Land, Oct. 18, 1907, art. 52).

¹⁹¹ *Id.* at 60.

¹⁹² *Id.* at 68.

¹⁹³ *Id.* at 69.

¹⁹⁴ *Id.* at 69.

¹⁹⁵ *Id.* at 70.

In addition to the responsibility of the area commander to ensure the security of the military force that he commands, he must ensure the safety, security and welfare of the inhabitants of the area. He owes this duty to all the inhabitants, without any distinction as to their identity—Jews, Arabs or foreigners. The question whether the residency of various parts of the population is legal does

the military commander also had the right and duty to protect the worshippers' fundamental freedom of worship, even if such protection limited the property rights of the petitioners, who were protected persons.¹⁹⁶ Scholars have criticized this logic and argued that international law only provides that the military commander shall protect the human rights of protected persons and not persons of the occupying State.¹⁹⁷

The HCJ first found that the respondents had the right to freedom of worship. As such freedom constitutes "one of the basic human rights . . . related to the realization of individuality" and "a constitutional right of supreme status" as discussed in previous cases.¹⁹⁸ Such basic right had been codified in Israeli law under the Protection of Holy Places Law, 5727-1967, which guaranteed worshipers the right to visit certain holy sites without receiving injury to religious sensibilities.¹⁹⁹ Despite the "supreme status" of the right to exercise religion in Israeli law, the Court cited precedent stating that "freedom of religion and worship is not an absolute freedom [and] a balance must be found between it and other rights and values that are worthy of protection, including the value of private property."²⁰⁰

Most notably, the Court did not discuss the right to life and security as one of the rights claimed by the respondents. Thus, the Court did not explore whether the respondents stood for two fundamental rights, which might have tipped the scales toward their case before a proportionality analysis.²⁰¹

not come before us today for a determination. Their very residency in the area leads to the duty of the area commander to protect their lives and their human rights. This is part of the humanitarian sphere for which the military force is responsible in a belligerent occupation.

HCJ 72/86 Zaloom v. IDF Commander for Judea and Samaria 41(1) PD 528 [1986] (Isr.); *see also* HCJ 469/83 Hebron Nat'l United Bus Co.v. Minister of Def. [1992] (Isr.); HCJ 4363/02 Zindah v. IDF Commander in Gaza Strip [2002] (Isr.); HCJ 4212/02 Gussin v. IDF Commander 56(4) 608 [2002] (Isr.).

¹⁹⁶ *Id.* at 71.

The inhabitants of the area have a constitutional right to freedom of religion and worship. This is the case for the Arab inhabitants and it is also the case for the Jewish inhabitants who live there. The inhabitants of the area also have the right of freedom of movement, by means of which it is possible to realize, inter alia, the right of access to holy places.

Id.; *see also* HCJ 7957/04 Mara'abe v. The Prime Minister of Isr. 60(2) PD 1, 19 [2005] (Isr.).

¹⁹⁷ *See generally* Gross, *supra* note 154.

¹⁹⁸ HCJ 10356/02 Haas v. IDF Commander in the West Bank 58(3) PD 53, 71 [2004] (Isr.).

¹⁹⁹ Protection of Holy Places Law, 5727-1967, 21 LSI 76 (1966-67) (Isr.).

²⁰⁰ HCJ 10356/02 Haas v. IDF Commander in the West Bank 58(3) PD 53, 71 [2004] (Isr.).

²⁰¹ *But see* Aeyal M. Gross, *supra* note 4, at 395 ("[T]he HCJ does not challenge this occupation's basic structure, which views the settlers' rights as security concerns that can justify placing restrictions on the rights of the local residents.").

b. Lack of Pre-Balancing Analysis and Conflating the Second and Third Tests

The Court determined that the security measure satisfied proportionality because the military commander reduced the security surrounding the footpath to “only to a minimum level,” beyond which “every other alternative was far more costly in terms of the security risks;” while at the same time the commander “reduced to a minimum the harm to private property along the route.”²⁰² In these statements, the Court conflated the second and third proportionality tests together. The Court deemed a security measure that employed a least restrictive means as automatically satisfying the third “narrow proportionality” test, i.e., a measure that reflected a fair trade-off between the competing rights. However, whether the act was actually proportional according to the third test—whether the means of increasing human rights of the petitioners justified the decrease in security for the respondents—is a different question from whether the military commander employed the least restrictive means.

The Court held that the security measure was proportional in the strict sense because it minimized damage to cultural property while ensuring “only a minimum [but feasible level] of security measures” to protect the lives of the worshippers.²⁰³ To create this minimum but feasible level of security, the commander reduced the original width of part of the security route from eight meters to six meters, which resulted in the destruction of only two and a half uninhabited archeological buildings, rather than thirteen.²⁰⁴ On the other hand, with only six meters of pathway rather than eight, the path could only handle one-way traffic of security and rescue vehicles, rather than two-way traffic.²⁰⁵ The military commander and the Court recognized that the loss of bi-directional traffic would cause an increased security risk for the worshippers and security personnel.²⁰⁶ At least theoretically, the military commander traded the security, and possibly the lives, of the worshippers and security personnel for the protection of property. Nevertheless, the Court confirmed this action as

²⁰² *Id.* at 78. (The opinion discusses the recent dangers posed by terrorists on worshippers and security personnel. But nowhere in the opinion do the judges discuss the probable risk of injury or death caused by the reduction of the security road from allowing bidirectional traffic to only allowing unidirectional traffic.)

²⁰³ *Id.* (The commander reduced security to the point such that “every other alternative was far more costly in terms of the security risks to the worshippers and the harm and damage anticipated to the inhabitants of the area.”)

²⁰⁴ *Id.* at 61. The property owners of the two and half buildings received just compensation.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 61.

proportional in the strict sense even though it only found that the least restrictive means had been employed.²⁰⁷

Because it found an apparently proportional outcome, the Court declined to perform a pre-balance weighing of the rights.²⁰⁸ As the Court stated, “in view of the facts of the concrete case, the balance between them satisfie[d]” proportionality; therefore there was no need to adopt a decisive position with regard to the relative value of the conflicting rights.²⁰⁹ However, had the Court evaluated the relative importance of the rights in question before balancing them, the Court might have determined that a proportional result in the strict sense had not been achieved.

3. *A Lack of Rationality*

Because the Court declined to weigh the conflicting rights before balancing them, its decision in *Haas* conflicts with prior HCJ precedent²¹⁰ and lacks rationality.²¹¹ As discussed above, the Court never examined the importance of protecting uninhabited archeological property as compared to the right of worship, let alone the right of security and bodily integrity, before proceeding with a proportionality analysis. Another flaw in the Court’s reasoning is that the Court did not analyze the right to life and security as a right that should limit the protection of cultural property.²¹² Security and the right to life did not serve as added rights for the side of the respondents that would weigh against the rights of the petitioners.²¹³ The Court did not examine the actual nature of the security need for bi-directional traffic of security vehicles.

²⁰⁷ *See id.* at 78.

²⁰⁸ *Id.* at 77.

²⁰⁹ *Id.*

²¹⁰ *See supra* Parts II.B. and II.C.; *see infra* notes 211, 212.

²¹¹ *Horev*, PD at 198 (holding that a standard for judging between different rights in general, based on their social value, must be found before commencing a particular judicial balancing consideration). Here, the Court did discuss the importance of the different rights in isolation from each other.

²¹² *Hass*, PD at 75–77.

²¹³ *Id.* at 77. (The Court only looked at security as a consideration that might prevent the military commander from even allowing the worshippers to visit the Cave of the Patriarchs. This question of balancing security against whether the worshippers should even earn protection from the government constituted the “first stage” of the balancing process. Only after the Court determined that the right to worship at the Cave of Machpeleh outweighed fundamental safety concerns did the Court proceed to weigh the petitioners’ protection of cultural property against the respondents’ right to worship.)

The Court in *Haas* skipped over a principle it stated in an earlier case, *Sabih v. Commander of IDF forces in the Area of Judea and Samaria*, which explored a similar trade-off between security and human rights:

The different material dictates, in itself, different methods of intervention. Indeed, an act of state and an act of war do not change their character also if the same are subject to the court's supervision, and the character of the acts, naturally, makes an imprint on the modes of intervention.²¹⁴

Similarly, the Court contradicted what it would state in a later case, *Mara'abe v. The Prime Minister of Israel*, which involved the building of a security fence:

The solution is not in assignment of absolute weight to one of the considerations; the solution is in assignment of relative weights to the various considerations, while balancing between them at the point of decision.²¹⁵

The Court gave no standard of weight or magnitude of harm for the destruction of uninhabited property with archeological value relative to the probability of loss of life. It thereby compromised its consistency and credibility by declaring acts proportional without considering if the act struck a true balance based on the relative value of the rights.²¹⁶

Had the Court evaluated the relative importance of the conflicting rights, it might have determined that enhancing protection of cultural property while diminishing the effectiveness of a security road did not actually create a proportional result. For instance, if the Court had found that security and the right to life already greatly outweighed protection of cultural property in general, then it would have required a much greater benefit in protection of

²¹⁴ HCJ 1730/96 *Sabih v. Commander of IDF Forces in the Area of Judea and Samaria* PD 369 [1996] (Isr.).

²¹⁵ See HCJ 7957/04 *Mara'abe v. The Prime Minister of Isr.* 60(2) PD 1, 19 [2005] (Isr.) See also HCJ 501/96 *Horev v. Minister of Transp.* 51(4) PD 153, 192 [1997] (Isr.) (“A decision’s reasonableness is assessed by balancing between competing values, *according to their respective weight.*” (emphasis added)); HCJ 14/86 *Laor v. The Film and Play Review Bd.* 41(1) PD 421, 434 [1987] (Isr.) (“[N]ot all principles are of identical significance in society’s eyes. Thus, in the absence of legislative direction, the Court must assess the relative social importance of the different values. Just as there is no person without a shadow, so too, there is no principle without weight. Balance on the basis of weight necessarily implies a social assessment of the relative importance of the different principles.”).

²¹⁶ See Matthias Klatt and Moritz Meister, *Proportionality: A Benefit to Human Rights? Remarks on the I•CON Controversy*, 10 INT. J. CONST. L. 687, 692 (2012) (“It is true that balancing cannot do without moral reasoning. Only a very naïve approach would arrive at the conclusion that any legal reasoning could be value-free and deprived of any moral considerations.”).

cultural property to balance against any detriment to security and the right to life. Alternatively, it may have determined that no benefit to the protection of cultural property could ever justify any decrease in the right to life and security.²¹⁷ Or, it may have found that the security risk created by reducing the security road to unidirectional traffic was only minimal and that the only benefit reduced was mere psychological comfort; and therefore sacrificing two and a half buildings for psychological comfort was proportionate (or disproportionate).

That the Court did not perform a closer analysis to determine a different outcome is understandable for two reasons. First, the Court's only task in this case was to determine whether the military commander broke the law by destroying the two and a half pieces of cultural property. The Court was not required to analyze the case in greater detail to determine a better plan of action for the military commander. Second, the Court showed legitimate deference to the military commander, and did not have the authority question his judgment as long as he stayed within the bounds of the law.²¹⁸ The Court judges cases on the principle that "when the decision of the military commander relies upon military knowledge, the Court grants special weight to the military expertise of the commander of the area."²¹⁹ However, it would have been interesting and perhaps preferable had the Court further analyzed the case (perhaps in a dicta portion of the opinion) to determine whether the final result fit with the Court's prior definition of a "proportional trade-off."²²⁰ Was the Court being as precise as it could have when it described destroying only two and a half pieces of cultural property, rather than thirteen, and thereby only

²¹⁷ See e.g., HCJ 501/96 Horev v. Minister of Transp. IsrLR 153, 193 [1997] ("[T]here are some interests against which there can be no balancing. For example, when the State of Israel's very existence was placed on the scales, this Court refused to weigh between that interest and competing interests.").

²¹⁸ See HCJ 7979/04 Mara'abe v. The Prime Minister of Israel 60(2) PD 1, 18 [2005] (Isr.).

²¹⁹ *Id.* at 23 (citing HCJ 390/79 Duikat v. The Gov't of Isr. 34(1) PD 1, 25 [1979] (Isr.); HCJ 258/79 Amira v. Minister of Def. 34(1) PD 90, 92 [1979] (Isr.); HCJ 1005/89 Aga v. Commander of the IDF Forces in the Gaza Strip Area 44(1) PD 536, 539 [1990] (Isr.)). Perhaps the Court in *Haas* was working on the unspoken assumption that the commander's security order fell within the "of reasonableness" established by prior HCJ decisions. According to the "zone of reasonableness" concept, judges admit that weighing conflicting values is not an exact science, and that different alternative balances could all fall within a zone of reasonableness. A judge overrules a government's decision only when the measure taken by the government or commander fell outside of this zone; see *Horev*, PD at 381.

²²⁰ This would not have been the first time that the Court would re-analyze or re-frame its holding. For instance, in *Abu Safiyeh v. Minister of Defense* the Court entered into a proportionality analysis of the military commander's decision, despite overturning his order for a different reason. HCJ 2150/07 *Abu Safiyeh v. Minister of Def.* 1–2 [2008] (Isr.).

building a single lane security road, rather than a two-way security road, as actually proportionate?

Even though the Court was not required to further analyze the case to determine a different holding, perhaps it should have used this analysis to avoid deeming a possibly disproportionate result as proportionate. Indeed, as the Court stated in *Horev*, “[B]alancing ought to be based on a generalization that also allows for the resolution of future cases . . . a rational principle ought to be formulated.”²²¹ Because the Court did not do a pre balancing evaluation of the rights, it declined to help resolve future cases that would grapple with similar issues.²²² By declining to perform such an evaluation, perhaps the Court in this case began to establish or strengthen a trend of deeming results proportionate without actually analyzing the genuine proportionality of those results. It thus weakened its own credibility by declaring an act as proportionate more from a stance of conviction and less from a rational measurement of the trade-off between benefits and detriments.²²³

2. Beit Sourik

In *Beit Sourik*, the HCJ ruled on the legality of the controversial²²⁴ security fence built by the Israeli government and the Minister’s Committee on National Security²²⁵ in response to a wave of terror attacks in the early part of the last decade.²²⁶ The government and the Minister’s Committee intended to build the fence to hold back the wave of attacks.²²⁷ For each intended portion of the fence under scrutiny, the Court confirmed that security was the only objective, and that there were no ulterior motives inherent in these portions of

²²¹ *Horev*, PD at 196.

²²² HCJ 10356/02 Haas v. IDF Commander in the West Bank 58(3) PD 53, 77 [2004] (Isr.).

²²³ *Cf.* The Sunday Times v. United Kingdom, 30 Eur. Ct. H.R. (ser. A) at 34 (1979).

²²⁴ *See* HCJ 2056/04 Beit Sourik Vill. Council v. Gov’t of Isr. PD 1, 3–4 [2004] (Isr.).

²²⁵ *Id.*

²²⁶ *Id.* at 1. (“In September 2000, the Palestinian side began a campaign of terror against Israel and Israelis. Terror attacks take place both in the area and in Israel. They are directed against citizens and soldiers, men and women, elderly and infants, regular citizens and public figures. Terror attacks are carried out everywhere: in public transportation, in shopping centers and markets, in coffee houses and in restaurants. Terror organizations use gunfire attacks, suicide attacks, mortar fire, Katyusha rocket fire, and car bombs. From September 2000 until the beginning of April 2004, more than 780 attacks were carried out within Israel. During the same period, more than 8200 attacks were carried out in the area. The armed conflict claimed (as of April 2004) the lives of 900 Israeli citizens and residents. More than 6000 were injured, some with serious wounds that have left them severely handicapped. The armed conflict has left many dead and wounded on the Palestinian side as well. Bereavement and pain wash over us.”).

²²⁷ *Id.* at 3–4.

the fence, such as land grabs.²²⁸ Thus, each intended section under scrutiny passed the first proportionality test: finding a rational connection between the military's stated objectives and the means of achieving those objectives.²²⁹

The Court then analyzed four different sections of the proposed fence that the petitioners claimed disproportionately injured their rights.²³⁰ In each instance, the military commander sought to move the fence farther from Israeli villages and closer to Palestinian villages.²³¹ This placement would achieve two basic security goals: allowing more of a vantage point over Palestinian villages and weak points in the fence, and creating a buffer between the fence and Israeli villages, such that the IDF would have more time to respond and catch a terrorist breaching the fence.²³² If the fence were built closer to the Israeli villages, these two advantages would be lost.²³³ Yet, the petitioners sought to scale the fence back, closer to the Israeli villages.²³⁴ The petitioners wished to move the fence away from their towns to prevent their villagers from being separated from important land and buildings.²³⁵

a. Declining to Consider the Claims on Their Own Terms

As in *Haas*, the Court declined to compare the conflicting rights to each other before commencing a proportionality review.²³⁶ In many ways, the oversights of the Court in *Beit Sourik* are more apparent. First, the Court does not clearly define the security rights at issue. The Court did not discuss the actual threat to life and security that each section of the fence was built to prevent.

On the other hand, it clearly defined the injuries to the petitioners. For instance, in analyzing the first section of the fence, the Court claimed that this section of fence would severely impair the free movement and property rights

²²⁸ See generally *id.* at 32, 38–39, 41.

²²⁹ *Id.*

²³⁰ HCJ 2056/04 Beit Sourik Vill. Council v. Gov't of Isr. PD 1, 3–4 [2004] (Isr.).

²³¹ *Id.*

²³² See generally *id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ HCJ 2056/04 Beit Sourik Vill. Council v. Gov't of Isr. PD 1, 33–34 [2004] (Isr.). In paragraph 57, the Court begins a proportionality analysis of the first section of the fence under review. Until paragraph 59, which employs a narrow proportionality review (whether the goal could be slightly reduced while greatly mitigating damage to the restricted party), the Court did not discuss any standard by which the rights of the petitioners—free access to important land and buildings—should be weighed against security and the right to life.

of 13,000 farmers by cutting them off from thousands of acres of farmland and thousands of productive trees, and by setting up a license system for access, which would allow access to these lands from only two points in the fence, and only at specific times of day.²³⁷ This situation would create long lines for the farmers to access their farms, would make vehicle access to the farms difficult, would create distance between the farmers and their farms, as there would only be two entrances by which to access the farms: all of these restrictions together, according to the Court, would stifle development and change the farmer's lives completely, and thus constituted severe impairments on free movement and property rights for thousands of people.²³⁸

On the other hand, according to the Court, moving the fence closer to the Israeli villages would only create a "minute difference" in security.²³⁹ However, this difference in security is "minute," according to the Court, only in comparison to the injury to the petitioners:

The gap between the security provided by the military commander's approach and the security provided by the alternate route is minute, *as compared to the large difference between a fence that separates the local inhabitants from their lands, and a fence which does not separate the two* (or which creates a separation which is smaller and possible to live with).²⁴⁰

Like in *Haas*, the Court here does not evaluate the competing rights before balancing them. The Court does not attempt to consider the reduction in security on its own terms. It does not determine if moving the fence closer to the Israeli villages would result in certain death, or how many deaths, or near certain death or injury, or how many injuries. What might be a major loss of security in general terms is reduced to a "minute difference" only after a comparison with the damage to the petitioner's rights. Thus the Court does not determine exactly what goal the respondents claimed. The analysis of the other three portions of the fence contained this same pattern.²⁴¹

²³⁷ *Id.* at 34–35.

²³⁸ *Id.* at 38–39.

²³⁹ *Id.* at 35.

²⁴⁰ *Id.* (emphasis added).

²⁴¹ *Id.* at 38. "The difficulties we mentioned regarding the previous order apply here as well. As we have seen, it is possible to lessen this damage substantially if the route of the separation fence passing east and west of Har Adar is changed, reducing the area of agricultural lands lying beyond the fence. The security advantage (*in comparison to the possible alternate route*) which the military commander wishes to achieve is not proportionate to the severe injury to the farmers (according to the route proposed by the military commander) (emphasis added)"; *id.* at 39–40 ("We are convinced that the security advantage achieved by the route, as determined by the military commander, *in comparison with the alternate route*, is in no way proportionate to the

Even less does the Court discuss the relative of importance of the petitioners' and the respondents' rights.²⁴² The Court does not assign relative weights to the competing interests before balancing them together, contrary to established case precedent that would require this analysis.²⁴³ Possibly, the Court had no qualms about employing this less disciplined proportionality review because of decisions like *Haas* that previously had declined to evaluate the weight of the competing rights before balancing.

b. Implications

Theoretically it is possible that the Court in *Beit Sourik* ruled for the proportionate result. Perhaps the reduction in security for all four parts of the fence was actually minimal. And perhaps that minimal reduction in security balanced fairly against the increase in human rights for the petitioners. Unfortunately, the public will not know whether a proportionate result was actually achieved, because the Court does not depict the security that was sacrificed. Nor does it depict how lost security—on its own terms—compares to the human rights of the petitioners.

Thus, the decision, as well as the *Haas* decision, does not actualize one of the main benefits of proportionality review discussed earlier in the comment, that of diffusing political strife through rational decision-making. As discussed earlier, the Court in a proportionality review is involved in “balancing between conflicting interests and values.”²⁴⁴ Necessarily, then, the Court is involved in

additional injury to the lives of the local inhabitants caused by this order.” (emphasis added); *id.* at 41–43 (putting forth a similar analysis with no discussion of the nature of the competing rights or their values considered independently of one another.).

²⁴² *Cf.* HCJ 1890/03 Bethlehem Municipality v. Israel PD 1, 27–28 [2005] (Isr.) (“In the case before us, we are presented with a conflict between two basic rights of equal weight . . . [B]oth the freedom of worship and the freedom of movement have been recognized in our case law as being on the highest level of the scale of rights . . . In addition, with regard to both of them an identical balancing formula has been applied in order to balance them against the same public interests . . . The result implied by the conclusion that we are concerned with a conflict between two rights of equal weight is that the balance required in this case is a horizontal balance, which will allow the coexistence of both of these rights.”).

²⁴³ *Cf.* HCJ 1730/96 Sabih v. Commander of IDF Forces in the Area of Judea and Samaria PD, 369 [1996] (Isr.) (emphasis added). (“Different subjects require different methods of intervention. Indeed, acts of state and acts of war do not change their character just because they are subject to the review of the judiciary, and the character of the acts, according to the nature of things, imprints its mark on the methods of intervention.”); HCJ 7957/04 Mara’abe v. The Prime Minister of Isr. 60(2) PD 1, 21 [2005] (Isr.) (citations omitted) (“The solution is not to assign absolute weight to one of the considerations; the solution is to assign relative weights to the various considerations, while balancing between them at the point of decision[.]”).

²⁴⁴ HCJ 501/96 Horev v. Minister of Transp. 51(4) PD 153, 193 [1997] (Isr.).

“placing competing values on the scale”²⁴⁵ and determining whether a reduction in certain benefits weighs equally—within a zone of reasonableness²⁴⁶—with a corresponding increase in liberties and rights. In order for this balancing process to make sense, the Court must know the weight of the values it places on the scale. Furthermore, it can only determine the weight of these values relative to each other. As the Court stated: “balance on the basis of weight necessarily implies a social assessment [i.e. a weighing] of the relative importance of the different principles” before the balancing process.²⁴⁷ A social value, such as freedom of movement, does not have absolute weight: “[t]he weight of any social principle is relative. The status of any fundamental principle is always assessed in relation to that of other principles with which it is likely to conflict.”²⁴⁸ The public was given no way to understand why certain security measures should be limited by other human rights because the Court did not explain why promoting those human rights should limit security and the right to life in principle.²⁴⁹

By declining to weigh the values against each other before balancing in order to determine which weights would actually go “on the scale,” the Court in *Beit Sourik* did not conclusively determine the best trade-off between governmental goals and human rights. Therefore, the decision does not diffuse political strife, because the public will not know if the Court determined a rational, proportional trade-off that objectively “weighs the costs against the benefits.”²⁵⁰

²⁴⁵ *Id.* (citing H CJ 73/53 *Kol Ha'Am Company Ltd. v. Minister of the Interior*, PD 7, 871, 879 [1953] (Isr.)). (“This was the Court’s approach regarding the conflict between freedom of expression and preserving public peace . . . in the clash between freedom of movement and public security[.]”)(internal citations omitted).

²⁴⁶ H CJ 7957/04 *Mara'be v. The Prime Minister of Isr.* 60(2) PD 1, 10 [2005] (Isr.).

²⁴⁷ H CJ 501/96 *Horev v. Minister of Transp.* 51(4) PD 153, 198 [1997] (Isr.) (citing H CJ 14/86 *Laor v. The Film and Play Review Bd.* 41(1) PD 421, 434 [1987]).

²⁴⁸ *Id.* at 192 (citing CA 105/92 *Re'em Eng'rs and Contractors Ltd. v. Municipality of Upper Nazareth*, 47(5) PD 189 [1993]).

²⁴⁹ *Cf. The Margin of Appreciation*, EUR. CT. HUM. RTS., http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/ECHR/Paper2_en.asp (“The right to life cannot be balanced either against other rights or against the lawful pursuit of law enforcement goals, because it is strongly prioritized by the “absolute necessity” test Balancing the rights protected by this article against other rights or against any public interest is therefore not appropriate.”).

²⁵⁰ H CJ 2056/04 *Beit Sourik Vill. Council v. Gov't of Isr.* PD 1, 34 [2004] (Isr.).

3. Abu Safiyeh

One of the most recent decisions where the HCJ balanced security against human rights is *Abu Safiyeh v. The Minister of Defense*.²⁵¹ In this case, the military commander issued an order prohibiting all Palestinians living in the West Bank from accessing Route 443 without a travel permit.²⁵² Road 443 constituted one of the main traffic arteries connecting the West Bank to Israel.²⁵³ This travel order carried a long list of detriments for the petitioners: they were forced to travel through an alternative route that is winding, narrow, and in disrepair, thereby lengthening necessary travel time and cost; moreover, the travel order cut off access to the city of Ramallah, which caused the closing of businesses, cut off access to educational, emergency, and medical facilities, and harmed social relationships; and finally, the order prevented direct access to the petitioners' farming lands, and also transferred traffic congestion on to internal roads, which had led to an increase in traffic accidents.²⁵⁴

The respondents argued that the travel order was necessary for the security of Israelis travelling on the road and that it was a temporary order issued only in response to a series of "brutal and murderous terrorist attacks . . ." ²⁵⁵ The order was intended to reduce the likely recurrence of former terror incidents including a car bombing, a drive-by shooting followed by an escape to a nearby village, the kidnapping of Israelis travelling on the road, and the transportation of terrorists and weapons into the territory of the State of Israel.²⁵⁶ The respondents cited a marked decrease in terror incidents after the issuance of the travel order, as well as a continuing threat of terror attacks necessitating the travel order.²⁵⁷ Respondents also claimed that the petitioners exaggerated their claims because the alternative route provided "a reasonable connection among the villages themselves and between the villages and the city of Ramallah," and also because the Israeli government was then spending the equivalent of millions of dollars to construct "fabric of life roads" that would provide a better option than the current alternative route, thus providing a reasonable alternative to travel along Route 443.²⁵⁸ Thus, respondents

²⁵¹ HCJ 2150/07 Abu Safiyeh v. Minister of Defense PD 1, 46 [2007] (Isr.).

²⁵² *Id.* at 9.

²⁵³ *Id.* at 6.

²⁵⁴ *Id.* at 9.

²⁵⁵ *Id.* at 11.

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 11–12. Respondents cited fifty-eight recent incidents where Palestinians threw stones or incendiary devices at Israeli cars travelling on the road.

²⁵⁸ *Id.* at 12.

characterized that the case was a conflict between “inconvenience and [the] right to life and physical safety[,]” and therefore that the Court should not even consider a proportionality review of the issue.²⁵⁹

The Court entered that proportionality review and found that the restrictive travel order satisfied the rational connection test.²⁶⁰ The Court found that the restriction was “extremely prejudicial,” at first, and implicitly agreed with the petitioners that it included not only a restriction on the freedom of movement but also on additional rights, “including the right to earn a living and to live with dignity, the right to education and to maintain contact with family members, and the right to health and to receive medical treatment.”²⁶¹ However, the Court found that the opening of the Beit Ur–Beituniya “fabric of life” road “led to a real reduction of the damage to the quality of the Palestinian residents’ lives[,]” and that although the road “[i]ndisputably . . . is not a fast highway like Road 443, but a two-lane road of lower quality[,]” it nevertheless “appears to be capable of providing the residents of the villages with direct access to the regional city.”²⁶²

Despite the fact that the fabric of life road had reduced almost all detriments to the petitioners—the Court implied that the “the inconvenience caused to the petitioners by the travel restrictions applying to them represents an indirect and limited infringement of their rights[.]”—the Court nevertheless ruled the travel order disproportionate.²⁶³ The Court’s reasoning was as follows: The Israeli government had originally built Route 443 for the benefit of the petitioners and all West Bank Palestinians, and it had done so by expropriating their land, and in time, Israelis would use the road as a main traffic artery to access the West Bank.²⁶⁴ After the travel order excluding Palestinians from Route 443 was issued, there began to be a “complete exclusion of the residents of the Area from a road that was intended to serve

²⁵⁹ *Id.* at 15. See also H CJ 501/96 Horev v. Minister of Transp. 51(4) PD 153, 193 [1997] (Isr.) (“[T]here are some interests against which there can be no balancing. For example, when the State of Israel’s very existence was placed on the scales, this Court refused to weigh between that interest and competing interests.” (citing IA 1/65 Yardor v. Chairman of Central Elections Committee 19(3) PD 373, 373 [1965] (Isr.))).

²⁶⁰ H CJ 2150/70 Abu Safiyeh v. Minister of Defense PD 1, 33 [2008] (Isr.).

²⁶¹ *Id.* at 37.

²⁶² *Id.* at 39.

²⁶³ *Abu Safiyeh*, PD at 39, 40 (quoting H CJ 6379/07 Comm. of the Dolev Settlement v. IDF Commander in the Judaea and Samaria Area [2008] (Isr.)).

²⁶⁴ *Id.* at 12, 17.

them, in favor of Israeli traffic that runs primarily between the coastal plain and Jerusalem.”²⁶⁵ Therefore, the Chief Justice stated:

As I see it, under those circumstances, the indiscriminate ban on travel that was imposed upon the Palestinian residents of the Area does not fulfill the third sub-test of proportionality. *This is because sufficient weight was not ascribed to preserving the rights of those residents as “protected persons.”*²⁶⁶

Essentially, the Chief Justice tilted the scales toward the petitioners because their rights as protected persons had been breached by the travel order. According to Article 43 of the Regulations Respecting the Laws and Customs of War on Land of 1907, appended to the Fourth Hague Convention, an occupying state is obligated to “ensure, as far as possible, public security and safety” of occupied peoples (which the Court uses interchangeably with the term “protected persons”).²⁶⁷ When the military expropriated land from protected persons,²⁶⁸ and then later determined that the land could only be used by the occupying power, it thereby breached its international law obligations to those protected persons.²⁶⁹

In this case, the Court was transparent about which factors would add weight to each of the parties’ claims. The Court showed that as it analyzed the proportionality of the measure, it would add weight to the petitioners’ claims because the military infringed upon their rights as protected persons. Thus the Court assessed the weight of the rights in question before balancing them. This assessment of the weight of rights is necessary in a proportionality review, because, as mentioned, “[b]alance on the basis of weight necessarily implies a social assessment [i.e. a weighing] of the relative importance of the different principles” before the balancing process.²⁷⁰

However, the Court gave no explanation—based on precedent²⁷¹ or any other reasons—of the relative importance of the right to life and security and the petitioners’ rights under international law as protected persons. As

²⁶⁵ *Id.* at 40.

²⁶⁶ *Id.* (emphasis added).

²⁶⁷ *Id.* (quoting Hague Convention (IV) Respecting the Laws and Customs of War on Land, Annex I art. 43, 36 Stat. 2227, U.N.T.S. 539).

²⁶⁸ *Id.* at 2, 17.

²⁶⁹ *Id.* at 29.

²⁷⁰ H CJ 501/96 Horev v. Minister of Transp. 51(4) PD 153, 198 [1997] (Isr.) (citing H CJ 14/86 Laor v. Film and Play Review Bd. 41(1) PD 421, 434 [1987] (Isr.)).

²⁷¹ *See supra* Parts II.B. and II.C.; *see* notes 211–212.

mentioned, a pre-balance weighing of rights alone is not sufficient for a proper proportionality review. The Court stated that it must determine and justify the relative importance of the rights at issue:

A social value . . . does not have “absolute weight.” The weight of any social principle is relative. The status of any fundamental principle is always assessed in relation to that of other principles with which it is likely to conflict.²⁷²

The Court offered no explanation of the relative importance of the petitioners' rights as protected persons and the respondents' fundamental right to life and security. It did not explain why the petitioners' rights as protected persons should, in general, weigh significantly against the respondent's right to life.

Thus, the Court's conclusion that proportionality demands lifting the travel ban is questionable. The Court did not necessarily achieve a fair and balanced trade-off between security benefits and human rights detriments. The Court does not explain why the petitioners' rights as protected persons factored so heavily in limiting the respondents' security and right to life (especially when the respondents' core claim was for detriments to their freedom of movement). Thus, the Court does not explain why the holding satisfies proportionality. As mentioned, ruling on a certain trade-off between competing values gains more credibility when judges are realistic, rational, and open about the relative importance of those values. Ironically, when the Court does not explain the relative importance of the values at issue, the decision comes out as

²⁷² HCJ 501/96 Horev v. Minister of Transp. 51(4) PD 153, 198 [1997] (Isr.) (citing CA 105/92 Re'em Eng'rs and Contractors Ltd. v. Municipality of Upper Nazareth PD 47(5) 189, 205 [1993] (Isr.)).

“arbitrary”²⁷³ and “paternalistic”²⁷⁴, which is exactly what the Court was trying to avoid by using proportionality review.²⁷⁵

CONCLUSION

As this Comment has shown, proportionality review offers multiple benefits to a society employing this review. Proportionality review expands the rights that a Court will protect, even non-fundamental rights, such as the religious feelings found in *Horev*. Proportionality review allows more politically insulated judges to take a second look at governmental decisions that limit human rights, to determine not only whether the government unduly limited a given right, but also whether it could have achieved its goal more efficiently without limiting rights as severely. Furthermore, proportionality review diffuses political strife by expanding the array of rights that a society will protect as constitutionally guaranteed. Relatedly, proportionality review diffuses strife by reframing political disputes as objective trade-offs between concrete benefits and detriments, such as was the case in *Horev*, where proportionality review transformed a deadlock battle between religious and secular values into an objective trade-off between a two minute detour and severely damaged religious feelings.

As shown, in order for proportionality review to work, especially with regards to the third test, judges must first determine the general, relative importance of the rights and goals at issue. Since proportionality review requires judges to decide whether certain rights and goals should gain more or less protection, judges must necessarily determine the relative importance of

²⁷³ See Cohen-Eliya, *supra* note 33, at 266; see also Steven Greer, *The Interpretation of the European Convention on Human Rights: Universal Principle or Margin of Appreciation?*, UCL HUM. RTS. REV. 1, 3 (2010) (“All commentators agree that no simple formula can describe how the margin of appreciation [another term for proportionality review] works and that, in spite of the mountain of jurisprudence and analysis, its most striking characteristic remains its casuistic, uneven, and largely unpredictable nature.”).

²⁷⁴ *Horev v. Minister of Transp.* 51(4) PD 153, 196 [1997] (Isr.) (citing FH 9/77 Israel Elec. Co. v. Ha’Aretz Newspaper Publ’ns 32(3) PD 337, 361 [1978] (Isr.)). See Richard A. Posner, *Enlightened Despot*, NEW REPUBLIC, at 6–7 (Apr. 23, 2007) (calling Barak a “legal buccaneer” and “enlightened despot”). See also Aharon Barak, *The Role of a Supreme Court in a Democracy and the Fight Against Terrorism*, 35 H.K. L.J. 287, 287–89 (2005) (“[O]ne of the lessons of the Holocaust and of the Second World War is the need to have democratic constitutions and ensure that they are put into effect by supreme court judges whose main task is to protect democracy . . . the main role of the supreme court judge in a democracy is to maintain and protect the constitution and democracy Judicial protection of democracy in general and of human rights in particular characterises the development of most modern democracies.”). Here, the former Chief Justice implies that in modern society, the judicial branch is the superior organ charged with preserving democracy.

²⁷⁵ Cohen-Eliya, *supra* note 22, at 266.

those rights in the overall scheme of constitutional values.²⁷⁶ (Deciding whether the right to life should limit the right to speed, and how much, must depend on the relative value of these rights in the overall scheme of social values.²⁷⁷)

This comment showed the Court in *Horev* systematically weighing the rights at issue before beginning a proportionality review. This evaluation of the relative weight of the values at issue ensured that the decision was based on objective criteria, rationality, and precedent.²⁷⁸ On the other hand, the Court in at least three decisions—*Haas* and *Beit Sourik*, and *Abu Safiyeh*—declined to determine the relative value of the rights and goals at issue in any systematic or rational way based on precedent. The Court's reluctance to enter this discussion of the relative importance of the rights at issue compromised its holding in each case. The public was given no way to understand why certain security measures should be limited by other human rights because the Court did not explain why promoting those human rights should limit security and the right to life in principle.

A look back at history might help the justices of the HCJ to determine a better path for the future. After the Second World War, Germany began officially using proportionality review.²⁷⁹ As a basis for that review, the German Constitutional Court set up a systematic hierarchy of values, or *Wertrangordnung*.²⁸⁰ The relative position and importance of each value would be determined in reference to the supreme value of Germany: human dignity.²⁸¹ This hierarchy of values would provide a framework for rationally deciding proportionality questions. Major criticism of this approach developed in Germany.²⁸² Critics claimed that judges have no expertise in weighing values²⁸³ and that elected officials should bear that responsibility for the represented public;²⁸⁴ they also claimed that judges would determine this hierarchy of values arbitrarily and based on their own beliefs.²⁸⁵ Therefore, in

²⁷⁶ *Id.* at 267 (citing Robert Alexy, *Balancing, Constitutional Review and Representation*, 3 INT'L J. CONST. L. 572 (2005)).

²⁷⁷ *Id.* See HCJ 7957/04 Mara'abe v. The Prime Minister of Isr. 60(2) PD 1, 21 [2005] (Isr.).

²⁷⁸ See *supra* Parts II.B. and II.C.

²⁷⁹ Cohen-Eliya & Porat, *supra* note 22, at 465.

²⁸⁰ Cohen-Eliya, *supra* note 4, at 267.

²⁸¹ *Id.*

²⁸² *Id.* at 268.

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

response to this impending “tyranny of the judges,”²⁸⁶ the German Court decided that any proportionality review based on the third test—where judges would disagree with elected officials on the proper balance between policy goals and human liberties—could only be decided if there was a clear lack of proportionality in the government’s decision.²⁸⁷ This decision flowed from the fact that judges using proportionality would have to determine a hierarchy of rights, and that determining this hierarchy of values inevitably involves arbitrariness and personal belief.²⁸⁸

The Israeli Court could try the approach that Germany has chosen.²⁸⁹ In close calls, where finding a proper balance between security and liberty turns on the assignment of values to the conflicting rights,²⁹⁰ such restraint might prevent judges from ruling based on arbitrary or unexplained preference for one value over another (as arguably happened in the three cases discussed). Or, the Court could implement what Iddo Porat has called the “dual model of balancing.”²⁹¹ In this model, a court would only employ the third proportionality test when balancing two conflicting rights of the same importance and magnitude: a conflict between a lower-order value and a higher-order value would not occur.²⁹² This would keep lower-order and higher-order values separate and would prevent a judge from encroaching on a higher-order right by arbitrarily exaggerating the importance of a lower-order right.²⁹³

²⁸⁶ Cohen-Eliya, *supra* note 4, at 267.

²⁸⁷ *Id.*

²⁸⁸ *Id.* at 268.

²⁸⁹ *Id.* at 269.

²⁹⁰ See Christopher Michaelsen, *The Proportionality Principle, Counter-Terrorism Laws and Human Rights*, 2 CITY U. H.K. L. REV. 19, 22 (2010) (“[T]he great majority of commentators on both sides of the equation argue that in order to protect liberal democracy from the scourge of international terrorism, a ‘balance’ must be struck between security and liberty. Where this balance falls, of course, depends on the political colours of the respective commentator.”).

²⁹¹ Iddo Porat, *The Dual Model of Balancing: A Model for the Proper Scope of Balancing in Constitutional Law*, 27 CARDOZO L. REV. 1393, 1395 (2006).

²⁹² *Id.* at 1395. See also COUNCIL OF EUROPE, *supra* note 98.

²⁹³ Other scholars suggest that liberty and security should never be balanced against one another. See Michaelsen, *supra* note 290, at 24 (“[A] simple balancing approach does not give adequate consideration to the philosophical and conceptual underpinnings of the notions of liberty and security. Liberty is a precondition of, and closely interrelated with, security. As a consequence, the two goods cannot be balanced against each other logically. Secondly, there are major rights-based objections against a simple balancing exercise. These include the jurisprudential problem of whether and to what extent civil liberties can be actually balanced against community interests. Other rights-based objections range from the difficulties of conceiving security as an individual right to the distributive character of the measures curtailing liberty themselves. It is not the entire population which is trading off liberty for greater security but only certain parts of it. Thirdly, commentators invoking the balance metaphor to justify new security laws to counter the immediate dangers posed by terrorism do not

This comment does not suggest that the rights and values emphasized by the HCJ in the *Haas*, *Beit Sourik*, and *Abu Safiyeh* decisions were unfounded or morally wrong. This comment only points out the decisions in those cases turned—whether implicitly or explicitly—on the Court's emphasis on the importance of human rights over security values in the balancing process. Moreover, the Court does not explain in a reasoned way, or in a way based on precedent, why the conflicting values should have such relative weights assigned to them. Therefore, the decisions are possibly tainted by arbitrariness and paternalism. Moving forward, the HCJ should pay closer attention to explaining and clarifying how it determines the relative weight of values, as it did in previous cases such as *Horev*. This will allow the Court to produce decisions in the future that fully provide all of the benefits of proportionality review while avoiding the dangers of paternalism and arbitrariness.

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give appropriate weight to the long-term consequences of curtailing fundamental rights and liberties. Despite some possible short-term gains in security, some counter-measures may actually increase the potential for terrorism and diminish security in the long run. Finally, detailed questions have to be asked as to whether a diminution of liberty actually enhances security or whether one is trading off civil liberties for symbolic gains and psychological comfort.”).

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