# FORMALISMS OF LAW
# BUILDING MEASURES TO EVALUATE THE FLUCTUATING PATHS OF LEGAL RHETORIC IN SUPREME COURT DECISIONS

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**ABSTRACT**

This paper deconstructs the debate on Legal Formalism by detailing the claims and counter-claims about formalism in the law, and empirically examines formalistic and anti-formalistic tendencies in Israeli Supreme Court legal decisions over time.

A code of 31 binary variables was used in a content analysis of 2,086 Supreme Court opinions. Despite claims that there had been a movement away from formalism in Israeli law, we found that on most measures, the rhetoric of legal decisions remained formalistic. However, we also found that the various measures of formalism followed diverse patterns. The most significant decline in formalism appeared in the use of the language of policy and principles, as well as in reference to judicial discretion and choice. We suggest that these changes can be interpreted as the emergence of a new "Stage II Formalism," that reconstructs formalism to incorporate policy and discretion into the formal legal realm.

## I. INTRODUCTION*

It is widely accepted that the aspiration for formality is an integral element of judicial decision writing. Despite the ongoing debates in legal literature that have referred to the limits of formalism, and have challenged assumptions about the possibility of deciding legal cases by an objective, straightforward application of rules, there still remains a commitment to the basic view of law as a complete, autonomous, conceptually ordered and socially acceptable system (Haltom 1998; Pildes 1999). There have been numerous definitions of legal formalism suggested in the literature, that often incorporate different attitudes to formalism. Some refer to the inherent quality of law as based on formality in all its institutional manifestations (Summers 1997). Others discuss legal formalism in a pejorative way, and condemn mechanical jurisprudence and the strict application of rules as rigid and unsophisticated (Dworkin 1977; 1986). Some refer to the relationship between rules and other factors that come into consideration in legal decision-making, such as principles, standards and policies (Schauer 1988). There are also arguments about the influence of legal cultures on

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formal and substantive decision making in law (Summers 1987). Discussions about the nature of formalism have often concluded with normative arguments to follow rules (Alexander 1999), to consider policies and principles (Dworkin 1985), and some calls to empirically test whether there are benefits to the use of more flexible considerations or to rely on rigid rules (Sunstein 1999).

Many of the arguments about formalism stem from Max Weber's portrayal of modern law as a gapless system of rules (Rheinstein 1954). According to Weber, the most advanced category of legal thought in western society is "formal rationality" and legal rules can be applied to any concrete fact situation and be used to evaluate any social conduct.

Jurisprudential scholarship challenged the possibility of a gapless system, and pointed to gaps and ambiguities that exist in legal rules that are particularly evident in hard cases (Hart 1994; Alexander 1999). The Legal Realist movement, which was part of the general intellectual revolt against formalism in the United States (White 1947), was even more radical. Its proponents claimed that rule formalism was basically impossible because the indeterminacy of legal rules was pervasive, and thus judges constantly make arbitrary decisions (Fisher et al 1993; Tamanaha 2007; 2009). Instead they described a legal universe composed of policies and instrumental reasoning in which legal discretion was the rule and not the exception. In addition, the Realists also pointed to the biased nature of fact-finding in legal decision-making, claiming that norm-application is embedded in the descriptions of facts, and raised doubts about the claim that legal concepts had internal meaning (Frank 1930). They further described the significant discrepancy that exists between law in the books and law in action (Pound 1908). These critical claims essentially expanded the notion of legal formalism to include fact-norm separation, rare moments of judicial discretion,

conceptual rigidity, and simplistic assumptions about the applicability of legal decisions. (Alberstein 2012).

Following the realist critique, various reconstructions of the notion of formalism have been developed. Some scholars have described the formality of the legal universe as entailing principles, policies and moral considerations (Dworkin 1977). Others have redefined the notion of judicial discretion, so that it is now limited and refers to structured reasoning rather than open-ended choice-making. These new "forms of formalism" reflect the multiplicity of views regarding the formalism of law (Pildes 1999), that often are realized within the texts of legal decisions. This paper seeks to provide a new slant on the debate about formalism by presenting a quantitative textual analysis of opinions in randomly selected routine legal cases of the Israeli Supreme Court from 1948 to 2013. Thus, contrary to traditional analyses of legal formalism which have largely relied on jurisprudential reasoning and have promoted a specific stance regarding formalism, the research in this paper adopts an interdisciplinary empirical approach. Incorporating the expanded notions of legal formalism that emerged following the debate with Legal Realism, we developed a complex measure which includes the various characteristics of formalism that have been suggested in the literature. This measure is used to depict the realization of formalism within the rhetoric of Israeli Supreme Court opinions over time.

The Israeli legal system provides a unique case study as it combines a British common law regime with some civil law influences (Barak 2002; Mautner 2012). Moreover, in the past decade Israeli legal practice and academic writing have been heavily influenced by American jurisprudence, including the incorporation of notions of judicial review. Within this rich legal culture, we expected to find various manifestations of different types of legal formalism. While our analysis is based on

Israeli judicial decisions, and thus the particular trajectories of formalism that we found may reflect specific socio-legal events that occurred in Israel, the empirical measurements we constructed to explore the realization of formalism in judges' decision-making can certainly be applied to decisions in other jurisdictions and legal systems. In fact, we anticipate that the Israeli case findings and insights will be of benefit to socio-legal scholars everywhere.

### A. *The Israeli Debate about the Decline of Formalism*

The debate about formalism in Israeli legal culture emerged and developed following a monograph written by Menachem Mautner in which he described the "decline of formalism and the rise of values in Israeli law" (Mautner 1993). This essay captured a broad shift in legal writing by the Israeli Supreme Court during the 1980s, which included a greater emphasis on values, on substance and on judicial activism. The changes in legal rhetoric, Mautner claimed, were reflected in other social and cultural arenas, and were part of a general move from collectivism to individualism.

Despite some criticism of Mautner's thesis (e.g., Harris 1997; Bendor 2003; Segev 2005; Kedar 2006; Friedman 2007), there is a broad consensus among legal academics that the writings of Aharon Barak, the former Chief Justice of the Israeli Supreme Court who is considered by some to be a particularly "activist" and "anti-formalist" judge, had a significant impact on the writing of Israeli judges on the Supreme Court and on other levels of court decision making (Amit 1998; Posner 2007a). Thus, the early period of the State is commonly regarded as formalistic, guided by a strong libertarian spirit of human rights protection. Both personality and socio-legal factors are associated with a decline in formalism and a move to values in Israeli legal decision writing in the eighties. The promotion of Justice Barak, who

was influenced by American legal culture, to the Supreme Court in 1978, as well as the Americanization of Israeli society, with legal actors looking to the US rather than Germany and England as models for decision-writing, and the exposure of Israeli academics to "law and" movements that provide legitimation for legal realism, are cited by Mautner (1993) as explanations for the decline in formalism.

There are a number of reasons to assume that since the mid-nineties there has been some return to formalism. Those who promote this view argue that Mautner's claim about Justice Barak's influence and the subsequent media debate about his judicial activism created a backlash which in turn led to a more conservative, formalistic mode of decision writing (Alberstein 2012).

Our research examines these taken for granted assumptions about the existence and timing of trends in formalism, and seeks to define more precisely the type of formalism that is said to have changed over time. In this project, formalism is analyzed as a social construct comprised of diverse jurisprudential cultures and claims, which are discussed below. We rely on conceptions of formalism that include assumptions about fact-finding, the relationship between legal decision making and reality, the level of discretion and creativity in decision making and the style of judicial writing. Thus, we attempt to tease out the various dimensions of legal formalism by an empirical analysis of a large number of judicial decisions in public law, and civil and criminal appeals. These elements are examined against the expected trends in the timing and periods of legal formalism discussed above: 1948-1979, 1980-1995, 1996-2007, and 2008-2013.

### *B. The Claims and Counter-Claims of Formalisms of Law*

The various claims and counter-claims about formalism that have been developed and discussed in legal literature and academic debates can be categorized into ten constructs of formalism (Alberstein 2012). Each construct was operationalized as a set of binary variables and all ten constructs are represented by 31 variables overall. In this section we elaborate on the ten constructs of formalisms, and we then describe the 31 variables in the methods section.

#### 1. The Introduction and Framing of the Legal Decision

Within a formalistic legal culture, the question of formal authority for the decision and the legal framing of the dispute receive paramount attention. Thus, right at the beginning of the opinion judges present themselves as deciding according to the law and often preface their decision by referring to the formal basis of their judgment. Questions of standing are meticulously argued and procedural concerns are emphasized. Moreover, from the outset the issue to be decided is framed as a legal question. By contrast, modern critique has challenged the notion that legal conflicts should be framed as legal questions. In fact, even some "hard cases" are famous for their non-formal openings (Alberstein 2012).[1] In addition, modern critique has marginalized questions of jurisdiction and of standing in certain legal contexts in favor of reference to the merits of the legal claim. Thus if the opinion opens with the legal question, if the issue at stake is defined from the outset as a matter of applying legal norms to existing facts, and if questions of jurisdiction are raised at the beginning of the opinion, the opening would be regarded as formalistic. Based on the public and academic debate about the decline of formalism in Israel during the 80s

[1] See Alberstein's (2012) description of Justice Dorner's decision in which she opens with a quote in French from the legal philosopher Michel Foucault.

and up to the mid-90s, we expect that legal decisions over time will open with fewer references to the facts even when these are relevant, and will be less likely to invoke issues of jurisdiction.

## 2. Reliance on Extra-legal Arguments

Classic descriptions of the modern Western legal system have assumed that there is a separation of the legal realm from other social institutions, such that decisions in the legal sphere are made and rules understood according to abstract principles that are applied to the determination of specific cases (Rhinestein 1954). Thus law is considered a closed system, in which there is no reference to external considerations, such as political, sociological or economic issues. Indeed, formalism envisions the operation of the legal system as a separate technical rational machine. In contrast, the Legal Realism and Critical Legal Studies schools of law have pointed to political and ideological considerations that determine legal decisions, and have noted the insertion of personal, political and ideological elements into judicial decision writing. The focus on factors outside the legal field and the use of external arguments are considered inherently anti-formalistic, and many of the claims against the "politicization of the judiciary" have been based on the move away from formalism that relies on these extralegal rationales (Posner 1987)[2]. Indeed, experimental evidence indicates that the legitimacy accorded the Supreme Court will be damaged to a certain extent when extra-legal rationales are used (Farganis 2012). This paper examines the tendency to rely on extra-legal factors in routine cases, in order to determine whether there is a move away from formalism over time.

[2] In the United States, such claims were raised against famous precedential cases such as Lochner (1905), Brown v. Board of Education (1954) and Bush v. Gore (2000).

### 3. Reliance on Policy Arguments and Legal Principles

Another corollary of the view of law as a closed, unified rational system is that judges must apply legal norms without reference to any policy arguments or legal or moral principles. Any appeal to policy considerations or to unwritten principles of the law is considered a deviation from formalism. Rejecting this claim, a large body of writing maintains that legal decisions are based on social goals, policy considerations and legal principles, which do not necessarily correspond to the definition of a rule, yet are not political or external to the legal field (Solum 2006). The Legal Process School of Law developed a reconstructed version of law that relies on policies and principles in what is known as "purposive interpretation" (Hart & Sacks 1958). Ronald Dworkin (1978; 1986) further developed the argument that discretion in hard cases is narrow because judges are bound by the principles and policies that are inherent components of legal norms. Our empirical analysis will enable us to determine whether there was a move away from the formalism based on rules to policy-based decision-making. In view of the fact that Aharon Barak explicitly acknowledged the influence of the Legal Process School of Law on his writing, and wrote about "purposive interpretation" as the overall frame for his legal analysis (Barak 1992; 2005), we expect a significant decline in rule-based decision making since the 1980s and possibly some reemergence of rule-based formalism after Justice Barak's retirement.

### 4. Impartiality and Impersonality

Another characteristic of formalism is the use of impersonal language to create the impression that judges speak the law as direct delegates of the legislator, and that there is "a government of laws, not men." (Tamanaha 2004: 122; Kaehler 2013). In contrast to this view, some scholars have pointed to judges' need to express themselves in personal and emotional terms (Maroney & Gross 2014) and the

expression of emotions (Anleu & Mack 2005), as well as judicial biases and hunches (Fisher et al. 1993) in legal decisions. Those who object to expressions of emotion and personal style claim that these challenge judges' assumed detachment and impersonal reasoning[3]. Thus, formalism in judicial opinions would be associated with the lack of personal expressions by judges. In line with claims about the decline and later rise in formalism, we expect that judicial legal rhetoric will include more personal expressions in the eighties, which will decline in the 21st century.

## 5. Judicial Discretion and Choice

According to a formalist perception, the application of legal rules is done in a mechanical manner, without exercising discretion or choice. Formal legal writing ignores doubts and covers gaps with sub-rules and procedures. In a formal legal system, judges present the law as determining the decision, as if there is one true resolution to the legal problem, and rarely allow for expressions of doubt or self-reflection in the decision (Posner 1999). In contrast to this view, critics claim that discretion is an inevitable phenomenon in any decision-making,[4] and judges' work involves a substantial degree of intuition (Lehman 1984),[5] with many junctures where choice is exercised. This has been expounded extensively by the Legal Realism movement, which pointed to the indeterminacies of rules, as well as to gaps and ambiguities that pervade legal decision-making (Fisher et al. 1993). Thus, the

[3] However, Popkin (2007) has suggested that today in the U.S, judges who use a personal/exploratory style "are more rather than less likely to accommodate the twin political goals of projecting judicial authority and performing the difficult task of deciding cases" (Popkin 2007:5)

[4] Aristotle, Nicomachean Ethics, Book V. 10:1137b: "When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, when the legislator has failed us, and has erred by over simplicity, to correct the omission—to say that the legislator himself would have said had he been present, and would have put into his law if he had known."

[5] In Lehman's (1984) article, the author argues in favor of an intuition based approach to decision making in law which counters the critique of formalism by Legal Realism.

acknowledgement of options, and personal reflection on the choices made, would characterize non-formalistic decisions, as would contemplation of difficulties or doubts in the decision-making process. We assume that this tendency has increased over time, with less emphasis on discretion and doubts and more formalism following Justice Barak's retirement.

## 6. The Relationship between Facts and Norms

According to a formalist perspective, judges apply legal norms based on the objective determination of facts. Many legal disputes are about facts, and judges are considered professional fact-finders who use the laws of evidence to distinguish fiction from truth in a definitive way. In a formal system, there is a clear separation between the determination of facts and the application of norms. Judges perceive themselves as professionals who are capable of overcoming any potential biases and who have the ability to differentiate between real justice and the appearance of justice (Rosen-Zvi 2005). Critics of formalism maintain that the legal determination of facts is biased and is influenced by a variety of factors, including the setting, and the emotional and cultural background of the judges (Frank 1930). Contrary to the formalistic assumption that facts are first determined and described, while norms are later applied, critics claim that norm application is embedded in the descriptions of the facts, and therefore a non-judgmental determination of facts does not exist. Contemporary scholars of law and literature have continued to develop this critique by pointing to the close connection between storytelling and fact-finding, as well as the importance of narrative theory in understanding the way courts decide facts (Brooks & Gewirtz 1996). Thus a formalistic decision would present the facts of the case as external to and independent of the judgmental act, while in a non-formalist decision, the judge will include emotions and evaluative predicates while presenting

the facts. We will examine the changes in the presentation of facts and norms over time, assuming that decisions that contain references to the interpretation of facts and to the emotions of the participants are less formalistic. We also predict that like the other markers of formalism, here too we will find a move to less formalism over time.

## 7. Professional Legal Rhetoric

Formalism is related to the use of professional language. "Legal language" refers to more than any particular practice and assumption of the law. It includes the use of legal terminology, special syntax, the avoidance of emotional and everyday language expressions, and the application of legal reasoning that is associated with a specific sequential structure (Danet 1980; Gibbons 2004; Bhatia et al. 2014). The use of professional language also defines the boundaries of legal practice and produces legitimacy and acceptability (Livermore, Riddell and Rockmore 2017). However, as critics have pointed out, judges regularly deviate from professional language. They may quote poetry or literary texts (Kearney 2003); they may adopt elements and stylistic devices from other registers and even include humor in their decisions (Marshall 1989; Rushing 1990). The use of professional language that is often inaccessible to laypersons is a basic feature of legal formalism[6]. Evidence of the move away from formalism would be the inclusion of non-legal registers in the decision, the use of poetry, expressions from popular culture, or references to literature and art. We assume that such deviations from formalism will be very rare.

## 8. Institutional Boundaries

One of the tenants of legal formalism is the idea of preserving boundaries between the different institutions in society, and ensuring that the professional competence of each

[6] See Owens, Wedeking & Wohlfarth (2013) who suggest that justices strategically obfuscate the language of their decisions in order to evade congressional review.

branch of government is maintained without extensive interventions by the judiciary (Hart & Sacks 1958). This principle also refers to the relationship between instances of the same court, so that a judge will not intervene in a lower court decision unless very specific types of errors have occurred. This implies a conservative approach to judging. Scholars who have studied judicial activism have emphasized the role of courts in influencing and controlling other branches of governance and in promoting human rights values (Wright 1968; Wallace 1981; Halpern & Lamb 1982; Holland 1991; Shapiro 1995; Kmiec 2004). Thus, we suggest that judges who intervene in the decisions of other institutions would be regarded as non-formalistic. In cases of the civil and criminal appeals that we examined, there is always a question of intervention in the decision of the previous instance. In constitutional and public cases (High Court of Justice - HCJ)[7] intervention is debated in reference to the administrative or executive branch or other professional courts. We assume that over time there will be less rhetoric of maintaining institutional boundaries and more actual intervention, and therefore less formalism.

### *9.* Rationalism and the Inner Logic of Legal Spheres

According to formalism, the basic quality of law as a system of norms is related to the deductive relations between principles and rules, as well as to the horizontal differentiations among the various fields of the law. Law is a logical system in which coherence and systematization are of paramount importance, and each field of law is characterized by unique and distinct principles (Cox 2003). The counter argument to the above assumption is that the boundaries of the law are flexible, and given to new

[7] The Israeli Supreme Court functions both as the final instance appellate court in all civil and criminal cases, and as the first and last instance in its role as the High Court of Justice (HCJ). People can petition the HCJ to seek relief from administrative decisions of public agencies.

demarcations in accordance with the needs and problems that arise. According to this parameter deviation from formalism will occur when an explicit declaration is made regarding the innovation or boundaries-blurring role of the decision. We will examine whether such rhetoric has increased over time, and suggest that some decline has occurred on this parameter since the 1980s (Mautner 1993).

## 10. The Gap Between "Law in the Books" and" Law in Action"

In formalistic thinking, there is an assumption that the statement and application of a norm will produce changes in reality, and that "law in the books" corresponds to "law in action". Here too, the claim is formalistic in that it regards the rationality of law as a mechanism to control reality. The counter-claim is that law in action is different from law in the books, and that legal writing has, at best, only an indirect connection to social change. The origin of this critique goes back to the sociological jurisprudence movement developed by Roscoe Pound (1908; 1910), which criticized legal studies for their emphasis on legal rules and decision-making, while ignoring the social context and implications of those decisions (Hunt 1978). Legal Realists continued to challenge the overemphasis on norms and on court opinions, and have developed a positivist approach based on the empirical analysis of the interaction between norms and reality (Schlegel 1995; Leiter 1999). Scholars of law and society have expanded this critique in academic debates and empirical research about the ability of legal rules and decisions to produce social change (Rosenberg 1991, 2008). In general, a formalistic judge takes the implementation of legal norms for granted, without referring to the effect of the rules or the difficulties of ensuring compliance with the decision, whereas deliberation regarding these issues would be signs of non-formalism. We do not expect that acknowledgement of the difficulties of implementing the decision will occur often in legal rhetoric, although we do expect

that over time judges will express more awareness of the gap between law in the books and law in action.

These 10 constructs of formalism were operationalized as a code used in the content analysis of 2,086 judicial decisions of civil and criminal appeals and public law cases. It thus joins the growing body of scholarly research of legal decisions that use content analysis in order to provide a more systematic and objective way to document what courts do and say than conventional interpretive techniques (Hall & Wright 2008)[8]. It should be noted that this study does not seek to develop or test a theory of judicial decision making or opinion writing. Rather, it strives to describe trends and generate conjectures about the nature of legal rhetoric in Israeli Supreme Court opinions, and to stimulate questions about similar phenomena elsewhere. In the following section, we elaborate on the details of the research procedure.

## II. METHODOLOGY

Using data from the legal database Nevo[9], we examined changes in formalism over time in Israeli Supreme Court cases. We identified our population as all primary decisions marked "judicial opinions", and not just technical decisions, that were longer than two pages and were written between the years 1948 and 2013. We based our sample strategy on the distribution of decisions by the Supreme Court of Israel in each of its functions as the final appellate court in civil and criminal cases and as the High Court of Justice (HCJ) over the years. From that pool of all judicial decisions we

[8] Hall & Wright (2008) note that content analysis is particularly suitable in cases that debunk conventional legal wisdom. We sought to examine what has become common knowledge among Israeli legal scholars, i.e., that there has been a decline in formalism over time.

[9] Nevo is regarded as the most complete commercial database of Israeli judicial opinions, and it claims that it receives all the judicial decisions directly from the Supreme Court.

sampled every four years, for three consecutive months each year in the early years, and two consecutive months each year from 1986 on, beginning with a different month each year. There were two reasons for oversampling in the earlier years. For one, in the early years, selected decisions of the Supreme Court were published by the Bar Association, based on the editors' assessments of their importance and precedential nature. Only in 1985 did the Supreme Court start computerizing all its decisions, and a few years later, the Bar Association and commercial enterprises began producing CD- based and on line full text decisions. Today, there are more than five commercial databases that publish Court decisions, and the most comprehensive one, Nevo, has also added to current decisions those opinions that were previously unpublished in print form. The problem is that unless we go through court files, there is no way of knowing how many of the early decisions were unpublished. In addition, there is a large gap between the number of decisions made by the Supreme Court in the early years compared to current numbers, and we wanted to have less of an imbalance between the number of decisions in each time period.

Thus our sample matches the proportion of decisions for each year and each particular instance with the actual number decided by the court during each year and in the particular court function, slightly weighting the early years. Altogether, there were 2,086 opinions in our sample, including 664 criminal, 849 civil and 573 public law (HCJ) cases.

In order to examine the claims about the changes in Israeli decision writing over time as discussed above, we divided the research years into four periods of time 1948-1979, 1980-1994, 1995-2006 and 2007-2013. This grouping was chosen, because it reflected periods during which there were changes in legislation, in the identity of the

Justices of the Supreme Court and in public opinion and academic perceptions about the Supreme Court.

As we noted previously, building on the claims and counterclaims of advocates and opponents of the formalism debate, we created a code of ten parameters that distinguished between formalistic and non-formalistic rhetoric in judicial decision writing. A series of one to seven yes/no questions were used to determine the formalism of each parameter, for a total of 31 binary variables (see Table 1). Apart from two questions (Var46 and Var47), all questions were coded as" 0" if the particular phenomenon referred to by the variable was not present in the decision and "1" if it occurred. For purposes of analysis, we recoded the 29 binary variables so that "1" reflects the formalistic option (i.e., either the presence or absence of the particular criterion). The coders were six trained law students. To ensure correct coding and inter-coder reliability, sixty decisions were coded by all coders in order to determine the reliability of the coding scheme and the clarity of the variables. The Cohen's Kappa test of reliability among the six coders ranged from 0.71 to 1.00, with an average of 0.825 across the coders and variables.

**Table 1. Description of Variables Used in Content Analysis***

| | |
|---|---|
| **1. The introductory framing of the decision (refers to the first 2 pages of the decision)** | |
| (Var21) *Legal intro*: Does the decision open with a legal question or issue? | Y |
| [If "yes" for Var21, go to Var22 and Var23:] | |
| (Var22) *Policy:* Is the legal question presented as one of policy? | N |
| (Var23) *Ideological1*: Is the legal issue presented as an ideological or value choice issue? | N |
| (Var24) *Non-legal sources*: Does the decision open with a quote from external sources (non-legal)? | N |
| (Var25) *Facts-norms*: Does the decision open with a presentation of the facts of the case? | Y |
| [If "yes" for Var25, go to Var26] | |
| (Var26) *Facts*: Does the decision present the facts in the first paragraph of the decision? | Y |
| (Var27) *Authority*: Does the decision open with a question of jurisdiction? | Y |
| **2. Reliance on extra-legal arguments** | |
| (Var28) *Extra-legal:* Does the decision refer to extra-legal research (i.e., economics, sociology, etc.)? | N |
| (Var29) *Cultural*: Does the decision refer to common knowledge and cultural understandings? | N |
| **3. Reliance on policy arguments and legal principles** | |
| (Var30) *Purpose*: Does the decision refer to the purpose of the relevant statute? | N |
| (Var31) *Principles*: Does the decision present principles such as equality, freedom, security, as inferred from legal texts? | N |
| (Var32) *Balancing*: Does the decision refer to the balancing of principles and/or rights? | N |
| (Var33) *Policy*: Is the decision presented as geared to the fulfillment of social purposes or based on social policy considerations? | N |
| **4. Impartiality and impersonality** | |
| (Var34) *First person*: Does the decision explicitly mention personal reflection and deliberation— e.g. "I think," "I believe," "in my opinion"? | N |
| **5. Judicial discretion and choice** | |
| (Var35) *Difficulty*: Is there reference to the difficulty in deciding the case? | N |
| (Var36) *Discretion*: Is the decision presented as a product of discretion (as opposed to the product of logical/legal reasoning and/or necessity) | N |
| **6. The relationship between facts and norms** | |
| (Var37) *Description of facts*: Does the decision include a description of the facts of the case? | Y |
| [if "yes" for var37, go to var38 and var39:] | |
| (Var38) *Feelings of parties*: Does the judge's description of the facts of the case include a description of the feelings, attitudes, emotions of the parties? | N |
| (Var39) *Facts, previous instance*: Does the decision include a reference to the facts as presented by previous instances or other opinions? | Y |
| (Var40) *Legal/other truth*: Does the judge make a distinction between legal truth and factual truth (legal facts and social/other facts)? | N |

**Table 1 (continued). Description of Variables Used in Content Analysis***

| | |
|---|---|
| **7. Professional legal rhetoric** | |
| (Var41) *Personal experience*: Does the decision include events from the judges' own personal experience or life history? | N |
| (Var42) *Popular culture*: Does the decision include references to literature, art, popular culture, poetry, humor, etc.? | N |
| (Var43) *Slang*: Does the decision include slang or popular idioms? | N |
| (Var44) *Poetic style*: Does the language of the decision stylistically diverge from ordinary legal writing? | N |
| **8. Institutional boundaries** | |
| (Var45) *Intervention:* Does the court intervene in the decision/operation of other institutions? | N |
| [if "yes" for var45, go to var46 and var47:] | |
| (Var46): *Institution of intervention*. Regarding which institution does the court present itself as intervening? | |
| 1. Administrative branch | |
| 2. Legislative branch | |
| 3. Other professional courts (labor, rabbinic, military), lower courts | |
| (Var47): *Authority to intervene*: Does the court determine that it has the authority to intervene? | |
| 1. No, it determines that it does not have the authority to intervene | |
| 2. Yes, it determines that it has the authority, but will not intervene | |
| 3. Yes, it determines that it has the authority to intervene and does intervene | |
| **9. Rationalism and the inner logic of legal spheres** | |
| (Var48): *Departure:* Does the decision mention that it is a departure from current legal norms and practice? | N |
| (Var49): *Innovative*: Does the decision mention that it is an innovative or boundary breaking decision? | N |
| **10. Law in the books and law in action** | |
| (Var50): *Implementation:* Does the decision refer to the difficulty of implementation? | N |
| (Var51): *Forwarded for implementation*: Is the decision forwarded to other institutions for implementation? | N |
| (Var52): *Overcoming implementation problems*: Does the decision mention ways of overcoming the hurdles that might prevent implementation? | N |

*The formalistic option is indicated, Y=Yes, N=No

Note: The results presented below do not address variables 22, 23, and 26 in an attempt to streamline the analysis because they did not contribute any added value to the discussion.

## III. RESULTS: THE FORMALISMS OF LAW AND THEIR FLUCTUATIONS OVER TIME

As mentioned previously, we expected that in general, on each of the parameters of formalism, the first period (1948-1979) would be marked by formalistic writing, the second (1980-1996) would reflect the decline of formalism, while there would be a return to formalism in the mid-90s (1997-2007) that would increase after the retirement of Chief Justice Barak in 2006 (2008-2013). Tables 2 -11 present the means and standard deviations for each parameter of formalism in each of these four periods of time, with the formalistic option on each criterion scored as 1. Thus, the means in Tables 2-11 represent the percentage of all judges' opinions that exhibited the formalistic option on each parameter during each period of time. We employed a one-way analysis of variance (ANOVA) test for time differences in the formalism of each parameter. In addition to the F test which indicates whether changes over the entire time period are statistically significant, we also present a Bonferroni post-hoc test to isolate the particular years in which the differences between the means of formalism are significant.

### *A. The introductory Framing of the Legal Decision*

As we noted above, features of decision openings that indicate a move away from formalism include framing the issues to be decided as policy and value matters, rather than as legal questions; ignoring questions of jurisdiction in the introduction; not referring to the facts of the case in the opening; and including references to sources external to the law at the beginning of the decision. Table 2 reveals there were differences in both the extent of formalism indicated by these variables, and their trajectories over time. From the earliest period, about half the decisions opened formalistically by presenting the decision as a legal question, and continued to do so over time (46% to 53%). The only exception was the period from 1980 to 1995, when

the number of opinions that opened with a legal question dropped to 27%. Even more decisions opened with a formalistic reference to the facts of the case (from 76% to 86%) and on this variable there was a significant increase in formalism over time. The results of the formalism of other variables on this parameter were mixed. While hardly any opinions opened with a quote from non-legal external sources, formalistic references to jurisdictional matters rose from 15% of all opinions during 1948-1979 to 42% during 2008-2013. Still, most judges did not begin the opinion with jurisdictional matters, which would have been the formalist way of framing the decision.

**Table 2: Means and Standard Deviations of Formalism in the Introduction of the Decisions over Time**

| *1. The Introductory Framing of the Legal Decision [No/yes] to indicate formalism* | 1948-1979 (n=711) | 1980-1995 (n=437) | 1996-2007 (n=451) | 2008-2013 (n=487) | F |
|---|---|---|---|---|---|
| Var21<br>Does the decision open with a legal question or issue? [Yes] | 0.46***<br>(0.50) | 0.27***<br>(0.44) | 0.53<br>(0.50) | 0.46<br>(0.50) | 24.23*** |
| Var24<br>Does the decision open with a quote from external sources (non-legal)? [*No*] | 1.00<br>(0.04) | 1.00<br>(0.05) | 0.99<br>(0.08) | 1.00<br>(0.05) | 0.98 |
| Var25<br>Does the decision open with a presentation of the facts of the case [*Yes*] | 0.76**<br>(0.43) | 0.84<br>(0.37) | 0.82<br>(0.38) | 0.86***<br>(0.35) | 6.93*** |
| Var27<br>Does the decision open with a question of jurisdiction? [*Yes*] | 0.15<br>(0.36) | 0.19***<br>(0.39) | 0.33*<br>(0.47) | 0.42***<br>(0.49) | 47.90*** |

*P<0.05, **P<0.01, ***P<0.001

Note: Asterisks in Column 2 (1948-79) indicate statistically significant differences between the means shown in Columns 2 and 3 (1980-95). Asterisks in Column 3 indicate statistically significant differences between the means shown in Columns 3 and 4 (1996-2007). Asterisks in Column 4 indicate statistically significant differences between the means shown in Columns 4 and 5 (2008-13). Asterisks in Column 5 indicate statistically significant differences between the means shown in Columns 5 and 2.

Overall we can see that while judges did not use the formalistic options on all features of the opening of the decision, there was an increase in the tendency to frame

the decision formalistically over time. Although precedential cases sometimes introduce legal cases in a non-formalistic manner (Alberstein 2012), in an empirical test of a random sample of cases, such framing is not common.

### *B. Reliance on Extra-legal Arguments*

Formalists regard law as a closed discourse, and judges are expected to make decisions only in reference to this universe. Our findings suggest that in contrast to claims about the decline of formalism on this feature raised by Mautner (1993), legal decisions continue to rely largely on legal arguments, without reference to other forms of knowledge. Results in Table 3 indicate that overall there are no statistically significant differences between the various periods of time in the use of extra-legal arguments.

**Table 3: Means and Standard Deviations of Formalism in the Reliance on Extra-legal Arguments over Time**

| *2. Reliance on Extra-legal Arguments [No/yes] to indicate formalism* | 1948-1979 (n=711) | 1980-1995 (n=437) | 1996-2007 (n=451) | 2008-2013 (n=487) | F |
|---|---|---|---|---|---|
| Var28 Does the decision refer to extra-legal research (i.e., economics, sociology, etc.)? [No] | 0.99 (0.07) | 0.98 (0.14) | 0.98 (0.15) | 0.98 (0.15) | 5.58 |
| Var29 Does the decision refer to common knowledge and cultural understandings? [No] | 0.93 (0.26) | 0.96** (0.19) | 0.90 (0.30) | 0.92 (0.28) | 4.56** |

*P<0.05, **P<0.01, ***P<0.001

Note: Asterisks in Column 2 (1948-79) indicate statistically significant differences between the means shown in Columns 2 and 3 (1980-95). Asterisks in Column 3 indicate statistically significant differences between the means shown in Columns 3 and 4 (1996-2007). Asterisks in Column 4 indicate statistically significant differences between the means shown in Columns 4 and 5 (2008-13). Asterisks in Column 5 indicate statistically significant differences between the means shown in Columns 5 and 2.

One exception is the period of 1996-2007, in which we find a minor but statistically significant decline in the proportion of decisions that did not rely on common

knowledge compared to the previous period (1980-1995), so that formalism declined from 96% of all opinions to 90%. Nevertheless, on this parameter, formalism still remains extremely high over time and the tendency to rely on knowledge outside the legal sphere did not increase in the eighties, as Mautner (1993) maintained.

### *C. Reliance on Policy Arguments and on Legal Principles*

Formalism is associated with decision making based strictly on legal norms, whereas the decline of formalism is related to outcomes that pursue policy goals and are inspired by values and principles. It is on this measure that we found the most significant decline in formalism over time, and the greatest support for Mautner's thesis. Here the transformation of legal rhetoric in Israeli case law is clear: rather than relying basically on legal rules, there is now a significant use of the rhetoric of policy and principles in legal decisions. Each of the variables on this parameter indicates a move away from formalism when comparing the earliest and current periods (Table 4). Judges are more likely to refer to the purpose of the statute in their writings (9% of all opinions in 1948-1979 compared with 21% in recent years); they are more likely to mention principles such as "equality and freedom" (7% to 32%)[10], and to refer to the balance between principles and/or rights (17% to 36%). Moreover, judges were not only more likely to cite social purposes and polices, but to increasingly present their decisions as *founded* on such sources (12% in the first period compared to 36% in the most recent one). However, it should be noted that despite the decline in formalism on this measure, on average about 64% to 93% of judges' decisions across time were strictly based on legal norms. Moreover, contrary to our expectation for a formalist revival since the mid-nineties and after the retirement of Chief Justice

[10] The decision was coded as referring to principles when it did so without clearly presenting these principles as a consequence of the two Basic Laws

Barak, the decline in formalism is mainly attributed to the years 1996-2007, with no statistically significant change in the later years, 2008-2013. We have added a figure that graphically represents these trends (Figure 1). We offer an interpretation for these interesting patterns in the discussion.

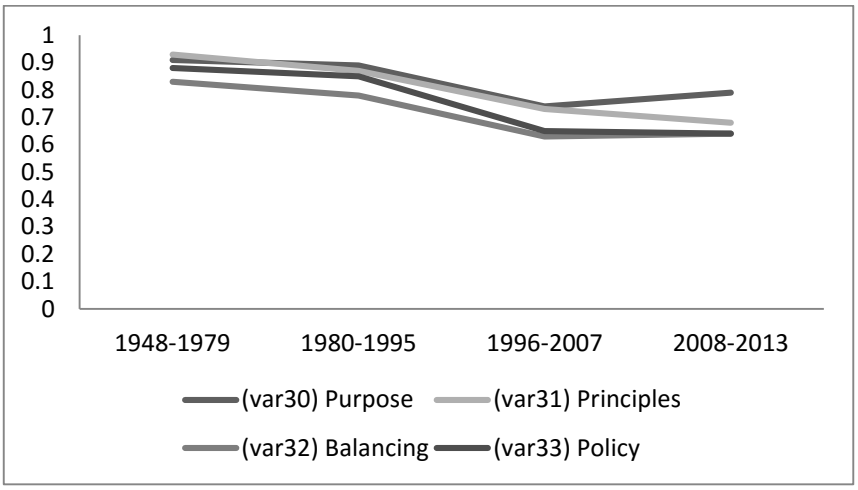
**Table 4: Means and Standard Deviations of Formalism in the Reliance on Policy Arguments and on Legal Principles over Time**

| *3. Reliance on Policy Arguments and on Legal Principles [No/yes] to indicate formalism* | 1948-1979 (n=711) | 1980-1995 (n=437) | 1996-2007 (n=451) | 2008-2013 (n=487) | F |
|---|---|---|---|---|---|
| Var30 Does the decision use the words "purpose" of the relevant statute? [No] | 0.91 (0.29) | 0.89*** (0.32) | 0.74 (0.44) | 0.79*** (0.41) | 25.30*** |
| Var31 Does the decision present principles such as equality, freedom, security as inferred from legal texts? [No] | 0.93* (0.26) | 0.87* (0.34) | 0.73 (0.45) | 0.68*** (0.47) | 53.70*** |
| Var32 Does the decision refer to the balancing of principles and/or rights? [No] | 0.83 (0.38) | 0.78*** (0.41) | 0.63 (0.48) | 0.64*** (0.48) | 29.10*** |
| Var33 Is the decision presented as founded on the fulfillment of social purposes, social policy considerations? [No] | 0.88 (0.33) | 0.85*** (0.35) | 0.65 (0.48) | 0.64*** (0.48) | 52.00*** |

*P<0.05, **P<0.01, ***P<0.001

Note: Asterisks in Column 2 (1948-79) indicate statistically significant differences between the means shown in Columns 2 and 3 (1980-95). Asterisks in Column 3 indicate statistically significant differences between the means shown in Columns 3 and 4 (1996-2007). Asterisks in Column 4 indicate statistically significant differences between the means shown in Columns 4 and 5 (2008-13). Asterisks in Column 5 indicate statistically significant differences between the means shown in Columns 5 and 2.

**Figure 1. Reliance on policy arguments and on legal principles**




### *D. Impartiality and Impersonality*

In light of the growing interest in recent decades in self-expression, emotions, and individual styles in judging, we expected to find more first person expressions and references to emotions over time. Surprisingly, we found a decline in the use of personal rhetoric over the years. Whereas before the 1980's about half of all opinions used first person expressions, in recent years, judges are more formalistic, as 62% of all opinions during 2008-13 avoided personal reflection and deliberation (Table 5).

One explanation for this phenomenon may be related to the results on the previous parameter, i.e., judges may balance other anti-formalistic trends, such as more policy-talk, with less personal or first person expressions in order to maintain a basically formal opinion. That said, however, despite the rise in formalism on this measure, on average about 38% to 45% of legal decisions over time involve personal expressions. Thus, notwithstanding the decline in recent years, even when formalism was the norm, judges often inserted their persona into their decisions, rather than presenting them as a consequence or outcome of the impersonal application of legal rules.

T**able 5: Means and Standard Deviations of Formalism of Impersonality over Time**

| *4. Impersonality (Use of First Person Expressions) [No/yes] to indicate formalism* | 1948-1979 (n=711) | 1980-1995 (n=437) | 1996-2007 (n=451) | 2008-2013 (n=487) | F |
|---|---|---|---|---|---|
| var34 Does the decision explicitly mention personal reflection and deliberation—e.g. "I think," "I believe," "in my opinion"? [No] | 0.45*** (0.50) | 0.51 (0.50) | 0.59 (0.49) | 0.62*** (0.49) | 14.80*** |

*P<0.05, **P<0.01, ***P<0.001

Note: Asterisks in Column 2 (1948-79) indicate statistically significant differences between the means shown in Columns 2 and 3 (1980-95). Asterisks in Column 3 indicate statistically significant differences between the means shown in Columns 3 and 4 (1996-2007). Asterisks in Column 4 indicate statistically significant differences between the means shown in Columns 4 and 5 (2008-13). Asterisks in Column 5 indicate statistically significant differences between the means shown in Columns 5 and 2.

### *E. Reference to Discretion and Choice*

Despite the fact that judicial discretion is an integral part of the decision- making process, the formalist notion of the mechanical application of legal rules does not leave room for expressions of doubt on the part of the judge, or the acknowledgement of discretion in arriving at his/her ruling (Pound 1908; Barak 1989). Following this argument, we expected to find an increase in judges' references to discretion and choice during the periods when formalism was said to decline in Israeli decision writing. Our findings demonstrate that judges rarely express doubts or difficulties in the process of decision making. Nonetheless, we found a minor yet statistically significant decline in formalism on this variable during the years 1996-2007 (Table 6). While before the mid-90s about 95% of all opinions reflect no difficulties in reaching a verdict, in 1996-2007 the percentages dropped to 90%. A similar pattern was found for references to discretion: until the mid-1990's, about 70% of judges' opinions did not mention discretion, whereas during the third period, the figure dropped to 60% indicating a less formalistic configuration. In the most recent period, formalism rose again to 68% of the opinions in 2008-2013 (see the graphic representation of these

trends in Figure 2). Overall, it appears that judges refer to discretion in decision-making in at least 27% of their opinions, while they acknowledge difficulty in deciding the case in up to 10% of their writing. Apparently, even a formalistic approach can accommodate a limited suggestion of judicial discretion.

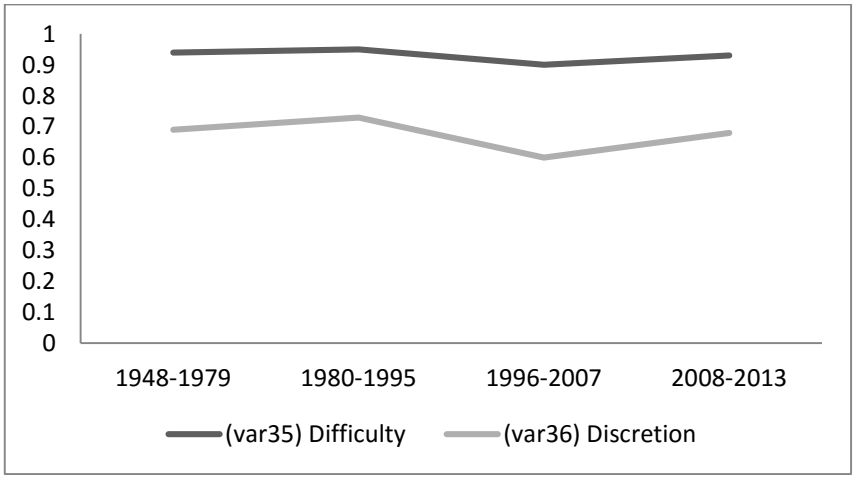
**Table 6: Means and Standard Deviations of Formalism in Reference to Discretion and Choice over Time**

| *5. Reference to Discretion and Choice [No/yes] to indicate formalism* | 1948-1979 (n=711) | 1980-1995 (n=437) | 1996-2007 (n=451) | 2008-2013 (n=487) | F |
|---|---|---|---|---|---|
| Var35 Is there reference to the difficulty in deciding the case? [No] | 0.94 (0.23) | 0.95*** (0.21) | 0.90 (0.30) | 0.93 (0.26) | 4.35** |
| Var36 Is the decision presented as a product of discretion or as the product of legal/logical reasoning and/or necessity? [legal/logical/necessity] | 0.69 (0.46) | 0.73*** (0.44) | 0.60* (0.49) | 0.68 (0.47) | 6.30*** |

*P<0.05, **P<0.01, ***P<0.001

Note: Asterisks in Column 2 (1948-79) indicate statistically significant differences between the means shown in Columns 2 and 3 (1980-95). Asterisks in Column 3 indicate statistically significant differences between the means shown in Columns 3 and 4 (1996-2007). Asterisks in Column 4 indicate statistically significant differences between the means shown in Columns 4 and 5 (2008-13). Asterisks in Column 5 indicate statistically significant differences between the means shown in Columns 5 and 2.

**Figure 2. Reference to discretion and choice**



### *F. The Relationship between Facts and Norms*

The formalist emphasis on the facts of the case as separate from norm application led us to expect that there would be a more explicit separation between facts and norms during the periods that have been portrayed as undergoing a decline in formalism. Contrary to our expectations, we found that there was a clear increase in the focus on facts associated with formalism over time: 80% of all opinions before the 1980's include a description of the facts of the case, compared to almost 90% between 1980 and 2007 and 85% in the most recent period (Table 7). In order to determine whether decisions that refer to facts in a formalistic manner continue in this vein on other features as well, we examined whether the description of the facts included non-formalistic elements, such as reference to the emotions of the parties. However, those cases that reported the facts of the case continued using the formalistic option, and more than 90% did not mention the emotions of the parties across all periods of time.

Another indication of the formalism of decisions is the distinction between legal and other facts. Although judges rarely made a distinction between legal and other facts (84% to 93%), they were more likely to do so in recent years (15%) than in the early periods (only 7% in the eighties). Thus, while in general the increased focus on facts indicates a move to formalism, the reference to different types of facts indicates the emergence of non-formalistic elements in recent years.

**Table 7: Means and Standard Deviations of Formalism in the Relationship between Facts and Norms over Time**

| *6. The Relationship between Facts and Norms [No/yes] to indicate formalism* | 1948-1979 (n=711) | 1980-1995 (n=437) | 1996-2007 (n=451) | 2008-2013 (n=487) | F |
|---|---|---|---|---|---|
| Var37 Does the decision include a description of the facts of the case? *[Yes]* | 0.80** (0.40) | 0.88 (0.33) | 0.87 (0.33) | 0.88*** (0.33) | 8.06*** |
| If "yes" for Var37, then: | | | | | |
| Var38 Does the judge's description of the facts of the case include a description of the feelings, attitudes, emotions of the parties? *[No]* | 0.94 (0.24) | 0.94 (0.25) | 0.90 (0.30) | 0.92 (0.27) | 1.97 |
| Var39 Does the decision include a reference to the facts as presented by previous or other opinions? *[Yes]* | 0.31*** (0.47) | 0.19*** (0.39) | 0.36 (0.48) | 0.31 (0.46) | 9.50*** |
| N | 565 | 383 | 393 | 428 | |
| Var40 Does the judge make a distinction between legal truth and factual truth (legal facts and social/other facts)? *[No]* | 0.90 (0.29) | 0.93*** (0.25) | 0.84 (0.37) | 0.85* (0.50) | 9.65*** |
| N | 642 | 324 | 262 | 285 | |

*P<0.05, **P<0.01, ***P<0.001

Note: Asterisks in Column 2 (1948-79) indicate statistically significant differences between the means shown in Columns 2 and 3 (1980-95). Asterisks in Column 3 indicate statistically significant differences between the means shown in Columns 3 and 4 (1996-2007). Asterisks in Column 4 indicate statistically significant differences between the means shown in Columns 4 and 5 (2008-13). Asterisks in Column 5 indicate statistically significant differences between the means shown in Columns 5 and 2.

### *G. Professional Judicial Rhetoric*

The decline in formalism in judicial writing in Israel that is part of the taken for granted view of legal scholars since Mautner's (1993) analysis, was also associated with a perception of a loosening of professional language, and an increased tendency to legal writing that could be accessible to the wider Israeli public. Again, contrary to our expectations, our findings confirm the formalistic nature of professional legal writing (Table 8).

**Table 8: Means (and standard deviations) of Formalism addressing Professional Judicial Rhetoric Norms over Time**

| *7. Professional Judicial Rhetoric [No/yes] to indicate formalism* | 1948-1979 (n=711) | 1980-1995 (n=437) | 1996-2007 (n=451) | 2008-2013 (n=487) | F |
|---|---|---|---|---|---|
| Var41 Does the decision include events from the judges' own personal experience? *[No]* | 0.99 (0.10) | 0.99 (0.08) | 0.99 (0.09) | 0.99 (0.06) | 0.46 |
| Var42 Does the decision include references to literature, art, popular culture, poetry, humor etc.? *[No]* | 1.00 (0.04) | 0.99 (0.10) | 0.98 (0.13) | 0.98* (0.14) | 4.04** |
| Var43 Does the decision include slang or popular idioms? *[No]* | 0.81*** (0.39) | 0.68*** (0.47) | 0.81 (0.39) | 0.80 (0.40) | 11.10*** |
| Var44 Is the language of the decision self-consciously literary, i.e., stylistically contrary to ordinary legal writing? *[No]* | 0.95 (0.22) | 0.97* (0.16) | 0.93 (0.25) | 0.92 (0.27) | 5.17** |

*P<0.05, **P<0.01, ***P<0.001

Note: Asterisks in Column 2 (1948-79) indicate statistically significant differences between the means shown in Columns 2 and 3 (1980-95). Asterisks in Column 3 indicate statistically significant differences between the means shown in Columns 3 and 4 (1996-2007). Asterisks in Column 4 indicate statistically significant differences between the means shown in Columns 4 and 5 (2008-13). Asterisks in Column 5 indicate statistically significant differences between the means shown in Columns 5 and 2.

In all time periods, over 90% of the decisions did not include references to the judges' own personal experience, did not include references to popular culture or artistic expression, and did not use language that was contrary to the conventional professional legal genre. The only deviation from this trend was the appearance of slang or popular expressions in about 20% of the decisions in most of the periods, with a slight rise to about 30% during 1980-1995. It is difficult to explain why there was less formalism on this variable than the others on this parameter. We suggest that contrary to the other variables, the use of which would mark the decision as unprofessional or non-legal, the inclusion of popular idioms in the decision can increase its comprehensibility without affecting its standing as a legal document.

### *H. Institutional boundaries*

We expected that judges would be most activist during the tenure of Barak as Chief Justice, and that this would be reflected in an increased tendency for judicial intervention in other institutions and legal rhetoric that ignores institutional boundaries. Table 9 indicates that in about 60% of judicial opinions in 1948, there was no intervention in the activities of other institutions. However, over time opinions became *more* formalistic, so that by the most recent period, more than 80% of the decisions did not interfere with other institutions. Of those opinions in which judges intervened in the operation of other institutions (644 over all time periods), the vast majority (88%) interfered with professional courts and lower instances, with 11% interventions in the administrative branch, and 1% in the operation of the legislative branch (not shown in Table 9). The fact that the majority of interventions were in the context of the Court's traditional supervisory role may be related to other factors in addition to an increase of formalism. One reason that over time the Supreme Court was increasingly likely to maintain institutional boundaries may be interpreted in the

context of the development of Israel's administrative institutions. Over time, the Court appears willing to rely on the judgments of other institutions, and thus is less likely to intervene in their decisions.

**Table 9: Means and Standard Deviations of Formalism in the Maintenance of Institutional Boundaries over Time**

| *8. Institutional Boundaries [No/yes] to indicate formalism* | 1948-1979 (n=711) | 1980-1995 (n=437) | 1996-2007 (n=451) | 2008-2013 (n=487) | F |
|---|---|---|---|---|---|
| Var45: Does the court intervene in the decision/operation of other institutions? *[No]* | 0.57*** (0.49) | 0.70 (0.46) | 0.74 (0.44) | 0.81*** (0.39) | 28.90*** |

*P<0.05, **P<0.01, ***P<0.001

Note: Asterisks in Column 2 (1948-79) indicate statistically significant differences between the means shown in Columns 2 and 3 (1980-95). Asterisks in Column 3 indicate statistically significant differences between the means shown in Columns 3 and 4 (1996-2007). Asterisks in Column 4 indicate statistically significant differences between the means shown in Columns 4 and 5 (2008-13). Asterisks in Column 5 indicate statistically significant differences between the means shown in Columns 5 and 2.

## *I. Rationalism and the Inner Logic of Legal Spheres*

Judges tend to maintain a conservative approach to current legal norms and practices, at least in terms of calling attention to any departure from traditional procedures. In all time periods, judges mentioned they were departing from practice or writing an innovative decision in less than 2% of the opinions (Table 10). In other words, in their writing judges exclusively rationalize their decisions within the inner logic of legal sphere.

**Table 10: Means and Standard Deviations of Formalism in the Rationalism and the Inner Logic of the Legal Sphere over Time**

| *9. Rationalism and the inner logic of legal spheres [No/yes] to indicate formalism* | 1948-1979 (n=711) | 1980-1995 (n=437) | 1996-2007 (n=451) | 2008-2013 (n=487) | F |
|---|---|---|---|---|---|
| Var48<br>Does the decision mention that it is a departure from current legal norms and practice? *[No]* | 0.99<br>(0.08) | 1.00*<br>(0.05) | 0.98<br>(0.15) | 0.99<br>(0.10) | 3.32* |
| Var49<br>Does the decision mention that it is an innovative or boundary–breaking decision? *[No]* | 1.00<br>(0.05) | 1.00*<br>(0.05) | 0.98**<br>(0.13) | 1.00<br>(0.05) | 4.85** |

*P<0.05, **P<0.01, ***P<0.001

Note: Asterisks in Column 2 (1948-79) indicate statistically significant differences between the means shown in Columns 2 and 3 (1980-95). Asterisks in Column 3 indicate statistically significant differences between the means shown in Columns 3 and 4 (1996-2007). Asterisks in Column 4 indicate statistically significant differences between the means shown in Columns 4 and 5 (2008-13). Asterisks in Column 5 indicate statistically significant differences between the means shown in Columns 5 and 2.

### *J. The Gap between "Law in the Books" and "Law in Action"*

In accordance with formalist legal rhetoric, judges are unconcerned with the application of their decisions, taking for granted the convergence of social reality with legal opinions. A move away from formalism would be found in references to the application of the norm. We found high levels of formalism on all three items in this construct (Table 11). Judges addressed the difficulties of implementing their decisions or ways of overcoming these difficulties in less than 10% of the opinions, and thus they appeared to take for granted that there was no gap between their decision and reality. In only a few more cases, 10% to 14%, were judges slightly less formalistic and delegated the implementation of their decision to other parties or institutions. What is interesting is that the third period- from 1996-2007- was the least formalistic of the four time frames, and on two variables (the difficulty of implementation, and ways of overcoming these difficulties) was significantly if only slightly lower than the

previous period). It is tempting to attribute this finding to the tenure of Justice Barak as Chief Justice during this period.

**Table 11: Means and Standard Deviations of Formalism in the Gap between "Law in the Books" and "Law in Action" over Time**

| *10. The Gap between "Law in the Books" and "Law in Action" [No/yes] to indicate formalism* | 1948-1979 (n=299) | 1980-1995 (n=217) | 1996-2007 (n=338) | 2008-2013 (n=379) | F |
|---|---|---|---|---|---|
| Var50 Does the decision refer to the difficulty of implementation? *[No]* | 0.98 (0.15) | 0.98* (0.15) | 0.94 (0.23) | 0.95 (0.21) | 4.47** |
| Var51 Is the decision forwarded to other institutions for implementation? *[No]* | 0.88 (0.32) | 0.89 (0.31) | 0.86 (0.34) | 0.90 (0.31) | 0.85 |
| Var52 Does the decision mention ways of overcoming the hurdles that might prevent implementation? *[No]* | 0.97 (0.18) | 0.98*** (0.15) | 0.91 (0.28) | 0.93*** (0.25) | 9.44*** |

*P<0.05, **P<0.01, ***P<0.001

Note: Asterisks in Column 2 (1948-79) indicate statistically significant differences between the means shown in Columns 2 and 3 (1980-95). Asterisks in Column 3 indicate statistically significant differences between the means shown in Columns 3 and 4 (1996-2007). Asterisks in Column 4 indicate statistically significant differences between the means shown in Columns 4 and 5 (2008-13). Asterisks in Column 5 indicate statistically significant differences between the means shown in Columns 5 and 2.

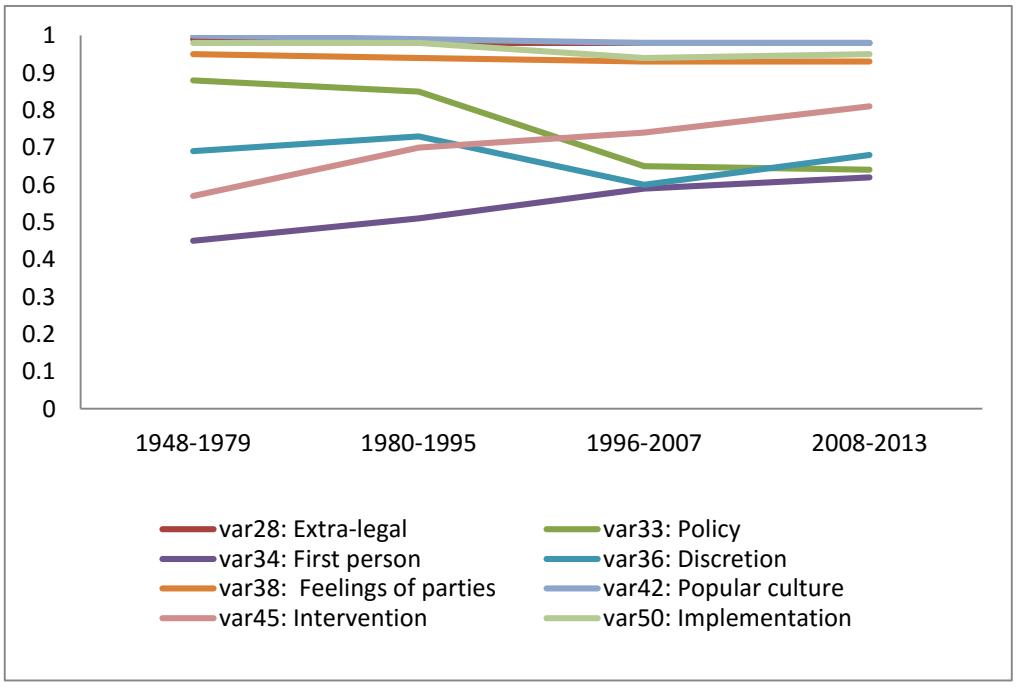
## V. DISCUSSION

Although law students who study hard cases are often exposed to creative and anti-formalist modes of decision-making, we found that in Israel, when using a random sample of routine legal opinions, formalism is the prevailing mode of legal rhetoric. Legal rhetoric does not rely on extra-legal arguments (Var28), does not include references to art or popular culture (Var42), does not refer to the emotions of parties in describing the facts of a case (Var38), and does not address the difficulties of applying legal norms (Var50).

Notwithstanding this high level of formalism, our data show two additional patterns indicating changes in formalism over time. These are patterns of increase and decline in specific variables that have been regarded as indicators of formalism. In terms of the increase in formalism, our data suggest that over time judges tend to use fewer personal expressions as their rhetoric becomes more professional (Var34), and, surprisingly, are less likely to intervene in the decisions of other institutions (Var45). (See Figure 3 for a schematic representation of the trajectories of all the variables together).

These results are interesting for two reasons. First of all, these variables were fairly low to begin with, and despite their increase over time, in the last period they still were less formalistic than the others. Moreover, the fact that even in the period which is generally accepted as part of the formalist era, there is some personal expression and institutional intervention seems to indicate that contrary to formalist theory, these deviations are acceptable, at least to a limited degree

**Figure 3. A schematic representation of the trajectories of main formalism variables**



One explanation for the increase of these two variables may be that the criticism of Chief Justice Barak and the activist tendencies he was associated with put pressure on justices to refrain from obvious anti-formalistic rhetoric, even if in essence the outcomes were not restrained or if other aspects of formalism were contravened in their decision-writing. This may also tie in to our previous suggestion that justices will balance the formalistic and anti-formalistic tendencies within a particular decision so that their opinion as a whole does not stray too far from formalist tendencies.

In terms of the decline of legal formalism, we found that over time judges' opinions include more references to policy (Var33) and legal discretion (Var36). The most significant and stable decline in formalism was found in the use of policies, legal principles and purposes. Legal rhetoric has shifted dramatically on this parameter since the 1948, when 12% of the opinions used the language of policies, to the most recent period when one quarter of the judges include references to policy and social purposes when writing their decisions. Is this a sign of the decline of formalism? Can claims about the decline of formalism be justified by this finding? We would like to suggest a different interpretation that is consonant with the theoretical development of this parameter in legal literature. We find that while the trend to greater policy and principles rhetoric reflects a decline of one type of formalism, at the same time it points to the emergence of a new phase that can be defined as formalistic in a different sense. The use of policy arguments or legal principles reflects a particular reconstruction of the critique of formalism in reference to the indeterminacy of legal rules as promoted by Legal Realism (Fisher et al. 1993). It introduces an instrumental perspective to legal decision-making that may be regarded as domesticating the Legal Realist critique, while developing new legal

rhetoric (Peller 1988). Some have already considered the introduction of policy and principles to be a more developed stage of formalism (Weinrib 1993). Ernest Weinrib (1988) adopted this new version of formalism and celebrated it as the true representation of the inherent qualities of law. According to Weinrib (1988: 950-957) "immanent moral rationality" is what formalism offers the law, and such a quality is central to any understanding of the functions and importance of law. Weinrib regards formalism in this new phase as the law's aspiration to be clean of politics, values, ideology and emotions.[11] Using policy arguments and purposive language thus keeps judicial writing within the realm of law. Our research suggests that legal writing reflects the emergence of a formalism described by Weinrib, which we term Stage II Formalism.

Stage II Formalism is also evident in the reference to discretion and choice, which as we found, also increased over time, indicating a decline of formalism. We can see that the decline in formalism appears particularly when we look at judges' tendency to acknowledge the very fact that they have discretion. The concept of judicial discretion has undergone various transformations in legal literature, moving from a perception of unbounded authority, such as Weber's Kadi-justice (Rheinstein 1954), in which decisions are influenced by a range of legal, moral, political and emotional considerations (Schneider 1991) , to weaker notions of discretion, such as the one defined by Dworkin (1963, 1977, 1978).[12] Recent writers assume that "the thesis of

[11] For a critical view of the use of policies and purposes as only pretending to escape politics and external arguments see Unger (1986: 79). "Formalism in this context is a commitment to, and therefore also a belief, in the possibility of a method of legal justification that contrasts with open-ended disputes about the basic terms of social life, disputes that people call ideological, philosophical, or visionary."

[12] Jurisprudential writing has discussed discretion in relation to hard cases. The most famous debate was between H.L.A. Hart and Ronald Dworkin, who disagreed whether judges have discretion in the strong or weak sense in hard cases. Dworkin's "one right answer" thesis has been challenged by Hart (1994) and others (e.g., Raz

judicial discretion does not claim that in cases where discretion may be exercised anything goes". Such cases are governed by laws "which rule out certain decisions" (Raz 1972: 843). While acknowledging the dangers of absolute discretion (Davis 1971), contemporary judges perceive structured discretion and reasoned elaboration as important aspects of their role (White 1973). It seems that Israeli justices feel that acknowledging discretion and choice in their opinions does not challenge the legitimacy of the formal decision. In other words, judges' references to discretion reflects a perception of legal decision making that does not equate discretion with an escape outside the boundaries of law. Indeed, the fact that from the earliest period, discretion was mentioned in about one quarter of the decisions seems to indicate that it was also legitimate to a more limited extent in rule-governed formalism.

When examining the various trends of formalism, it is apparent that formalism does not decline significantly on all its dimensions. On the contrary, many forms of formalism remain stable and high, while others increase over time. However, even on those parameters in which formalism remained high, there was often a slight decline in the period of 1996-2007 (variables 29, 40, 48, 49, 50, 52), that coincides with Barak's tenure as Chief Justice of the Supreme Court. Thus, on some indicators, despite the very formalistic nature of judicial writing, the trend was in line with those who spoke of a decline in formalism.

It is compelling to ask, in light of our surprising finding about legal impersonality and impartiality, whether judges seek to maintain a balance in the use of different elements of formalism. For example, do judges balance a decline in formalism at the policy level, with an increased formality in professional rhetoric? Do judges balance

1979). They assume that not every legal question has a right answer, and in difficult cases at least two alternative decisions are possible.

their emphasis on discretion with a growing frame of formalism in the introduction? Do judges use more personal language when rule-based formalism is their style? It may be suggested that the formalist ship of law sails safely when one or two tenets are declining, but it cannot release itself altogether from all formalistic bonds.

What our research has not resolved, and what can be viewed as a limitation of this study, is the question of what weight should be assigned to each measure of formalism. Claims against formalism have developed at different stages of legal history, and some of the characteristics attributed to formalism have become more popular and familiar, and therefore more significant in classifying legal decisions as formal or not. It seems that Mautner's depiction of the decline of formalism in Israeli judicial decisions is based largely on three features: the insertion of liberal political ideas into law; the rise of purposive interpretation and policy discourse; and the increased acknowledgment of judicial discretion. Our findings support the decline of formalism on the last two parameters.

Nonetheless, other parameters, such as the use of impersonal language associated with an objective detached perception of law, the preservation of institutional boundaries, and the legalistic framing of the text of decisions, have always been considered distinctive traits of a functioning, formal legal system On these we did not find the expected decline over time, and at this stage we can only suggest that there is a possible interplay between the various features of formalism, so that judges do not completely diverge from the formalistic mold.

This research addresses formalism as a complex multidimensional phenomenon, and does not emphasize one measure of formalism over another. Now that there is a clearer empirical picture of the trends of each parameter of legal formalism in Israeli

legal rhetoric, the floor is open for various interpretations about the relative weight of each measure.

## VI. SUMMARY AND CONCLUSION

This paper examined the extent to which critical claims about the formalism of law are implemented in the legal rhetoric of Supreme Court decisions. Our findings suggest that on most measures, there was little evidence of the much-debated decline in formalism. However, the rise in the reference to judicial discretion and the incorporation of policy goals as a basis for decision-making do follow the expected change in judicial rhetoric. We argue that these findings may indicate a reconstructed genre of formalism, which we termed Stage II Formalism. Thus, although legal rhetoric adheres to the "Stage I Formalism", i.e., the aspects traditionally associated with formalism, on most measures, it seems that the deviations and decline discussed in the literature can in fact reflect a reconstruction of formalism that incorporates policy and discretion into the formal legal realm. In other words, legal realism and other critical schools have not replaced formalism, but have changed it in significant ways.

This research presents the findings of a four-year empirical study that sought to examine the extent to which claims about the decline in formalism were evident in legal writing in routine cases. Like other research that relies on content analysis, it provides a way of systematically and objectively analyzing legal phenomena in a large number of opinions. Thus, unlike other work that has studied anti-formalistic trends mainly in relation to a small number of "hard" or "precedential" cases, our analysis encompasses a large number of routine cases decided by the Supreme Court. However, as others have noted (Hall & Wright 2008:99), content analysis based

research cannot provide the deeper understanding of individual opinions that comes from traditional interpretive techniques. Moreover, the main aim of this study was to determine whether the features that have been said to indicate formalism in legal opinions do indeed act in a similar way, and to trace the trajectory over time of each of these elements of formalism. We acknowledge that there are many case characteristics that may also potentially influence the formalism of legal opinions, and we anticipate conducting further research to identify patterns of formalism among, for example, the different fields of law represented in the data (criminal cases, public law and civil cases) and between hard cases (frequently quoted in other cases) and routine cases. Future research could also analyze the relationship of the parameters of formalism to other independent variables such as the number of opinions quoted, the length of decisions, and the particular judges who wrote the decisions. It would thus be possible to provide profiles of Supreme Court justices in relation to formalism.

Understanding the formalisms of law is important in order to understand law in action. Contrary to current notions of formalism, our research demonstrates that it is not so much the case that formalism exists or not, but that there is an intricate interplay between the various aspects of formalism. Legal texts today and even in the past reflect both the aspiration for formalism, as well as its deviations and judges may attempt to balance these in their opinions. The fluctuating paths of legal rhetoric are therefore neither completely in the direction of formalism or away from it, but reflect the trends in social and jurisprudential development in negotiation with formalistic aspirations.

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**LEGISLATION**

The basic law: human dignity and freedom (1992)

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# Panel formation on the UK Supreme Court

By Chris Hanretty

In this paper, I look at how five, seven or nine judge panels of the UK Supreme Court are formed. I group explanatory factors into legal, organisational and political factors. I develop an original technique for dealing with this discrete choice problem of picking m judges from a bench of n judges. I find that the most important factor is legal specialisation. Workload and rates of agreement also matter, but in the opposite direction to that predicted: judges with already high workloads are more likely to be empanelled, and judges who agree more with the President of the court are less likely to be empaneled.

# The Personalization of Judicial Review:

# The Cohesiveness of Judicial Nominations and Constitutional Courts

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Assaf Meydani, The Academic College of Tel – Aviv Yaffo

Maoz Rosental, IDC Herzliya

Abstract

In this paper, we examine how would the decrease of judicial selectorates' cohesiveness increase the influence of judges' individual characteristics on judicial review. We relate to this phenomenon as a personalization of judicial review. We claim that this phenomenon has a significant effect on our ability to understand constitutional courts' judicial review. We validate our theory using the case of Israel's High Court of Justice (IHCJ) rulings between 1995 and 2016. During this period, the Court varied in its cohesiveness due to institutional changes in Israel's polity and its selectorate. Consequently, the IHCJ's review became more personalized.

# Judging the Government: Evidence from the Supreme Court of Canada

Andrew Green and Ben Alarie
July 2018

Abstract

Administrative law involves judges in a struggle between the rule of law and the need for pragmatic, effective policy decisions. Part of the difficulty lies in finding ways to take the politics out of judicial review of administrative decisions of government. How can you limit the ability or willingness of judges to decide often complex, high stakes policy questions on the basis of their own policy preferences? The answer may lie in part in the tests developed to sort between those questions on which the courts should defer to the administrative decision-maker and those for which the judge herself should provide the answer. As with most areas of empirical research into judicial decision-making, much of the empirical work on administrative law has been undertaken on US courts. However, different countries have arrived at distinctive ways for resolving this issue. Moreover, countries appear to have difficulty finding stable solutions to this problem, with courts altering tests as difficulties with each new answer appear. In this project we seek to further understanding of this struggle by examining the evolution of the solutions adopted in Canada. We use a database we have developed of all Supreme Court of Canada cases since 1953 to study how the Supreme Court has reacted over time to this challenge. Canada has in the past used a highly contextual test for determining when to defer to administrative decision-makers, though more recently has moved towards a more categorical approach that was argued to be less discretionary (and therefore harder for judges to use ideologically). We examine whether the changes in these tests on when to defer seem to alter how the Supreme Court decides cases.

**Interrupted paper trails.**
**Analyzing decision making on the Norwegian Supreme Court**

Paper prepared for presentation at
*Comparative Supreme Court Decision Making Workshop*,
December 16-17, 2018, The Hebrew University of Jerusalem

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Abstract:
Social science analyses of judicial decision making on the Norwegian Supreme Court started with a small exploratory analysis in 2007-2008. In that study, researchers compiled a data file consisting of fifteen justices casting a total of 163 votes in eleven non-unanimous plenary decisions on constitutional issues between 2000 and 2007. Today, the judicial behavior research project maintains a relational database that includes more than 17,000 decisions and more than 70,000 justices' votes, as well as a text database covering the full range of Supreme Court decisions since 1945.

# 1. Creating databases

## 1.1 The void

The research project on judicial behavior on the Norwegian Supreme Court, including the project's database, had its genesis in a comment made during a panel on judicial decision making at the International Political Science Association's 2003 meetings in Durban, South Africa. Eric Waltenburg and Sam Lopeman presented a paper and served as panel discussants at the IPSA convention. While discussing a paper on the decisional outputs of the Norwegian Supreme Court, Lopeman suggested that the author consider the justices' preferences and values as a possible, systematic explanation for the behavior the author uncovered. The notion that a justice's attitudes might bear upon his or her decisions was hardly novel to Lopeman and Waltenburg. The role of attitudes in judicial behavior has been an accepted paradigm in American political science for a very long time, so when Lopeman's suggestion was met with some skepticism, they were somewhat taken aback.[1] Both Lopeman and Waltenburg being a bit bullheaded, however, they were convinced that the effect of attitudes on the decisional outputs of Norwegian Supreme Court justices was an empirical puzzle worthy of analysis. And although the panel's participants told them in no uncertain terms that Norway's justices decided cases according to the law and that politics (ideology) had no place in their rulings, Lopeman and Waltenburg decided to explore the role of attitudes on the votes of Norway's justices.

That empirical exploration, however, would be daunting. The problem was that neither Lopeman nor Waltenburg knew much about Norwegian law and politics. Luckily, William Shaffer, Waltenburg's colleague at Purdue University, had long nurtured a deep and abiding interest in all things Norwegian. Upon returning to the United States, Waltenburg related to Shaffer the reaction that Lopeman's comment had engendered. And after listening to Waltenburg's recounting of how the Norwegian Supreme Court allegedly did not venture into the 'political thicket,' Shaffer agreed that he should follow up while on sabbatical leave at the University of Bergen in 2006-2007. Specifically, he would investigate the proposition that politics, not simply legal reasoning, plays a key role in Norwegian judicial behavior. He discovered immediately that the Supreme Court received little coverage in the Norwegian press,

[1] This and the next paragraphs draw on (Grendstad et al. 2015:xv).

that few people could name the Chief Justice of the Norwegian Supreme Court, and that some legal but no political science research on judicial behavior on the Court had been published. From there, Shaffer asked Gunnar Grendstad from the University of Bergen if he would join the Purdue research team.

### 1.2 Building data files

While the Norwegian Supreme Court publishes its decisions from the Appeals Selection Committee and its merits panels online as pdf-files, the single systematic source for decisions on the Supreme Court is *Lovdata*.[2] *Lovdata* is a foundation established by the Ministry of Justice and the Faculty of Law at the University of Oslo. It is a large text database which contains all Supreme Court decisions since 1945 and the most important decisions before that. It is organized toward and primarily serves the needs of lawyers, litigants, and the legal community. *Lovdata* contains all national legal sources (acts, laws, statutory instruments (*forskrifter*) and preparatory works, parliamentary papers), relevant international legal sources, as well as legal litterature, articles and relevant research publications. The most recent information is public and freely available at *Lovdata*, but a subscription is required to access to the full database.

The Purdue-Bergen research team decided first to limit the analyses to the non-unanimous decisions and to start with the most consequential decisions. The first attempt included eleven non-unanimous Supreme Court *en banc* decisions and the votes of the total of fifteen justices who participated in at least half of the cases heard by the full court. The eleven decisions cover the 2000-2007 period. The first round of collecting data from *Lovdata* was organized in Word and Excel files, depending on the type of information, and then analyzed in SPSS or STATA. Applying the attitudinal model (Segal and Spaeth 2002), the results of the analysis were presented at the 2008 MPSA Conference (Grendstad et al. 2008) and later published (Grendstad et al. 2010b).

Since virtually all merits decisions on the Norwegian Supreme Court are *not* decided *en banc* or in the eleven-justice Grand Chamber, the research team decided to expand the next round

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[2] https://www.domstol.no/hoyesterett/ https://www.domstol.no/no/Enkelt-domstol/-norges-hoyesterett/avgjorelser/avgjorelser-20181/ https://lovdata.no/ , https://lovdata.no/info/information_in_english

of analysis to include non-unanimous decisions handed down in the regular five-justice panels. The research question addressed judicial behavior in decisions that pitted a private party against a public party on a legal issue that involved economic interests and economic issues. The data included the 31 justices who had cast votes in 63 non-unanimous decisions on economic issues handed down by the Norwegian Supreme Court in the 2000-2007 period. This round of research included a total of 351 observations. The results were presented at the 2009 MPSA Conference (Grendstad et al. 2009) and later published (Grendstad et al. 2011).[3]

### 1.3 Taking stock

In August 2009, Grendstad travelled to Purdue University to spend his sabbatical working together with Shaffer and Waltenburg. Taking stock of the research efforts and realizing that a great amount of empirical analysis remained to be done, the team decided to include more non-unanimous decions in the five-justice merits panels. However, given the somewhat disorganized fashion in which data had been compiled across different types of files in the two first rounds of papers, a key question was how to best record, store and retrieve different types of data on decisions, justices and votes.

Up until 2009, the organization of different types of data had been done in a somewhat ad hoc manner. For the first two papers the data files were built step by step by manually matching information on the decisions with information on the justices through the individual votes of the justices. But this practice was not a viable strategy moving forward. It did not make much sense to more or less manually quintuplicate case information to the five justices who participated in the decision. And it did not make much sense to manually duplicate background information on each justice and match it to all the decisions in which they participated.

### 1.4 A relational database

The answer to the question of how to organize and handle data was to build a relational database which promises both rigor and flexibility. The guiding principle in a relational database is to store a piece of information only once and to store it where it logically belongs. It was decided to use

[3] An early but still unpublished political science analysis of the justices on the Norwegian Supreme Court, using item-response modelling, can be found in Høyland et al. (2011).

Microsoft Access to build the database. This software is flexible, rigorous and user-friendly. The first step was to identify the different types of information in judicial research. The answer was three types:

- information on decisions,
- information on justices, and
- information on votes.

The next step was to initiate three separate tables and to allocate relevant types of information to each. And the third step was to establish the two direct relationships between the tables (see Figure 1).[4]

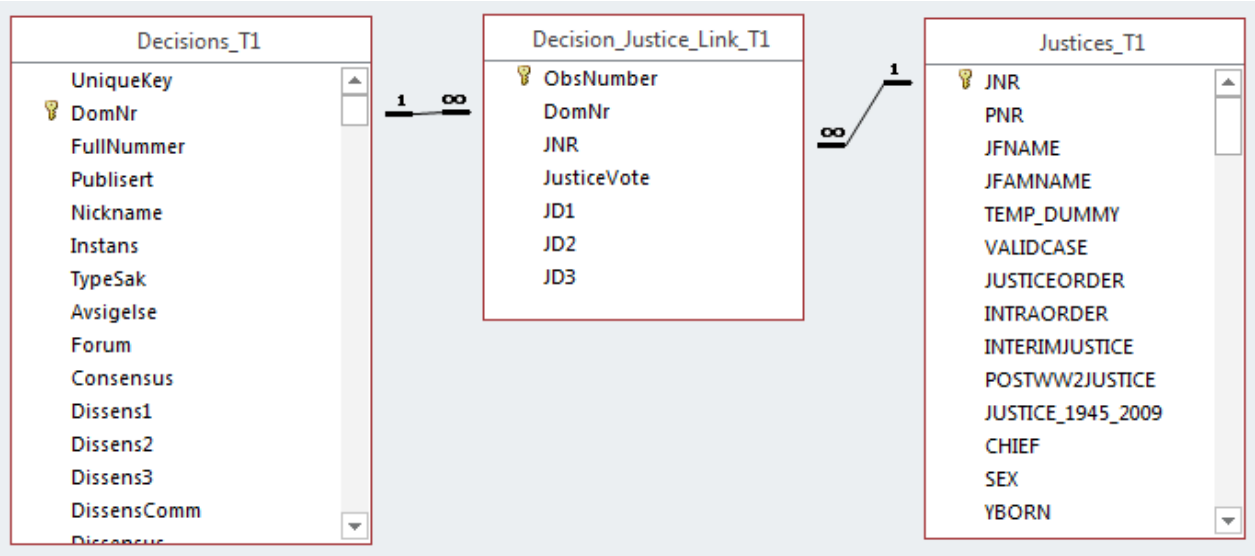


**Figure 1** The three main tables of the *Doranoh* relational database and the relationships between them: Decisions, Votes (link), and Justices.

Decisions are linked to the justices' votes in a *one-to-many* relationship since more than one justice participates in every decision. Justices are linked to votes in a *one-to-many* relationship since a justice casts many votes during her time on the court. These relationships ensure that any information on any justice who participates in a decision can be linked to any information on the

[4] The database consists of other interrelated tables, too, but they are less central here.

decison through the justice's vote, and vice versa. Thus became the structure of the database on judicial behavior on the Norwegian Supreme Court.[5]

*Lovdata* adds meta data to the Court's decisions. It also inserts hyperlinks to statutes and earlier decisions. From the *Lovdata* database we retrieved and stored basic meta data in the decision table: court, date of decision, case identifier, key words, abstract, case history, parties, justices, and references to legal sources (See Figure 2). The textual data was later coded into numerical categories as needed. From a number of different sources – books, library biographies and online resources – we retrieved and stored information on the justices in the justice table. We coded the justices' votes in the link file according to whether a justice voted with the majority or the minority. Later, during more specific parts of research projects, when we needed to identify the type of judicial vote – majority or minority on the outcome of the case, concurrences, and direction of sentencing/compensation – we added more variables on the justices' votes.

By December 2009, the research team had recorded the approximately 2,500 non-unanimous five-justice decisions on the Court for the 1945-2009 period. The team also had basic information on the justices participating in these decisions and whether the justices cast their votes with the majority or minority in each decision. The *Doranoh* database was at this point a skeleton structure to which more information on decisions, justices and votes could be added when needed or required. The new data was utilized in a research paper on voting coalitions on the Supreme Court (Grendstad et al. 2010a).

Meanwhile, the research team submitted a research proposal to the Meltzer Foundation at the University of Bergen. The project aimed to hire law students who could read Court decisions and provide substantive and systematic coding, such as legal issues, case properties and decisional outcomes, to the decisions in the database. In March 2010, the Meltzer Foundation decided to fund the proposal. The research team drew on the *High Courts Judicial Database Codebook* (Haynie et al. 2007) and initiated a range of new case variables. In April Grendstad travelled from Indiana and back to the University of Bergen, hired two law students and introduced them to the coding protocol.

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[5] The database was named *Doranoh* [dommeratferd norges høyesterett] ['Judicial Behavior on the Norwegian Supreme Court'].

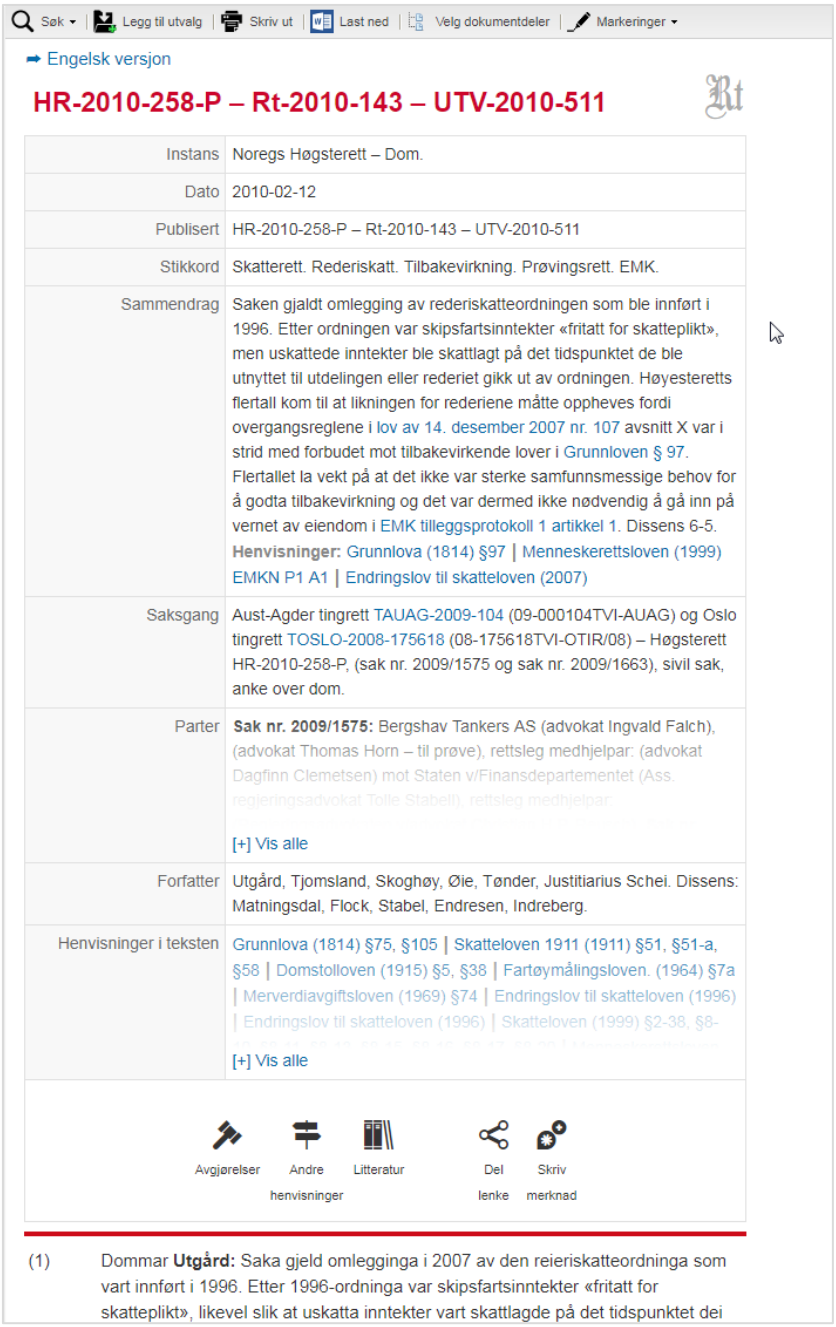


**Figure 2:** An example of meta-text provided by *Lovdata* after a decision has been handed down by the Supreme Court. The meta data categories are (from top to bottom): court and type of decision; date of decision; case identifiers; key words; abstract; case history with the links and case identifiers to the lower court decisions; parties; justices; and legal references In this example, Justice Utgård starts to write the majority's position in paragraph 1 at the bottom of the screenshot. Source: Lovdata.no, Rt-2010-143. (Retrieved: November 12, 2018.)

The Icelandic ash cloud that descended over Europe on Thursday morning, April 15, 2010, had a silver lining. Grendstad had a return ticket to Indiana this morning but was "ash stranded" as all commercial air traffic in Europe was grounded. Exiled in his own land, the next week suddenly offered time and opportunity to start a research proposal on judicial behavior for the Norwegian Research Council.

### 1.5 Windfalls

In the spring of 2011 Grendstad offered a graduate course on judicial behavior at the Department of comparative politics. From this course, and from another course a year later, the study of judicial behavior attracted a handful of very motivated and competent students. The teaching and research efforts that were picking up speed coincided with and were boosted by three other developments.

First, in the spring of 2011 the department also offered an advanced course in regression analysis covering both theory and method in multi-level analysis. The students who took both the judicial behavior course and the multi-level regression course quickly connected the dots. If, these students asked, justices' decisions were driven by attitudes, why should this mechanism only take place in non-unanimous decisions? Why not expand the database to include unanimous five-justice decisions and have the statistical analyses of judicial behavior include the collegial level of decision making? Overall, the students added, there is a crucial institutional component that is missed by the limited attention to justices' individual votes in non-unanimous decisions only: justices on the Supreme Court also give *individual* votes in a *specific* case in a *collegial* and institutional setting where voting is a result of coordination and collaboration in *rotating five-justice panels* (Bentsen and Skiple 2012).

One bottleneck of the database was its configuration for a single user only. Another limitation was that access to read data automatically provided the right to write data. Selections of observations and variables from the database could be copied and exported for external coding later to be returned and integrated into the overall database (as was done with the coding by the two law students). But continuing such a practice was not only cumbersome, it was also somewhat of an affront to computer and data-savvy students. In May 2011 the solution was to split the database in two separate parts: a 'back end' and a 'front end'. The back end, containing all the data tables and the documentation of the variables, was placed on a restricted university

server for which logon and pass word were necessary for access. The front end, consisting of queries, forms, and reports to access the data, could be copied and shared across computers. A select group of students received training and were given access to the database. Several persons could now read and write on the database at the same time (though not on the same record).

Although the research proposal on judicial behavior to the Norwegian Research Council was not successful, the University of Bergen incentivized the researchers to improve and resubmit their proposal the following year by providing some life-support funding in the interim.[6] Two students were hired to update the database with information on unanimous decisions from *Lovdata* and link the decisions to the justices' votes. Starting with registration data for 2010, the students worked backwards until the money ran out in 1963, so to speak. In addition, new variables were added to the database as students and researchers suggested new research questions. From the updated and expanded database students extracted data that were exported to STATA and used for their master's theses (Bentsen 2012; Jacobsen 2012; Skiple 2012; Bergset 2013; Svendsen 2013).

Second, approaching over the horizon was the Norwegian Supreme Court's 200-year anniversary in 2015. As the legal community quietly started to launch seminars and conferences to celebrate the event, the Norwegian Court Administration stumbled in its effort to find an author who could complement the 1815-1905 and 1905-1965 volumes of the Supreme Court history (Sandmo 2005; Langeland 2005) with a new 1965-2015 volume. The Court Administration had recruited former appeals court judge and University of Tromsø law professor Aage Thor Falkanger as author. But Falkanger withdrew from the assignment shortly afterwards when the government appointed him as justice to the Supreme Court. The Court Administration then turned to law professor and legal historian Jørn Øyrehagen Sunde at the University of Bergen. Selecting Sunde was the perfect move. His dedication to impart and disseminate law and his willingness to engage with disciplines outside law began a constructive and fruitful collaboration with members of the judicial behavior project at the Department of comparative politics. Lawyers rarely boast about their statistical competence. Neither do political scientists brag about their legal insights. But the interaction between lawyers and political scientists paved

[6] The resubmitted research proposal was not funded either.

the way for constructive interdisciplinary research.[7] By the time Sunde published his volume on the Supreme Court history (2015), cross-disciplinary collaborations were well underway.

Third, while gearing up for the 200-year anniversary in 2015, the Supreme Court had emerged emboldened from a major institutional reform. Traditionally, the basic goal of the Court had been to maintain its role as a passive court of appeals to resolve indeterminate cases. In 1995, the court implemented the criminal procedure reform that the parliament had passed. The reform gave the trial courts original jurisdiction in all criminal cases so that the appeals courts, which before the reform had original jurisdiction in large criminal cases, could deliver the rule-of-law guarantee of the right to appeal. The Supreme Court's workload at the gatekeeping stage fell dramatically and the Court was relieved from handling inconsequential criminal cases. In addition, a minor and inconspicuous clause added to the civil law procedure in 1990 was used increasingly by the justices to deny appeals. The slow change of the civil law procedure was fully codified and institutionally secured with the civil case reform in 2005, which was implemented three years later. From 2008 and onwards, the Supreme Court had the full opportunity to deny appeals where the legal question had no interest or consequence beyond the case itself. More than ever before, the Court's goal from that point on was to 'develop the law'. An appeal is now granted review by the Supreme Court if it the justices decide that it can be used as a vehicle for a more significant and interesting question.

So, in 2008, in the same year as a team of political scientists took advantage of the theoretical framework of the attitudinal model and presented their first empirical analysis of judicial behavior and policy making on the Norwegian Supreme Court (Grendstad et al. 2008), the justices on the same court slipped the surly bonds of mandatory appeals and embraced their new-found power of discretionary jurisdiction and complete docket control. The Court commenced on selecting appeals strategically in accordance with the Court's goal of developing

[7] One example of the interdisciplinary work by a student of law is Nadim's dissertation on legal precedents which is obviously informed by his interactions with political scientists (Nadim 2017). The dissertations (in progress) by students of political science Bentsen (2018b) and Skiple (2018) are obviously informed by interactions with lawyers.

the law, aka policy making. Ascending the summit of policy making from opposite sides, political scientists and supreme court justices were suddenly standing face to face.[8]

### 1.6 Domstolr

In 2016 the research project on judicial behavior initiated a textual database on Supreme Court decisions. The motivation for the database was basically driven by students who saw the limitations as to how much case variation could be extracted from the decisional data organized in the *Doranoh* database. In addition, direct access to the judgements from the Supreme Courts and to the writings of the justices, including majority and minority opinions as well as concurrences, would offer great opportunities and expand research beyond the limited structure in *Doranoh*.

Under the agreement between the University of Bergen and *Lovdata* on use of data for research purposes, all Supreme Court's merits decisions were downloaded to a university server. *Domstolr*, developed and written by Olav Laug Bjørnebekk and Mikael Poul Johannesson (in cooperation with Henrik Bentsen, Jon Kåre Skiple and Gunnar Grendstad) is an R package that organizes text and metadata from all Norwegian Supreme Court Decisions since 1945 in seven different data matrixes:

- decisions,
- justices,
- parties,

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[8] In a 2017/2018 evaluation of the Social Sciences in Norway, the impact case 'HIGHCOURT,' which was based on the analysis of judicial behavior on the Norwegian Supreme Court with data from the *Doranoh* database, was identified as 'good practice:'

> "The impact case provides strong evidence that the research on the appointment of judges to the Norwegian Supreme Court spurred great public awareness and debate and that it had a significant influence on practical procedures through the decision to make recommendations for appointments public. The research also formed the background to legislative proposals for amendments of Norway's Constitution" (Forskningsrådet 2018:181).

- keywords,
- case history,
- text paragraphs (in the decision), and
- legal references.

Significantly, it is the matrix with text paragraphs from all Supreme Court decisions since 1945 that boosts the content of the *Domstolr* database. A first version of the database was presented to legal academics, political scientists, and compuational linguists in 2016 (Bjørnebekk et al. 2016). Although academic work based on data from *domstolr* is still in early stages, the data source offers great potential for future studies.

## 2. Maintenance, developments and synergies

### *2.1 Doranoh*

The *Doranoh* relational database basically consists of three types of information: decisions, justices, votes (see Figure 1). As of November 2018, the decision table consists of 184 variables and 17,247 observations, the justice table consists of 98 variables and 524 judicial appointments,[9] and the vote table consists of seven variables and 82,929 observations.

Basically, the *Doranoh* relational database consists as a skeleton with some flesh on its bones. Most of the decisions have the metadata (eg, date of decision, type of decision, and parties). There is also a handful of variables that most of the justices share, eg, year of birth/death, gender, birthplace, year of graduation, school of graduation, prior occupational experience, start/end year of appointment.[10] The decision and justice tables are richer closer to

[9] The unit of observation for justices is the *appointment* of a justice. This type of unit provides the advantage of keeping track of individual appointments from the point of view of the government that makes the appointment (interim justices are frequently reappointed – the record is five reappointments).

[10] The compilation and organization of the part of the database that includes the justices requires approval by the NSD *Data Protection Services* pursuant of the *Personal Data Act*. http://pvo.nsd.no/prosjekt/23648.

the present. Information becomes more complete as one passes 1945 (all non-unanimous decisions), 1963 (all decisions) and 1988/1996 (information on more variables).

Variables are initiated, coded or updated in a 'need for research' basis, eg, economic decision making (Skiple et al. 2016) or why justices dissent (Bentsen 2018a). The 'silent revolution' of international law in domestic jurisprudence that gained momentum in the 1990s prompted a range of new variables in the database. Interest in the effect of gender and the experience of the parties' lawyers required additional coding of related variables (Misje 2018).

### *2.1.1 Student projects*

When students approach the research team and ask for data from the *Doranoh* database to write a term paper, an early point of discussion is what kind of new or updated data the students themselves can bring to the table(s). The purpose of this discussion is for the students to understand that the data in *Doranoh* was contributed by somebody. In the same way as students today stand on shoulders of former students. Students today will be the former students of tomorrow.

If the students have the chance and opportunity to code new data, they will be given a limited datafile from *Doranoh* consisting of case identifiers and other relevant variables that will make their work easier (for instance, the links that take them directly to the full text of the decisions in *Lovdata*). Other types of coding may be to provide intercoder reliability or validate earlier coding in order to improve the overall quality of the database (Bjørnebekk 2015; Kalheim 2015). Both efforts will not only help students learn to do empirical research and make them understand that there sometimes is a lot of work behind a quickly downloadable data file; the intention is also to invite students into the research process and give them ownership to the data.

When the students have coded the data, it is examined and then imported into the database. Afterwards, they will receive a complete data set with the variables they need to answer their research question, including the data or variables that they already have contributed. When they have completed their term/research paper, they are required to return a final copy of the paper, data and syntax files for documentation.

A case in point is the political science and law student who wanted to study judicial behavior in environmental decisions. She gave the project the list of the 38 environmental decisions handed down by the court. Then she received a datafile with the relevant variables for

analysis (Liljeros 2018). Other student term papers address, for instance, the lawyers or case complexity (Misje 2018; Bringedal 2017; Arnesen 2017). Usually students are also given two or three auxiliary numerical and string variables where they can provide temporary codes and comments in order to provide additional case documentation. These variables communicate special information on cases and are integrated into the database, too.

## 2.2 Synergies

*Domstolr* offers a dynamic and flexible organization of text, allowing researchers to combine and organize text from the seven data matrixes. The *Domstolr* database provides efficient identification, coding and export of variables that can be integrated with ongoing analyses from the *Doranoh* database. For instance, the *Doranoh* database has exact information on which justices sit on any five-justice panel as well as detailed information on justices' pre-appointment careers. The *Domstolr* database offers researchers the possibility to pool all of a justice's written opinions. Combining elements from the two databases, researchers can analyze interesting and important questions on judicial recruitment and judicial opinion writing. For example: do justices recruited from legal academia speak differently or to a different audience than do justices recruited from government administration? Data from *Domstolr* can create new variables that improve analysis with data from *Doranoh*. For example, researchers can create issue-area variables using topic models which can be integrated into analysis of justices' votes on the merits.

Another area of research on the Norwegian court is the influence of the justices' seniority and role on panels. Two such categories are the presiding justice on the panel and justice who writes the majority decision. The most senior justice on the panel, or the chief justice if she is present, chairs the panel. Panel leadership is important. During conference/deliberation, the chair always takes the floor first, summarizes the case and suggests a solution. As a consequence, the chief justice and the most senior justices have the potential to influence decisions on the court (See Figure 3). Some research suggests that the presiding justice is highly influential (Eisenberg et al. 2013). Combining data from *Doranoh* and *Domstolr*, researchers can study if and when the presiding justice exerts influence over the outcome of the case and in what ways, if any, the presiding justice influences the positions of the author of the majority and minority opinions.

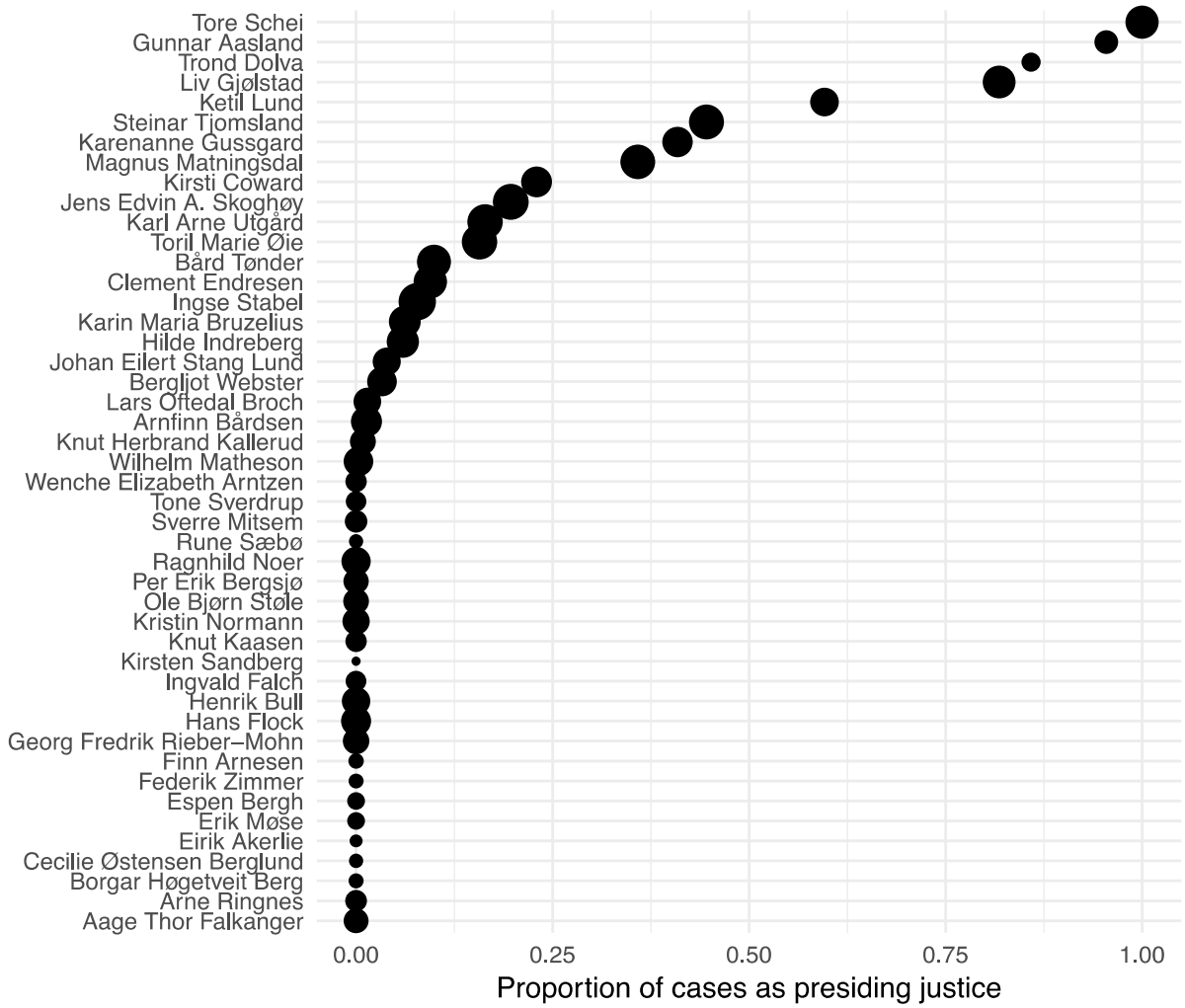


**Figure 3:** Supreme Court justices' participation in merits panels (size of marker) and proportion of times in the role of presiding justice (location of marker on y-axis). The Norwegian Supreme Court 2002-2017 (Tore Schei's court 2002-2016 and Toril Øie's court 2016-).

## 3. Other data sets linked to the Norwegian Supreme Court

Alongside the major change in the Supreme Court from a court of appeals to a court of precedents is the growth and function of the clerk unit. The first clerk was hired in 1957. The number of clerks increased substantially in the 1990s. Today the 23 clerks in the clerk pool outnumber the 20 justices on the Court. Researchers have built a database with basic socio-demographic information on each of the 135 clerks who have served on the Court through 2017 (Grendstad et al. 2017). Information on clerks can not be linked to any way to the handling or processing of cases on the Court.

The author of the 1965-2015 volume of the history of the Supreme Court built a number of stand-alone data files that were used for various purposes during the writing of the volume (Sunde 2015). Some of the data from this effort have been imported to the *Doranoh* database, eg, information on the frequency of the justices' use of the term 'equitable considerations' that can be found in their opinions. 'Equitable considerations' is a doctrine of 'fairness' that enables justices to base rulings on changing political and social conditions (Grendstad et al. 2015:14).

Morten Nadim, in his study of Supreme Court precedents and the development of case law, draws on data on plenary and grand chamber decisions from *Doranoh* and expands the data to include detailed information on legal sources (Nadim 2017).

### 3.1 Internal Supreme Court databases

In January 2000, the Supreme Court introduced *Høyrett*, a new internal data system for organizing and managing the Court's case flow (NOU 2001:613). The data system includes various internal documents and information. The law clerks' notes to the Appeals Selection Committee and the Committee's own decisions to grant or deny are also part of the data system. The Supreme Court has on some occasions been willing to extract limited information from *Høyrett* but only if the requested information does not relate to or involve internal documents, internal procedures or decision making.

*Høyrett* also has limited functionality for accessing information *across* cases. Since information only can be extracted on a manual case-by-case procedure, information can only be provided if administrative manpower can be set aside for the request. At the end of the court term, which coincides with the calendar year, *Høyrett* generates the annual statistics of the different types and numbers of appealed cases, decided cases and backlogs.[11]

In March 2018, *Høyrett* was discontinued and replaced by *Lovisa*, which is the national, court-wide case processing system organized by the Norwegian Court Administration.

[11] https://www.domstol.no/no/domstoladministrasjonen/publikasjoner/arsrapport/tema-13/mer-effektiv-saksbehandling/ [November 16, 2018]

# 4. Other Scandinavian databases

## 4.1 The Danish Supreme Court Database

The Danish Supreme court database is a relational database developed and maintained by Mark McKenzie, Henrik Bentsen and Jon Kåre Skiple (McKenzie et al. 2016; Skiple et al. 2018). The data is coded by McKenzie, Bentsen, and a Danish law student. The Danish database builds on the blueprint of *Doranoh* and links together three different tables: cases, votes, and justices. At the time of writing the database compromises complete data on all cases from 2013-2014, and on all cases involving tax issues from 2006 to 2016. The database contains information about all justices who have voted in the cases under study. The data on the court cases, including the information on which justices that vote in what direction in each case, are based on the judicial database UfR (Ugeskrift for Retsvæsen).[12] Information on the Danish justices is compiled from various contemporary, historical, and archival sources.

## 4.2 The Swedish Supreme Court Database

Sweden has one Supreme Court for criminal and civil law cases and one Supreme Administrative Court for administrative cases. To the best of this author's knowledge, Sweden does not have any databases on decisions and on justices for its Supreme Court or its Supreme Administrative Court. Research projects have been developed with the aim to establish such databases, eg, (Schaffer et al. 2018). Derlèn and Lindholm analyze data on the two highest courts in Sweden. It is unclear if data on justices exists. It is also unclear how data on decisions is organized (Derlén and Lindholm 2018, 2016; Lindholm and Derlén 2015; Lindholm and Derlén 2017).

# 5. Internetlinks

- Denmark (Supreme Court): http://www.hoejesteret.dk/hoejesteret/Pages/default.aspx
- Sweden (Supreme Court): http://www.hogstadomstolen.se/
- Sweden (The Supreme Administrative Court): http://www.domstol.se/templates/DV_InfoPage____2323.aspx
- Norway (Supreme Court): https://www.domstol.no/hoyesterett/

[12] UfR is published by the Karnov Group (https://www.karnovgroup.dk).

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# Legal Framing and Judicial Policy Making: Former Intelligence Collaborators, Present Asylum Seekers at the Israeli High Court of Justice

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This paper asks if a state's legal framing encourages courts to act as effective policy-makers? While previous academic studies mostly demonstrated how courts can serve as policy makers by making statutory interpretation and writing authoritative decisions, little attention has been paid to the way court may shape policy in complex and sensitive cases, where it intentionally refrains from making binding decisions. Inspired by Critical Frame Analysis, we examine the way legal framing of a phenomenon over repeated legal cases helps the court to shape directly or indirectly a detailed policy without making any explicit final binding ruling against the elected authorities. The case study presented here is the Israel immigration policy towards Palestinian asylum seekers because of intelligence related collaboration . About 800 petitions have been submitted to the Israeli High Court of Justice over the past two decades. The policy shaped through court's deliberations was officially published in 2015 and it reflects practices previously invented or approved by the court in its "non-decision" decisions.

**Costs Rulings and Substantive Judicial Review in the Israeli High Court of Justice**

Inbar Levy and Nadiv Mordechay

The Supreme Court of Israel (SCI), in one of its functions, acts as the High Court of Justice (HCJ) and has original jurisdiction as a court of first instance in matters related to the constitutionality of Knesset (Parliament) laws and the legality of decisions of administrative authorities. Alongside its constitutional and administrative roles, The SCI is a civil and a criminal appellant jurisdiction, altogether, an extremely busy institution.

The HCJ is unique amongst other courts in common law jurisdictions, among other reasons, being especially inviting towards public interest petitioners, i.e. petitioners who submit a petition on behalf of a general public interest and without having any personal claim. Despite of the significant role of the HCJ in the Israeli legal system, there is no clear rule regarding costs in the HCJ and the current costs rulings are far from being consistent. Since 2010, the HCJ judges have started a stream of new case law that marked a strong tendency of costs rulings against public interest petitioners, as part of a bigger procedural trend of managing the caseload of the court. This new case law – led by the former Chief Justice of the court (and reinforced by other new liberal justices) – raises a prominent question that is related to the interaction between substantive and procedural Public Law: even though costs ruling is considered to be a part of the legal procedure in the HCJ, legal scholars have claimed that the use of costs by the judges in the HCJ has in fact a hidden purpose of changing the substantive law, namely the currently wide Standing right of public interest petitioners.

Our project examines the fundamental question of costs ruling against petitioners in the HCJ using a doctrinal analysis of the court's decisions in view of the classical theory of judicial review and an empirical analysis based on data we have collected from 716 HCJ decisions in which the court ruled costs against petitioners. The decisions we studied are of a panel of judges in petitions submitted both by private petitioners and public interest petitioners since the 1960's and until 2017. We have quantified several variables that would help characterize the nature of costs rulings against petitioners in the HCJ. Among those variables are: the institutional identity of the petitioner and the respondent (for example, a private litigant, an NGO, a corporation), the identity of the judges, the reasoning for the costs ruling (when such reasoning exist), the amount of the costs ruled, and more.

We suggest a theoretical analysis that draws the line between procedural efficiency and changes made to substantive judicial review. We then offer a comprehensive theory regarding costs rulings against petitioners in the HCJ that allows the use of the costs tool in order to improve the litigation in the HCJ, while maintaining the wide standing right of the petitioners.

**Using Automated Linguistic Analysis to Assess How Justices Age**

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**Abstract**:

Because federal judges enjoy life tenure, they can—and do—remain on the bench well into their 70s. We ask whether justices of the U.S. Supreme Court show evidence of cognitive decline associated with progression into more pronounced dementia. Using transcripts from the Court's oral arguments, we find evidence of decline in one of the eleven justices appointed since 1969. These results are not unexpected: about 14% of Americans over age 70 show signs of dementia. But few Americans hold the power of Supreme Court justices ,who address important questions of public concern year in and year out. Our findings suggest the need for further analysis of the extent of cognitive decline on the bench and for deeper consideration of proposals aimed at insuring a mentally healthy judiciary.

# Automating the Complaw Database: Exploring the limits and possibilities of replacing human coders

Authors: Matthew Gabel and Jeff Ziegler (Washington University in St. Louis)

Abstract:

The Complaw database provides a common coding template for describing the context and outcomes of constitutional review across courts and time. In a pilot project, we have shown the template is reasonably successful for systematically coding relevant information about the content and context of constitutional rulings for 48 courts involving a broad array of languages for one year (2003). However, the coding template relies on human coding. This has severely limited the expansion of the database and, consequently, its value for researchers. In this paper, we evaluate the potential for populating the Complaw database through an automated process based on text analysis of the publications of the courts. Automation faces a variety of hurdles related to the formatting of documents and the language used. As a test case, we chose the French Constitutional Council which has ruling and supporting documents available electronically for a long time-series and with some potentially challenging features related to variation in the format/type of rulings (e.g., ex ante vs. ex post). The goal of the exercise is to learn how much of the coding can be accomplished through automation. And, where automation cannot directly identify the information needed to complete the database, we hope to define an algorithm that can isolate the relevant text that a human coder would need to complete the coding.

# Exploring Dissent in the Supreme Court of Argentina

## I. INTRODUCTION

In collegial courts, judicial disagreement is inevitable. Legal systems address the possibility of judicial disagreement in a variety of ways. Early in its history, the Supreme Court of the United States replaced the traditional seriatim decision (in which each Justice enters her own opinion) by the current system of an opinion on behalf of the entire court with the opportunity for separate opinions (concurs or dissents). In the United Kingdom, judges in the Appellate Committee of the House of Lords historically issued their decisions seriatim, a practice picked up by the new Supreme Court (Raffaeli, 2012). By contrast, in the French *Cour de Cassation* deliberations are made secret by law and there are no dissenting opinions.[1] Many other courts have mixed practices whereby dissents are allowed, but efforts are routinely made to find common ground and achieve consensus, as described in the quote at the beginning of this article for the specific case of the Supreme Court of Argentina (*Corte Suprema de Justicia de la Nación* - hereafter, CSJN).

It is a widespread characteristic that high courts are collegial in their nature of entertaining litigation under appeal. As they have increased responsibilities in error correcting and lawmaking, they tend to have more members than lower courts. Moreover, court decision is the outcome of collective deliberation. In effect, the specialized literature points out that a larger number of judges should improve accuracy in adjudication (Good and Tullock, 1984; Posner, 1985; Kornhauser and Sager, 1986; Shavell, 1995). Yet their collegial nature, together with the

[1] See "The Role of the Court of Cassation", official document available at https://www.courdecassation.fr/about_the_court_9256.html (last access October 15, 2018).

distinct role of high courts in any given legal system (addressing primarily points of law rather than assessing facts), seems prone to a degree of internal judicial disagreement. At the same time, there are norms of consensus in all legal systems (Gerber and Parker, 1997). It is intuitive that too much disagreement is dysfunctional and excessively costly. So, within an efficiency theory of court norms, some pressure for consensus is clearly rational.

Jurisdictions around the globe (and across time)[2] have different approaches towards disagreement within a court. While the practice of producing and publicizing dissents is extended across common law countries, the tradition in civil law jurisdictions was to prohibit dissenting opinions (Fon and Parisi, 2006). Still today, in the case of the Belgian Court of Cassation or the Italian Constitutional and Cassation Courts, publishing individual views of judges made in secret deliberations constitutes a criminal offense (Raffaeli, 2012).[3]

When dissents are allowed, judges must decide whether or when to write them (Wood, 2012). This depends on a set of determinants, including limited resources, extent of the disagreement, internal practices of the court, and working environment. Rational dissent theory (Epstein et al., 2011; Fischman, 2011; Edelman et al., 2012) explains these determinants with a model of self-interested federal judges who enjoy life tenure. In this model, as judges make the decision whether or not to dissent, they trade off their desire for leisure and good collegial relations with their aspiration for a good reputation and their willingness to express their opinion to influence the law.[4] As a result, judges may choose not to dissent even if they do not share the opinion of

[2] See Epstein et al. (2011).

[3] Art. 685 of the Italian Criminal Code criminalizes the publication of the names and votes of judges sitting in criminal cases. However, since 1988 (when the new law on judicial civil liability was enacted), dissents, and the grounds therefore, may be recorded, upon the dissenter's request, but are kept in a sealed envelope.

[4] Fischman (2011) conceptualizes the trade off in terms of suppressed dissent, which occurs when a judge decides to join a majority even if her preferred outcome would differ from the one voted by her colleagues.

the majority. Epstein et al. (2011, hereafter, ELP) refer to this as "dissent aversion". Tests of rational dissent theory have shown that the probability of dissent is influenced positively by the ideological differences among judges (ELP, 2011), the number of judges in the court or panel (Hazelton et al., 2017), and the importance of a case (ELP, 2011); and negatively by the size of the caseload (ELP, 2011) and by sociodemographic variables (for example, whether judges work in the same city; Hazelton et al., 2017).[5] Others have emphasized other costs generated by dissenters, such as the harm they may cause to a court's perceived legitimacy or reputation (Stack, 1996).

While the main insights of rational dissent theory have been documented and corroborated in several studies, there has been much less empirical testing on how different types of dissent may affect the likelihood of dissent. Dissents in more salient cases, or more forceful dissents, may have stronger legal effects than dissents appearing in less relevant cases or very narrowly constructed dissents. Our article aims to fill that gap in the literature by seeking to isolate varying levels of appeal intensity and types of dissents in the Supreme Court of Argentina.

CSJN is a collegial high court with discretionary appellate jurisdiction. It reviews constitutional and federal questions potentially impacting many other cases[6] as well as due process adjudication (whose effects are restricted to the appeal at stake). In addition, CSJN issues rulings on appeal's admissibility and on the substance of the case within the same decision. These special features allow us to identify different types of dissents (for example, certiorari denied or formulaic dissents vs reasoned dissents) as well as cases with different level of importance (for example, federal or constitutional appeals vs due process violations).

[5] Earlier papers (Walker et al., 1988) discussed the possibility that a more significant caseload could enhance levels of individual expression, as judges would not have the time to build consensus and construct compromises.

[6] While Argentina's formal lack of stare decisis means that CSJN's decisions are not binding on other courts, CSJN's decisions on constitutional or federal questions carry significant authoritative value. See section III below.

Consistently with previous results (mainly the work by ELP, 2011), we found that more important cases have a lower likelihood of carrying a dissenting opinion. Nevertheless, when we breakdown dissents by type between reasoned dissents and formulaic boilerplate dissents, we find that majority decisions carrying dissents tend to be longer, but only in cases of reasoned dissents. Furthermore, we show that reasoned dissents are more likely in important cases, suggesting that Justices choose to exert the effort needed to produce a reasoned dissent when the potential benefits, for example in terms of legal aspiration, are higher. Overall, our study highlights that not all dissents should be treated alike as different types of dissent carry different levels of collegial and effort related costs. These costs affect the likelihood of dissent in different and complex ways.

The paper proceeds as follows. In section II we present the legal and institutional background of CSJN. In section III we present the theoretical framework and construct our hypotheses. In section IV we succinctly describe our data. Section V presents our main findings. Section VI briefly concludes.

## II. CSJN'S INSTITUTIONAL CONTEXT

In this section, we briefly explain CSJN's procedural rules, and describe the Court's organizational structure and jurisdiction. CSJN intervenes both through its original jurisdiction (that is, first instance court in very specific matters) and as the appeal court of last resort.[7] Only the latter is relevant for our purposes here.[8] CSJN's appellate jurisdiction[9] includes cases decided

[7] When the Argentine parliament established the Supreme Court appellate jurisdiction, it followed closely the U.S. Judiciary Act of 1789.

[8] Its original jurisdiction is used for cases related to foreign ambassadors, ministers or consuls, or cases between provinces or a province and a foreign state. Constitution of Argentina, article 117 and article 1 of Act 48 (Organización y Competencia de los Tribunales Nacionales).

by courts of federal, national (*i.e.*, local courts of the city of Buenos Aires),[10] federal/national (*i.e.*, criminal cases from federal or national standing that reach the Federal Criminal Cassation Court), or provincial jurisdiction.

The standard appellate jurisdiction is known as Extraordinary Appeal (*Recurso Extraordinario Federal*; hereinafter, *REF*) and it has three different sources. A first possibility arises when a case questions the validity of a treaty, federal law or action undertaken under federal authority and the local court holds against the validity of the treaty, law or the federal authority. A second alternative arises when the validity of a provincial law, decree or act has been questioned as unconstitutional or contrary to a treaty or federal law, and the provincial court decides in favor of the validity of the provincial measure. Finally, the Supreme Court may intervene when a party invokes a constitutional clause, a treaty, a law, or a grant of federal authority and the provincial court decides against the norm or privilege invoked.[11] Under exceptional circumstances, an

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[9] In most of these cases, the Supreme Court possesses appellate jurisdiction, save for those cases concerning foreign ambassadors, ministers and consuls, and in those cases in which a province shall be a party, where the Court has original and exclusive jurisdiction. See article 117 of the Constitution of Argentina. An unofficial English version of the Constitution is available at http://www.biblioteca.jus.gov.ar/argentina-constitution.pdf (last access October 15, 2018). See, accordingly, article 1 of Law N° 48, available in Spanish at http://www.infoleg.gov.ar/infolegInternet/anexos/115000-119999/116296/texact.htm (last access October 15, 2018).

[10] Article 4 of Law N° 48.

[11] Article 14 of Law N° 48, available in Spanish at http://www.infoleg.gov.ar/infolegInternet/anexos/115000-119999/116296/texact.htm (last access October 15, 2018).There is a separate kind of mandatory appellate jurisdiction known as ordinary appeals, which are reserved for cases in which the state is a party and the amount of the claim exceeds a certain figure. This latter form of appellate jurisdiction is subjected to different rules. It is not addressed in this study.

appeal may be granted on the grounds that the decision of the lower court was arbitrary (*Recurso Extrarodinario por sentencia arbitraria*, hereinafter, *Arbitrariedad*).[12]

In order to reach CSJN, petitioners must file complaints – commonly referred to as *Recurso extraordinario* (hereinafter, REX) – in the relevant lower court of appeal (or provincial supreme court), which decides whether the appeal meets the substantive and procedural requirements after affording an opportunity for respondents to file appropriate replies. If the lower court considers that all requirements are satisfied, the appeal is sent to CSJN. If the lower court considers they are not, the appeal is denied; in that case, litigants may directly ask CSJN to reconsider their cases through a *Recurso de Queja* (hereinafter, RHE). In this case, CSJN will review whether the lower court legitimately denied the appeal.

Once the appeal reaches the CSJN, it is distributed to the Judicial Department specialized in the specific area of the appeal.[13] The relevant Judicial Department conducts a preliminary assessment on the basis of the formal requirements.[14] The specialized Judicial Department often keeps the file for internal drafting before circulating it among the justices if the appeal arrives through RHE. When the appeal is granted by the lower court, the specialized Judicial Department usually distributes it across the justices, often starting with one with particular specialization in an area (before going to the others).[15] An initial majority draft is crafted in the office of the first Justice to review a REX appeal. If a Justice proposes a different solution, that second opinion is added to the circulating file. Eventually, the latter opinion may become the majority opinion.

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[12] See, *e.g.*, Supreme Court decisions in Fallos 302:1191, and Fallos 300:535.

[13] A description of the thematic area of specialization of each JD in provided in Table A.1 in the appendix.

[14] On the appeal document's formal requirement, see Muro et al. (2018).

[15] Tax law appeals are always analyzed by the relevant JD (Secretaría Judicial N° 7). Interview A-3.

There is no rule that limits the period during which (or the number of times) a file may circulate across Justices. In addition, *Arbitrariedad* and *REF* files will typically be sent to the office of the *Procurador General de la Nación* (hereinafter, PGN) for a non-binding opinion.[16] Each Justice will usually make a decision on the petition after reviewing the appeal file by issuing (or joining in) a reasoned opinion or a boilerplate one, or by making a remission to a previous case decision or to the non-binding opinion of the PGN.[17] Justices opinions may come in the form of a majority vote, a separate concurring vote (classified by CSJN as *por su voto*), a dissenting vote (partial or total) (classified by CSJN as either *en disidencia* or en *disidencia parcial*) or even a no vote.[18] Formally, the decisions are made on Tuesdays, the days Justices officially get together to sign the opinions they have made on the different cases. Such meetings may also serve to discuss other cases in the pipeline.[19] Proper hearings are extremely rare.[20]

The fact that CSJN has jurisdiction over a case does not guarantee that the court will arrive at a decision on the intrinsic merits of the appeal. In 1990, Congress reformed the Code of Civil and Commercial Procedure, giving CSJN discretion to dispose of appeals based on a lack of

[16] The PGN is often equated to the figure of the Attorney General in the US. It formally sits outside the structure of the executive and judicial power and is charged with the protection of the general interests of society and the defense of the constitution (see Article 120, Constitution of Argentina.) The PGN is nominated by the president, and is confirmed by two thirds of the members of the Senate.

[17] It should be noted that there is no rule mandating a minimal amount for circulation of each file or that each Justice should receive the file through the circulation process.

[18] Not voting on a case is a fairly widespread practice in Argentine collegial courts, commonly attributed to the large docket sizes those courts handle.

[19] When discussing cases, Justices may question officers leading the relevant specialized JD on the details of the case. Informal meetings where Justices (or their clerks) discuss cases are somewhat frequent.

[20] On this, see Benedetti and Sáenz (2016).

substantive importance.[21] This type of decision is referred to as *Article 280*. Since then, CSJN has routinely made use of the discretionary power to reject appeals on the grounds that the matters raised by the appellant are either insignificant or inconsequential. In order for CSJN to reject an appeal, it must deliver a decision,[22] typically of the boilerplate type. Rulings on appeal's admissibility and, eventually, on the substance of the case are included in the same decision. As a result, some admitted appeals carry *Article 280* dissents and some rejected appeals have dissents admitting the appeal and analyzing the merits. At the time of our study, CSJN had seven members. In practical terms, it means that at least four Justices had to vote in order to produce a legal outcome.[23]

[21] Articles 280 and 285, *Código de Procedimiento Civil y Comercial de la Nación, Ley 23.774* (1990), available in Spanish at http://www.infoleg.gov.ar/infolegInternet/anexos/15000-19999/16547/texact.htm#5 (last access on March 15, 2018).

[22] Notably, this type of decision has the same majority requirements as a decision on the merits.

[23] In 2014, CSJN composition was reduced from seven to five justices. Hence, with the new composition, at least three justices have to vote now to reach a decision. It should also be noted that a majority vote is reached for dismissal even if a vote provides other grounds for appeal dismissal in a separate opinion.

## III. THEORY AND HYPOTHESES

### III. 1. REVIEW OF THE LITERATURE

The normative debate surrounding the possibility of dissenting has a long history. Arguments in favor of voicing dissent are rooted in free speech and judicial independence (Vitale, 2014), the moral obligation a Justice has when her interpretation differs from the majority (Brennan, 1985), an outcome consisting of a better argued majority opinion (Haire et al., 2013), and the benefits for the evolution of the law (McCormick, 2012). Arguments in favor of decisions *per curiam* are based on the negative effects dissents may pose on public confidence on the court and on court legitimacy (Stack, 1996; Zink et al., 2009; Salamone, 2013), on legal certainty, on the efficient use of court resources (Vitale, 2014) and on compliance with court decisions (Naurin and Stiansen, 2016).

While the debate over the overall benefits of dissents is far from settled, when judges do have the option to dissent available to them, they face a somewhat complex choice (Berzon, 2012; Wood, 2012). According to rational dissent theory (Edelman et al., 2012; ELP, 2011; Fischman, 2011; Niblett and Yoon, 2015), a potential dissenter must balance the costs and benefits of actually writing a dissenting opinion. As such, a potential dissenter recognizes that reaching a different outcome than the majority of the court requires effort, which represents an important cost. Furthermore, the dissenting vote will demand additional effort from the majority to answer the arguments of the dissenter (either in terms of revising the original opinion to accommodate the point of view of the dissenter or to respond to her objections). Repeated or forceful dissents may make it more difficult for the dissenter to gain the support of her peers in future cases and may even affect job satisfaction (ELP, 2013), generating a collegiality cost. Finally, dissents may

harm the legitimacy of the court (Salamone, 2013) and even diminish the probability of compliance with its orders (Naurin and Stiansen, 2016).

Against these costs, potential dissenters assess the benefits of a dissenting opinion. These benefits include the desire for a good judicial reputation and to express their opinion - which may include the satisfaction for doing so or the chance to influence the case law (Wahlbeck et al., 1999; Harnay and Marciano, 2003; Hettinger et al., 2004; Sunstein, 2015). As a result of the balance of costs and benefits, a judge may ultimately forgo the opportunity to dissent even if her ideological preference is different from the one expressed by the majority vote.

Researchers have found evidence supporting the validity of some testable hypotheses emanating from rational dissent theory. First, and as per costs of dissent, ELP (2011) found that caseload is negatively related to the probability of dissent at both Supreme Court and appellate courts, suggesting that the marginal cost of writing a dissenting opinion increases with a heavier workload. At the US Supreme Court level, ELP (2011) found evidence for the additional effort demanded from the supporting judges as majority opinions tend to be longer when more than one dissent is present. Similarly, they found that majority opinions in US appellate courts are longer when there is a dissenting opinion. In terms of collegiality costs, Hazelton et al. (2017) document that US Court of Appeals judges who work in the same city are less likely to dissent with one another. They also showed that judges on circuits with fewer active judges, who are more likely to be in a panel together in the future, as well as judges who have served longer with other judges in the same circuit, are less likely to dissent with one another.[24]

Second, ELP (2011) showed evidence on the benefits of dissenting. In their study, dissent at the appellate courts slightly increases the chances that the Supreme Court will grant certiorari. Those dissents are rarely cited inside or outside the circuit, diminishing the likelihood of reputation-

[24] Hazelton et al. (2017) found a similar co-tenure effect in the Supreme Court.

building or of influencing the law. In the case of the Supreme Court, when a decision has more than one dissenting opinion or when the case is more important (proxied by the number of citations received by the majority opinion) it increases the likelihood of citing those dissents. In the same vein, McCormick (2012) recently found that an initial minority became a majority in roughly one in every four divided panels in the Supreme Court of Canada.[25]

## III.2 THEORY

While rational dissent theory accounts for costs and benefits, so far the prevailing way for empirically accounting for these costs and benefits has not been particularly granular. Specifically, how different types of cases and petitions shape the likelihood of dissent is an open question. On the one hand, a dissent which carries unduly criticism of the majority opinion[26] may not be received as lightly as one where the language accounts for the complexity of the issue and makes an effort to limit the areas of disagreement. On the other hand, it is implausible that dissenting is oblivious to the importance of a case. Even if the level of criticism in a dissenting opinion remains constant, a dissent which appears in an important or salient case may generate more collegiality costs, or more harm to the legitimacy of the court, than others. It could also offer higher reputational rewards.

We can, therefore, suggest two different relevant decisions. First, judges must consider whether or not to dissent. According to rational dissent theory, they will balance costs and benefits. Therefore, judges should dissent in cases where the possible benefits (for example, impact in the law or external recognition) outweigh costs. Second, if dissenting, judges must decide which

[25] Other commonly intervening factors seem to play a role in dissents too. For instance, ELP (2011) showed that ideological differences among judges at both Supreme Court and appellate courts increase the chances of a dissent.

[26] See Vitale (2014) for illustrative examples of accusations of improper motives and other unduly criticisms.

kind of dissent to cast – a long detailed reasoned dissent or a boilerplate dissent. By backwards induction, the decision on whether or not to dissent should take into account the subsequent decision concerning type of dissent.

Let us assume that a dissent is being drafted. A rational judge would go for a reasoned dissent when the matter justified a long legal pondering of arguments. The same rational judge should opt for boilerplate or formulaic dissents when the case does not answer a very important legal question. The immediate consequence of these observations is that dissenting in important matters is more costly (because it involves long and complex reasoned dissents) while dissenting in less important cases is less costly (since the judge will file something like a template).

At the same time, we can envisage that individual benefits from dissenting are also more acute in important cases (at least, in terms of external visibility) than in less important cases (which have little impact on the law or on legal and political debates).

Therefore, rational dissent theory cannot predict the exact outcome on the balance of costs and benefits. In fact, it could be that the net benefit is positive for important cases (because legal impact is more significant than drafting a reasoned dissent), for less important cases (because filing a boilerplate dissent is almost costless) or for both. It seems that only empirical evidence can respond to this question.

CSJN's institutional setting allows us to investigate these matters. A key element of the institutional setting is that the process is primarily written (not oral, as in common law systems) and the role for litigants, albeit in a few exceptional cases,[27] is limited to the filing of the appeal and the written response. The norm, then, is for CSJN to decide on appeal admissibility and on the substance of the case (if necessary) in the same decision. Consequently, dissenting opinions may consist of argued positions on the subject matter or merely a denied certiorari. A denied

[27] See Benedetti and Sáenz (2016).

certiorari dissent typically does not include an explanation on why the appeal should be dismissed. As a result, such a dissent should demand less from the Justices in the majority who do not have to respond to any particular argument.

CSJN issues three types of decisions on extraordinary appeals.[28] *REF* decisions involve appeals concerned with constitutional review while *Arbitrariedad* decisions focus on whether or not the inferior's court decision was arbitrary, typically due to violations of due process or the right to a reasoned opinion. In turn, *Article 280* decisions are certiorari denied cases (based on lack of substantive importance of the appeal). As *REF* appeals involve constitutional or federal issues, typically raising questions about fundamental values. This is often not the case with *Arbitrariedad* cases. Furthermore, while Argentina does not formally recognize stare decisis, *REF* precedents typically carry greater authoritative value and are more often than not followed by lower courts.[29] *Arbitrariedad* decisions, by the nature of the underlying appeal, apply merely to the case at stake.[30] Finally, *Article 280* decisions apply to both appeals asking for constitutional review or to overturn an arbitrary decision and are issued when a majority of Justices believes that the appeal lacks substantive importance. By definition, *Article 280* cases are those whose importance does not warrant the attention of the Court. Combined, these reasons suggest that *REF* cases are, on average, more important than *Arbitrariedad*, and that each of them is, in turn, more important than *Article 280* appeals.

## IV. DATA COLLECTION AND PROCESSING

[28] CSJN also issues decisions to dismiss appeals on formal grounds, for instance when the appeal document did not comply with certain requirements or for lack of autonomous reasoning (Muro et al. 2018).

[29] See Legarre (2011); interview with Cristian Abritta, a former senior officer of CSJN (retired in 2018).

[30] See Carrió (1967).

The focus of this study is on individual votes concerning the decisions (*REF*, *Arbitrariedad* and *Article 280*) arising out of extraordinary appeals (REX and RHE) issued by CSJN in 2012 and 2013, *i.e.*, in the subset of cases where litigants decided to appeal to CSJN.[31] CSJN publishes online every opinion it issues, along with information on case history and other background information. Starting on 2012, CSJN's jurisprudence office has categorized every opinion according to different criteria. It also introduced a search engine which allows looking for opinions meeting any of the pre-determined criteria. One such criterion is the outcome of the opinion. We used the search engine to find every decision on *Arbitrariedad* and *REF* grounds that CSJN made during 2012 and 2013, excluding pension cases.[32] In addition, we randomly selected one fourth (500) of all opinions issued in 2012 decided on *Article 280* grounds, excluding again pension cases.[33] After discarding repeated opinions and opinions which were mistakenly classified as *Arbitrariedad*, *Article 280* or *REF*, we ended up with a working database

[31] CSJN decides thousands of appeals each year. During the 2012-3 period, the court issued about 14,000 decisions, including pension cases. Most of those decisions (83%) were appeal dismissals. At the time, about half of the court's decisions to dismiss appeals were boilerplate or formulaic decisions on procedural grounds (such as for failing to comply with formal requirements or failing to produce a self-contained appeal document). The rest were certiorari denied decisions based on Article 280.

[32] Pension cases are somewhat particular and therefore we decided to exclude them from the analysis. Specifically, almost every pension case arises out of disputes between pensioners and the government due to lack of adjustments made to the pension amount over the years. Typically, lower courts would order the government to adjust those amounts according to a specific criterion and the government has adopted a policy which mandates its legal department to appeal each case up to the Supreme Court. Therefore, there are thousands of similar cases reaching the Supreme Court each year which do not merit much attention for present purposes.

[33] For data availability issues, we only used *Article 280* decisions from 2012. As these are certiorari denied opinions, we have no reason to believe the decisions in 2013 (or other years) would differ in terms of dissent probability or average length of the opinion.

consisting on the following decisions: 918 *REF*, 320 *Arbitrariedad*, 496 *Article 280*.[34] Given the methodology used, we find this to be consistent with a random sampling for the purpose of statistical testing.

Because we were interested in looking at an individual level information to assess the factors shaping the probability of dissent, we then assessed the data to capture the votes of each Justice in every single case. We classified individual votes as dissents (total or partial) and classified separate concurring opinions following CSJN's own classification. This procedure resulted in a database consisting of the following individual votes: 6,426 *REF*, 2,240 *Arbitrariedad* and 3,472 *Article 280*.

## V. RESULTS

The object of this article is to assess the effects of different cases and dissents on the probability of dissent. To address this issue, we started with a database of extraordinary appeal decisions which excluded those decisions rejecting appeals on formal grounds.[35] Table 1 describes the decisions in our database. *REF* decisions comprise 53% of the total number of decisions used in this article, while *Arbitrariedad* and *Article 280* represent 18% and 29% respectively. Most of *REF* decisions were originated out of REX appeals (75%), while most *Article 280* decisions arose from RHE appeals (78%). Taken together, these figures suggest a certain level of agreement between lower courts and CSJN on which appeals should be entertained by CSJN, as

[34] The cases identified by the methods described above were coded by student research assistants. Prior to the student coding, the authors developed a template to structure the coding and a coding protocol. After review of the performance of the form, the protocol and the students in an initial set of cases, the form and the protocol were revised. The students used that revised form and protocol to code the cases, under the supervision of the authors.

[35] There are several formalities appeals must comply with in order to be reviewed. For more on this point, see Muro et al. (2018).

CSJN only gets to review REX appeals when a lower court grants the leave for appeal. *Arbitrariedad* decisions are more evenly distributed, with 51% of them arising from REX appeals.

[Insert table 1 here]

Table 2 reports the number of decisions issued according to the subject matter of appeals and categorized according to the type of decision. The prominence of subject areas varies greatly with the type of decision. For instance, 46% of *REF* decisions (418) came about on the public/administrative law area. In turn, tort/insurance law is the most frequent subject matter area in *Arbitrariedad* decisions, accounting for 44% (137) of them. Finally, *Article 280* decisions most frequently appear in criminal law/criminal procedure appeals.

[Insert table 2 here]

Consistent with a court that aims for consensus, dissenting votes are somewhat rare. Only 4% of the Justices' votes come in the form of a dissenting or partially dissenting opinion. Dissenting votes are somewhat rare in all type of decisions, though they seem to appear more frequently in *Arbitrariedad* votes (10%). By contrast, only 2% of *REF* votes and only 3% of *Article 280* votes are dissenting ones. As table 3 shows, dissenting votes are rare in all areas of the law, being more prominent in criminal law (except for *Article 280* decisions).

[Insert table 3 here]

All Justices have low levels of dissents. Nevertheless, Justice Argibay[36] was clearly the Justice with most dissents as 11% of her votes were cast as dissenting opinions and 1% as a partial dissent. The Justice with the second highest dissenting rate, Highton de Nolasco[37], issued a dissenting or partially dissenting vote in just 5% of the decisions. Even though dissent rates are quite low, it does not translate into overwhelming levels of consensus. The reasons for this is that it is very common for Justices to decide not to cast a vote. For instance, Justice Fayt[38] decided not to vote in 58% of the decisions in our sample.

[Insert table 4 here]

*Dissent probability and appeal relevance*

In order to assess dissent probability, we started by looking at appeals potentially carrying different weights. *REF* decisions typically involve constitutional or federal questions and they tend to have an authoritative effect on lower courts handling similar cases. *Arbitrariedad* decisions generally involve due process violations and their effects are limited to the case at stake. In turn, *Article 280* (i.e. certiorari denied) decisions arise out appeals assessed to lack substantive importance by the majority of the court. Hence, we expect more important REF cases to involve higher rewards for dissenters but also to produce higher collegiality costs. At the other end of the spectrum, we expect dissents in *Article 280* decisions to carry lower rewards and lower collegiality costs. As it was described in table 3, dissents appear to be more frequent in

[36] Justice Carmen Argibay (1939-2014) became a member of the Court in 2004 by choice of President Néstor Kirchner.

[37] Justice Elena Highton de Nolasco (1942) was nominated by President Néstor Kirchner in 2004. She has been Vice-President of the Court since 2005.

[38] Justice Carlos Fayt (1918-2016) was nominated by President Raúl Alfonsín in 1983.

*Arbitrariedad* cases. To test this issue in a multivariate context, we run several binomial multiple regression models. The dependent variable takes value "1" if a dissenting or partially dissenting vote is cast and "0" otherwise (including no vote).[39] Our main independent variable is *decision type*, a categorical value with three levels (*REF*, *Arbitrariedad* and *Article 280*).

To account for CSJN's institutional setting, appeal and Justices' characteristics, we also included several control variables in different specifications. As previous studies found ideology to play a role, we included a variable called *Justice distance to median* based on Gonzalez Bertomeu et al. (2017), which captures the distance between each Justice and the median Justice. It measures some form of more radical judicial philosophy and so we expect it to have a positive impact on the probability of dissent.

Seniority may be related to lesser pressure to join the majority, so we have the variable *Justice's seniority.* Similarly, we included a dummy variable *CSJN pres in majority* to account for the cases with Chief Justice Lorenzetti[40] in the majority. Because dissent may be affected by the participation of the executive branch in the appeal, we included a dummy variable *national government as party.* More complex cases may require additional study at each Justice's office. Hence, we included a variable capturing the number of times an appeal file circulated through Justice's offices *(total times at Justices offices*). To capture the effect of remissions by the majority opinion (a common practice in CSJN), we included two dummy variables for possible remissions: *remission to PGN* and *remission to a previous decision*. Given that separate concurring opinions may also have an effect on dissent probability, we incorporated a dummy variable called *separate opinion* which is equal to one if there is at least one other judge in the

[39] See tables A.2-A.3 in Appendix for the binomial logit regressions when "no vote" is excluded. The results are largely consistent with tables 5-6. The number of individual observations is reduced from 11,102 to 7,643.

[40] Justice Ricardo Lorenzetti (1955) is the President of the Court since 2007. He was nominated to the Court by President Néstor Kirchner in 2004.

panel presenting a separate concurring opinion and zero otherwise.[41] Similarly, we added a dummy variable called *additional dissents* to control for those decisions containing more than one dissenting vote. To account for possible differences between appeals granted by the lower court and direct appeals, we included a dummy accounting for *REX* and *RHE*. We also included a dummy variable for decisions issued in 2013 (*decision in 2013*) to capture any possible caseload effects.[42] To capture the subject matter of each appeal we included Judicial Department's fixed effects. Finally, we also controlled for the rapporteur in each CSJN decision. For sake of independence, all standard errors are clustered on each CSJN decision.[43]

Table 5 shows the logistic regression results. Consistent with the descriptive statistics presented in table 3, when compared to *REF* decisions, *Arbitrariedad* cases are associated with higher probability of dissent in all seven specifications, a result which is highly significant in all regression specifications (p-value < 0.01). In turn, *Article 280* is associated to a lower chance of dissent in five specifications (p-value < 0.01). Ideological extremism (measured in terms of distance to the median Justice) is positively related to the probability of dissent in a highly statistically significant manner (p-value < 0.01) and in all specifications. The dummy for the year of the decision, as well as the control for Justice's seniority, fail to show any statistically significant effect on the probability of dissent. As per decisions based on remissions, the

[41] On separate concurring opinions, see Amaral-Garcia and Garoupa (2017).

[42] CSJN publicizes only information on decisions issued. Hence, it is not possible to precisely assess its caseload on a given year.

[43] Notice also that we run several specifications in order to acknowledge that some variables might raise concerns in terms of identification. Our main variable of interest (decision type) could potentially be influencing the existence of *separate opinions* or *additional dissents,* as well as the number of times a file circulated through Justice's offices. Hence, our base regression does not include any of these control variables. The results obtained are consistent across different specifications.

decisions with remissions to the PGN are negatively related to the probability of dissent in all seven specifications (p-value < 0.01). Interestingly, decisions with remissions to previous decisions fail to show any statistically significant difference in dissent probability, suggesting that dissents in the remitted decision tend to be replicated in later cases. Cases that originated in Judicial Department N4 (administrative law cases) and cases originated in Judicial Department N7 (tax law cases) were both associated to a lower probability of dissent compared to cases that went through Judicial Department N5 (p-value < 0.1, in all but two specifications). Direct appeals to CSJN (RHE), arising after a lower court rejected the grant of leave for appeal petition, are less likely to generate a dissenting vote (p-value < 0.05 in all but three of the regression specifications).

Let us now consider variables excluded from the base regression. Case complexity, as proxied by *Total times at Justices offices*, is positively related to the likelihood of dissent in four specifications (p-value < 0.01). Decisions carrying separate concurring opinions fail to show any statistically significant difference in the likelihood of dissent. In contrast, decisions carrying an additional dissent are positively associated with the probability of dissent (p-value < 0.01). When the national government is a party the probability of dissent is smaller in two specifications. Finally, the variable controlling for the rapporteur of the case fails to show any statistically significant effect on dissent probability.

[Insert table 5 here]

Unobserved judicial characteristics could be affecting our results. For instance, as *Arbitrariedad* is a CSJN-made doctrine, a particular judicial taste for *Arbitrariedad* could be driving the results.

To account for this possibility, we rerun our regressions including Justices fixed effects.[44] The results are presented in table 6. The regression results are generally the same and consistent with previous interpretation. *Arbitrariedad* decisions are more likely to carry a dissenting opinion than *REF* decisions in all specifications (p-value < 0.01). In turn, *Article 280* decisions are associated to a lower probability of dissent (p-value < 0.01, in all but one specification). As compared to Justice Highton, Justice Argibay is more likely to dissent (p-value < 0.01), while Justices Fayt, Lorenzetti and Maqueda[45] are less likely to dissent (p-values < 0.01). No statistically significant difference is detected for Justices Petracchi[46] and Zaffaroni.[47]

[Insert table 6 here]

We also run the same exercise at decision level, rather than with individual votes. This robustness test addresses concerns about the non-independence of individual votes and the dynamics of aggregation of preferences at the court level. The results we derived with previous approaches are replicated at decision level as we can see from table 7. In particular, the empirical observations concerning *Arbitrariedad* and *Article 280* are unchanged.

[Insert table 7 here]

The results presented in tables 5 to 7 show that the net benefits of dissent are not sufficient to have a higher likelihood of dissent in more important cases (*i.e.*, *REF* appeals). To further

[44] These regressions also have clustered standard errors.

[45] Justice Juan Carlos Maqueda (1949) was nominated to the Court by President Eduardo Duhalde in 2002.

[46] Justice Enrique Petracchi (1935-2014) was nominated by President Raúl Alfonsín in 1983. He died in 2014, while still a member of CSJN.

[47] Justice Eugenio Zaffaroni (1940) was nominated by President Néstor Kirchner in 2003. He retired in 2015.

investigate why dissents are more likely in *Arbitrariedad* decisions, we compared the different types of dissents Justices voiced in *REF* and *Arbitrariedad* decisions. Of the 218 *Arbitrariedad* dissenting votes, only 10 (about 5%) came in the form of reasoned opinions. This figure is relatively much smaller than the 38 votes out of 210 *REF* dissents (18%) which came in the form of reasoned opinions.[48] These numbers suggest that the actual average cost of casting a dissenting vote, and of responding to a dissenting vote, is larger in *REF* than in *Arbitrariedad* decisions, and higher incidences of dissent seem to be related to lesser cost of dissenting.[49]

*Effort related cost to the majority*

In order to assess whether different dissents entail different cost levels, we turn to the reactions of the majority produced by different types of dissenting opinions. To study the different cost

[48] In unreported results, we ran several multinomial regression models to test the effects of the type of decision on the type of dissents. The results obtained in those regressions confirm that REF decisions are associated to a smaller probability of formulaic dissents -relative to reasoned dissents- (p-value < 0.01 in all regression specifications).

[49] Alternative specifications have been studied. One alternative specification is to define the dependent variable as "1" if a dissenting vote, a partially dissenting vote or no vote occur and "0" otherwise (including concurring vote). A second alternative specification is to code "1" if not voting with the majority (including concurs) while "0" otherwise. The results are reported on tables A.4-A.5 and tables A.6-A.7 respectively. There are two significant changes. First, *Arbitrariedad* has the same positive sign, but is not statistically significant on tables A.6-A.7. Second, *Article 280* has now a positive impact (i.e., by comparison with *REF*) and is statistically significant in all specifications. The former effect is likely dependent on lumping together concurring and dissenting opinions. Separate concurring opinions in *Arbitrariedad* and *REF* are reasoned (costlier) opinions. Given the lesser importance of *Arbitrariedad* cases, it is consistent with the theory to have fewer separate concurring opinions in these cases (relative to *REF* ones), which may explain the lack of significance in these regressions. The latter effect is directly dependent on including no votes in the dependent variable, as CSJN has a practice to stop file circulation when a majority is reached in cases of appeals dismissals, and only those Justices who have seen the file typically vote on a case. Therefore, the specifications discussed in the text are more robust to judicial motivations.

levels, we focused on CSJN decisions as our unit of observation. We excluded from our database cases decided on *Article 280* grounds as they are run-of-the-mill decisions with little to no length variation.[50] Table 8 shows summary statistics for the number of words in the majority opinion. The table shows two distinct types of scenario according to whether the majority opinion issued its decision based on a remission to a previous decision or not. The former decisions are on average much shorter (158 words on average), regardless of whether or not a dissent was present. The latter decisions are much longer on average (1,637 words), especially so when there is a reasoned dissent. Focusing on decisions with no remission, decisions carrying reasoned dissents are on average 4,148 words long, more than three times as many words as the average decision carrying no dissent. Consistent with our hypothesis, decisions with formulaic dissents tend to be much shorter, containing on average 895 words.

[Insert table 8 here]

To test these results in a multivariate setting, we run a series of multiple least square regressions. Our dependent variable is the log of the total number of words in the majority opinion.[51] Our key independent variable is dissent type, a categorical variable taking one of four values: no dissent, formulaic dissent (a boilerplate decision; typically based on *Article 280* or *Acordada 4/2007* grounds), remission dissent (a dissenting opinion which merely refers to one or more previous opinions), or reasoned opinion. We included several control variables to take into account CSJN's institutional setting and case characteristics. Given CSJN's practice of relying on

[50] In the past, these decisions were issued by imprinting a large stamp on a piece of paper. While the technology has been upgraded, the practice remains largely the same.

[51] The total number of words includes footnotes, though footnotes are seldom used in CSJN's opinions.

previous decisions, we included the variable *remission* to control for the decisions where the majority grounds its opinion on a previous decision or on the opinion of the PGN. Initial drafts of decisions are typically included in the memos written by the thematically specialized Judicial Department. Hence, we included the variable *Judicial Department* (with seven levels, one per Judicial Department) to control for differences in writing style within each office. We also included a dummy variable for decisions issued in 2013 *–decision in 2013*- to capture any possible caseload effects.

Differences in jurisdictional source were captured by a categorical variable taking four levels (*Federal, Fed/Nat, Local* and *National*). To account for possible differences between appeals granted by the lower court and direct appeals, we included a dummy taking value "1" for *RHE* and "0" for *REX*. Because cases of greater importance may generate longer majority opinion, we introduced a dummy variable taking value "1" for cases raising federal/ constitutional questions (*REF*) and taking value "0" for cases decided on due process grounds (*Arbitrariedad*). For comparison purposes, we also included a dummy variable (*dissent*) taking value "1" if a decision included a dissent or partial dissent and "0" otherwise.

Separate concurring opinions may also have an effect on the majority, as the later seems to take the former into account. Hence, we incorporate a dummy variable called *separate opinion*. More complex cases may require more study at each Justice's office or at each Judicial Department and may generate longer opinions. Hence, we included a variable capturing the number of times an appeal file circulated through Justice's offices - *total times at Justices offices*. Finally, opinions with more dissenters may require more effort from the majority. To account for this, we incorporated a dummy variable (*2 or more dissenters*) to the regressions.

Table 9 reports the results. While dissent has a statistically significant effect on majority opinion length, most of the effect seems to be attributed to opinions with reasoned dissent. As compared

with decisions containing formulaic dissents, decisions with reasoned dissents tend to be longer, a result which is statistically significant (p-value < 0.05). This result is not only statistically significant, but also has practical implications. On average, a decision with a reasoned dissent tends to be 47% longer than a decision with a formulaic dissent. In turn, we fail to find a statistically significant difference in majority opinion length between decisions carrying no dissent (or remission dissents) and those carrying a formulaic dissent.

Decisions where the majority makes remissions to the opinion of the PGN or to previous decisions tend to be shorter than decisions without remission, a result which is highly statistically significant (p-value < 0.01). Also, decisions including at least one separate concurring opinion or decisions issued in 2013 tend to be longer on average (both results with a p-value < 0.01). Decisions carrying an additional dissent tend to be longer (p-value < 0.1). In turn, *REF* decisions tend to be longer, though this result is statistically significant in only 3 of our regression specifications (p-value < 0.05). Finally, as an appeal file circulates more through Justices offices majority opinions tend to be shorter (p-value < 0.01). The results presented in table 6 are consistent with different types of dissents generating different levels of costs. Specifically, they show that only reasoned dissents generate the need for a stronger reaction by the majority, suggesting that some dissents (such as formulaic or remission ones) may carry much lower collegiality costs.

[Insert table 9 here]

Taken together, our results strongly suggest the hypothesis that not all dissents do carry equal weight. In fact, different types of dissent do not only generate different response levels in the majority (in terms of the majority opinion extension), but also have different likelihood of

occurrence according to the importance of the case. Consistent with the cost side of rational dissent theory, more important (*REF*) decisions are less likely to carry dissenting opinions. Meanwhile, reasoned dissents are more likely to occur in important cases (in line with the benefits side of rational dissent theory).

## VI. CONCLUSION

In this article, we showed that the probability of dissent at the CSJN is affected by multiple factors. Specifically, and complementing previous results by ELP (2011), we showed that the probability of dissent is positively associated to less important decisions (*i.e*., based on *Arbitrariedad* grounds). In turn, *Arbitrariedad* dissents are more likely to be formulaic or boilerplate than those appearing in more important decisions (*i.e*., *REF* ones). The formulaic nature of *Arbitrariedad* dissents reduces the cost of producing a dissent. Further, more important *REF* cases (offering relatively more benefits to dissenters) are more likely to carry reasoned dissents.

In addition, we showed that different types of dissents generate different costs to the majority in terms of reacting to the dissenting opinion. Specifically, reasoned dissents are associated with longer majority opinions than those carrying formulaic or boilerplate dissents, a result which is statistically significant at 5%. Further, we failed to observe a statistically significant difference in majority opinion length in cases carrying no dissent relative to cases with formulaic dissents. These results highlight the importance of the types of dissent in terms of their propensity to impose additional costs on the majority. Formulaic dissents likely entail lower collegiality costs because the majority is not required to exert additional effort to account for those dissents. In addition, these types of dissents are unlikely to ignite direct confrontations. Hence, we suggest that the lower cost of introducing dissents helps to explain their prominence in *Arbitrariedad*

decisions. Also, the higher benefits of reasoned dissents helps to explain the higher likelihood of dissent in more important appeals.

More generally, our results point to the fact that not all dissents carry equal weight. Hence, the frequency of dissents is dependent also on the specific costs and benefits that each type of dissent introduces in a particular type of case. When dissent costs fall dramatically, as it is often the case in *Arbitrariedad* cases, Justices dissent rate grows accordingly even if the benefits are small too. In turn, the higher probability of reasoned dissents (which are costly to produce and induce higher collegiality costs) in more important cases is consistent with the larger benefits and with the results obtained previously in the literature (ELP 2011). Further efforts by the literature to quantify the costs and benefits of dissents may offer a clearer window to the implicit calculations Justices make when deciding whether or not to dissent and what type of dissent to cast.

**Table 1. Number of decisions by appeal type and decision type**

| | 2012 | 2013 |
|---|---|---|
| ***REF*** | | |
| REX | 314 | 379 |
| RHE | 107 | 118 |
| ***Arbitrariedad*** | | |
| REX | 82 | 82 |
| RHE | 86 | 70 |
| ***Article 280*** | | |
| REX | 105 | 0 |
| RHE | 391 | 0 |

**Table 2. Percentage of decisions by type and subject area**

| | *REF* | *Arbitrariedad* | *Article 280* |
|---|---|---|---|
| Bankruptcy/ Corporate Law | 0.03 | 0.02 | 0.03 |
| Civil Procedure | 0 | 0 | 0 |
| Constitutional Law/ Health Law | 0.03 | 0.03 | 0.01 |
| Contract Law/ Financial Contracts/ Consumer Law | 0.01 | 0.06 | 0.03 |
| Criminal Law/ Criminal Procedure | 0.06 | 0.12 | 0.39 |
| Family Law/ Estates | 0.01 | 0.01 | 0.02 |
| Human Rights Law | 0.03 | 0.01 | 0.02 |
| Labor Law | 0.08 | 0.13 | 0.16 |
| Property Law | 0.1 | 0.02 | 0.04 |
| Public/ Antitrust Law | 0.46 | 0.15 | 0.15 |
| Social Security Law | 0 | 0 | 0 |
| Tax Law | 0.16 | 0.02 | 0.11 |
| Tort/ Insurance Law | 0.04 | 0.44 | 0.05 |

**Table 3. Proportion of dissents or partial dissents by area of law and decision type**

| | No dissent | Partial or total dissent |
|---|---|---|
| ***REF*** | | |
| Private Law | 0.99 | 0.01 |
| Constitutional Law | 0.96 | 0.04 |
| Criminal Law | 0.92 | 0.08 |
| Labor Law | 0.95 | 0.05 |
| Public/ Tax Law | 0.97 | 0.03 |
| ***Arbitrariedad*** | | |
| Private Law | 0.9 | 0.1 |
| Constitutional Law | 0.86 | 0.14 |
| Criminal Law | 0.88 | 0.12 |
| Labor Law | 0.87 | 0.13 |
| Public/ Tax Law | 0.95 | 0.05 |
| ***Article 280*** | | |
| Private Law | 0.99 | 0.01 |

**Table 3. Proportion of dissents or partial dissents by area of law and decision type**

| | No dissent | Partial or total dissent |
|---|---|---|
| Constitutional Law | 1 | 0 |
| Criminal Law | 0.98 | 0.02 |
| Labor Law | 1 | 0 |
| Public/ Tax Law | 0.97 | 0.03 |

**Table 4. Percentage of vote types by Justice**

| | With majority | Concurring | No vote | Dissent | Partial dissent |
|---|---|---|---|---|---|
| Argibay | 0.35 | 0.03 | 0.5 | 0.11 | 0.01 |
| Fayt | 0.37 | 0.04 | 0.58 | 0.01 | 0 |
| Highton | 0.71 | 0.01 | 0.24 | 0.04 | 0.01 |
| Lorenzetti | 0.73 | 0.02 | 0.24 | 0.01 | 0 |
| Maqueda | 0.85 | 0.01 | 0.12 | 0.02 | 0 |
| Petracchi | 0.6 | 0.02 | 0.34 | 0.04 | 0 |
| Zaffaroni | 0.75 | 0.01 | 0.2 | 0.03 | 0.01 |

**Table 5. Binomial logit regression results**

| | *Dependent variable:* | | | | | | |
|---|---|---|---|---|---|---|---|
| | Dissent or partial dissent = 1 | | | | | | |
| | (1) | (2) | (3) | (4) | (5) | (6) | (7) |
| Justices distance to median | 0.712*** | 0.719*** | 0.719*** | 0.719*** | 0.723*** | 0.942*** | 0.547*** |
| | (0.053) | (0.053) | (0.053) | (0.053) | (0.061) | (0.080) | (0.085) |
| Arbitrariedad | 0.979*** | 1.032*** | 1.010*** | 1.004*** | 0.949*** | 1.066*** | 0.726*** |
| | (0.156) | (0.156) | (0.158) | (0.158) | (0.178) | (0.154) | (0.176) |
| Article 280 | -1.342*** | -0.992*** | -1.023*** | -0.980*** | -1.093*** | -0.436 | -0.494* |
| | (0.312) | (0.335) | (0.336) | (0.344) | (0.415) | (0.283) | (0.257) |
| Remission to PGN | -0.832*** | -0.920*** | -0.927*** | -0.922*** | -1.051*** | -0.509*** | -0.661*** |
| | (0.213) | (0.205) | (0.205) | (0.206) | (0.249) | (0.183) | (0.177) |
| Remission to previous decision | -0.292* | 0.062 | 0.053 | 0.048 | 0.073 | 0.069 | -0.102 |
| | (0.168) | (0.180) | (0.180) | (0.180) | (0.215) | (0.167) | (0.155) |
| Decision in 2013 | 0.076 | -0.061 | -0.057 | -0.048 | -0.008 | 0.160 | -0.176 |
| | (0.131) | (0.131) | (0.131) | (0.131) | (0.148) | (0.112) | (0.144) |
| Judicial Department N1 | -0.707** | -0.592* | -0.592* | -0.602* | -0.557 | 0.070 | |
| | (0.313) | (0.325) | (0.329) | (0.331) | (0.412) | (0.330) | |
| Judicial Department N2 | -0.191 | -0.078 | -0.080 | -0.100 | -0.059 | 0.531* | |
| | (0.304) | (0.317) | (0.322) | (0.323) | (0.418) | (0.322) | |
| Judicial Department N3 | 0.506* | 0.463 | 0.465 | 0.462 | 0.584 | 0.524 | |
| | (0.289) | (0.296) | (0.302) | (0.301) | (0.389) | (0.358) | |
| Judicial Department N4 | -0.587* | -0.723** | -0.734** | -0.747** | -0.697* | -0.144 | |
| | (0.319) | (0.322) | (0.322) | (0.323) | (0.409) | (0.325) | |
| Judicial Department N6 | 0.210 | 0.143 | 0.141 | 0.135 | 0.062 | -0.107 | |
| | (0.314) | (0.320) | (0.324) | (0.324) | (0.423) | (0.367) | |
| Judicial Department N7 | -1.107*** | -1.083*** | -1.087*** | -1.084*** | -1.035** | -0.230 | |
| | (0.330) | (0.333) | (0.336) | (0.337) | (0.409) | (0.331) | |
| RHE appeal | -0.260* | -0.371** | -0.370** | -0.368** | -0.292* | -0.602*** | -0.465*** |
| | (0.145) | (0.151) | (0.151) | (0.151) | (0.176) | (0.148) | (0.161) |
| Seniority | -0.00001 | -0.00002 | -0.00002 | -0.00002 | 0.0002 | -0.0001 | -0.012 |
| | (0.007) | (0.007) | (0.007) | (0.007) | (0.008) | (0.009) | (0.010) |
| Total times at Justices offices | | 0.083*** | 0.083*** | 0.084*** | 0.078*** | -0.018 | 0.028 |
| | | (0.016) | (0.016) | (0.016) | (0.019) | (0.015) | (0.020) |
| Separate opinion | | | -0.191 | -0.186 | -0.176 | -0.268 | -0.046 |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| | | | (0.214) | (0.215) | (0.231) | (0.263) | (0.238) |
| CSJN pres in majority | | | | 0.159 | 0.115 | 0.239 | 0.360** |
| | | | | (0.186) | (0.210) | (0.152) | (0.145) |
| Nat'l government as party | | | | | -0.009 | -0.396*** | -0.357** |
| | | | | | (0.185) | (0.150) | (0.157) |
| Additional dissents | | | | | | 3.838*** | 3.573*** |
| | | | | | | (0.157) | (0.134) |
| Rapporteur Lorenzetti | | | | | | | -0.586 |
| | | | | | | | (0.461) |
| Rapporteur Maqueda | | | | | | | -0.690 |
| | | | | | | | (0.513) |
| Rapporteur Petracchi | | | | | | | -0.388 |
| | | | | | | | (0.455) |
| Rapporteur Fayt | | | | | | | -0.300 |
| | | | | | | | (0.481) |
| Rapporteur Zaffaroni | | | | | | | -0.389 |
| | | | | | | | (0.454) |
| Rapporteur Highton | | | | | | | -0.106 |
| | | | | | | | (0.464) |
| Constant | -3.303*** | -3.979*** | -3.939*** | -4.068*** | -3.993*** | -5.242*** | -4.237*** |
| | (0.339) | (0.390) | (0.385) | (0.430) | (0.536) | (0.478) | (0.583) |
| Observations | 11,102 | 11,102 | 11,102 | 11,102 | 8,827 | 8,827 | 6,489 |
| $R^2$ | 0.166 | 0.179 | 0.180 | 0.180 | 0.173 | 0.406 | 0.384 |
| $chi^2$ | 561.161*** (df = 14) | 605.961*** (df = 15) | 607.297*** (df = 16) | 608.661*** (df = 17) | 469.176*** (df = 18) | 1,139.560*** (df = 19) | 750.381*** (df = 19) |
| *Note:* | | | | | | | *p<0.1; **p<0.05; ***p<0.01 |

**Table 6. Binomial logit regression results, Justices fixed effects**

| | *Dependent variable:* | | | | | |
|---|---|---|---|---|---|---|
| | Dissent or partial dissent = 1 | | | | | |
| | (1) | (2) | (3) | (4) | (5) | (6) |
| Argibay | 1.061*** | 1.073*** | 1.074*** | 1.074*** | 1.124*** | 1.523*** |
| | (0.134) | (0.134) | (0.134) | (0.134) | (0.156) | (0.206) |
| Fayt | -1.588*** | -1.597*** | -1.597*** | -1.598*** | -1.591*** | -1.891*** |
| | (0.271) | (0.272) | (0.273) | (0.273) | (0.313) | (0.360) |
| Lorenzetti | -1.588*** | -1.597*** | -1.597*** | -1.598*** | -1.516*** | -1.808*** |
| | (0.269) | (0.270) | (0.270) | (0.270) | (0.295) | (0.343) |
| Maqueda | -0.936*** | -0.943*** | -0.943*** | -0.943*** | -0.876*** | -1.081*** |
| | (0.199) | (0.201) | (0.201) | (0.201) | (0.219) | (0.267) |
| Petracchi | -0.058 | -0.059 | -0.059 | -0.059 | -0.000 | 0.000 |
| | (0.152) | (0.153) | (0.153) | (0.153) | (0.173) | (0.225) |
| Zaffaroni | -0.219 | -0.221 | -0.221 | -0.221 | -0.117 | -0.152 |
| | (0.160) | (0.161) | (0.161) | (0.161) | (0.171) | (0.222) |
| Arbitrariedad | 0.984*** | 1.038*** | 1.016*** | 1.010*** | 0.954*** | 1.083*** |
| | (0.156) | (0.157) | (0.159) | (0.158) | (0.178) | (0.154) |
| Article 280 | -1.346*** | -0.994*** | -1.026*** | -0.983*** | -1.095*** | -0.449 |
| | (0.313) | (0.336) | (0.337) | (0.346) | (0.416) | (0.287) |
| Remission to PGN | -0.837*** | -0.926*** | -0.933*** | -0.928*** | -1.056*** | -0.521*** |
| | (0.214) | (0.206) | (0.206) | (0.207) | (0.250) | (0.185) |
| Remission to previous decision | -0.294* | 0.062 | 0.053 | 0.048 | 0.072 | 0.075 |
| | (0.169) | (0.181) | (0.181) | (0.181) | (0.216) | (0.170) |
| Decision in 2013 | 0.077 | -0.061 | -0.056 | -0.048 | -0.007 | 0.160 |
| | (0.132) | (0.132) | (0.132) | (0.132) | (0.148) | (0.111) |
| Judicial Department N1 | -0.709** | -0.595* | -0.595* | -0.605* | -0.558 | 0.059 |
| | (0.314) | (0.326) | (0.331) | (0.332) | (0.413) | (0.332) |
| Judicial Department N2 | -0.193 | -0.079 | -0.080 | -0.101 | -0.059 | 0.519 |
| | (0.305) | (0.319) | (0.324) | (0.325) | (0.419) | (0.325) |
| Judicial Department N3 | 0.510* | 0.466 | 0.469 | 0.465 | 0.589 | 0.537 |
| | (0.290) | (0.298) | (0.304) | (0.303) | (0.390) | (0.362) |
| Judicial Department N4 | -0.588* | -0.726** | -0.737** | -0.750** | -0.699* | -0.159 |
| | (0.320) | (0.323) | (0.323) | (0.324) | (0.410) | (0.329) |
| Judicial Department N6 | 0.212 | 0.143 | 0.141 | 0.135 | 0.062 | -0.109 |
| | (0.316) | (0.322) | (0.326) | (0.327) | (0.425) | (0.370) |
| Judicial Department N7 | -1.109*** | -1.085*** | -1.089*** | -1.086*** | -1.036** | -0.240 |

| | | | | | | |
|---|---|---|---|---|---|---|
| | (0.331) | (0.334) | (0.337) | (0.338) | (0.409) | (0.334) |
| RHE appeal | -0.261* | -0.372** | -0.371** | -0.370** | -0.293* | -0.596*** |
| | (0.145) | (0.151) | (0.152) | (0.152) | (0.177) | (0.149) |
| Total times at Justices offices | | 0.084*** | 0.084*** | 0.084*** | 0.078*** | -0.018 |
| | | (0.016) | (0.016) | (0.016) | (0.020) | (0.016) |
| Separate opinion | | | -0.192 | -0.187 | -0.177 | -0.258 |
| | | | (0.215) | (0.216) | (0.232) | (0.262) |
| CSJN pres in majority | | | | 0.160 | 0.116 | 0.248 |
| | | | | (0.187) | (0.210) | (0.154) |
| Nat'l government as party | | | | | -0.009 | -0.402*** |
| | | | | | (0.186) | (0.152) |
| Additional dissents | | | | | | 3.885*** |
| | | | | | | (0.159) |
| Constant | -2.384*** | -3.057*** | -3.017*** | -3.147*** | -3.114*** | -4.166*** |
| | (0.310) | (0.374) | (0.371) | (0.400) | (0.499) | (0.442) |
| Observations | 11,102 | 11,102 | 11,102 | 11,102 | 8,827 | 8,827 |
| $R^2$ | 0.183 | 0.196 | 0.196 | 0.197 | 0.189 | 0.423 |
| $chi^2$ | 618.981*** (df = 18) | 664.048*** (df = 19) | 665.393*** (df = 20) | 666.773*** (df = 21) | 512.444*** (df = 22) | 1,189.593*** (df = 23) |

*Note:* *p<0.1; **p<0.05; ***p<0.01

**Table 7. Binomial logit regression results. Decision level**

| | *Dependent variable:* | | | | | | |
|---|---|---|---|---|---|---|---|
| | Dissent or partial dissent = 1 | | | | | | |
| | (1) | (2) | (3) | (4) | (5) | (6) | (7) |
| Arbitrariedad | 1.772*** | 1.827*** | 1.785*** | 1.773*** | 1.611*** | 1.882*** | 1.486*** |
| | (0.182) | (0.185) | (0.186) | (0.187) | (0.194) | (0.239) | (0.292) |
| Article 280 | -1.128*** | -0.898*** | -0.957*** | -0.849*** | -0.959*** | -0.598 | -0.922** |
| | (0.306) | (0.314) | (0.316) | (0.317) | (0.319) | (0.415) | (0.441) |
| Remission to PGN | -0.957*** | -1.071*** | -1.080*** | -1.075*** | -1.062*** | -0.693** | -1.208*** |
| | (0.234) | (0.235) | (0.235) | (0.236) | (0.234) | (0.301) | (0.341) |
| Remission to previous decision | 0.014 | 0.284 | 0.271 | 0.253 | 0.244 | 0.311 | -0.130 |
| | (0.200) | (0.213) | (0.214) | (0.214) | (0.213) | (0.289) | (0.299) |
| Decision in 2013 | 0.077 | -0.014 | -0.007 | 0.022 | 0.105 | 0.195 | -0.421 |
| | (0.160) | (0.164) | (0.164) | (0.165) | (0.168) | (0.209) | (0.259) |
| Judicial Department N1 | -0.696* | -0.599 | -0.603 | -0.622 | -0.498 | -0.405 | |
| | (0.395) | (0.398) | (0.397) | (0.397) | (0.403) | (0.562) | |
| Judicial Department N2 | 0.162 | 0.246 | 0.253 | 0.210 | 0.175 | 0.220 | |
| | (0.381) | (0.383) | (0.383) | (0.384) | (0.388) | (0.546) | |
| Judicial Department N3 | 0.992** | 0.987** | 0.993** | 1.011*** | 0.983** | 1.178** | |
| | (0.387) | (0.390) | (0.389) | (0.390) | (0.394) | (0.548) | |
| Judicial Department N4 | -0.768** | -0.883** | -0.902** | -0.935** | -0.839** | -0.823 | |
| | (0.382) | (0.386) | (0.386) | (0.387) | (0.394) | (0.581) | |
| Judicial Department N6 | 0.068 | 0.019 | 0.018 | 0.004 | 0.011 | -0.259 | |
| | (0.408) | (0.410) | (0.410) | (0.410) | (0.411) | (0.606) | |
| Judicial Department N7 | -1.237*** | -1.213*** | -1.215*** | -1.201*** | -1.086*** | -0.767 | |
| | (0.390) | (0.391) | (0.391) | (0.392) | (0.396) | (0.559) | |
| RHE appeal | -0.578*** | -0.650*** | -0.648*** | -0.635*** | -0.694*** | -0.682*** | -0.573** |
| | (0.171) | (0.174) | (0.174) | (0.174) | (0.175) | (0.221) | (0.263) |
| Total times at Justices offices | | 0.066*** | 0.065*** | 0.067*** | 0.059*** | -0.036 | 0.031 |
| | | (0.019) | (0.019) | (0.019) | (0.019) | (0.027) | (0.036) |
| Separate opinion | | | -0.365 | -0.351 | -0.353 | -0.369 | 0.125 |
| | | | (0.244) | (0.245) | (0.247) | (0.318) | (0.370) |
| CSJN pres in majority | | | | 0.418** | 0.411** | 0.855*** | 0.910*** |
| | | | | (0.202) | (0.203) | (0.293) | (0.331) |
| Nat'l government as party | | | | | -0.301 | -0.666** | -0.647** |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| | | | | | (0.196) | (0.265) | (0.276) |
| Additional dissents | | | | | | 13.799 | 13.294 |
| | | | | | | (24.247) | (22.618) |
| Rapporteur Lorenzetti | | | | | | | -1.742** |
| | | | | | | | (0.814) |
| Rapporteur Maqueda | | | | | | | -1.619* |
| | | | | | | | (0.838) |
| Rapporteur Petracchi | | | | | | | -1.230 |
| | | | | | | | (0.752) |
| Rapporteur Fayt | | | | | | | -2.103* |
| | | | | | | | (1.264) |
| Rapporteur Zaffaroni | | | | | | | -0.652 |
| | | | | | | | (0.763) |
| Rapporteur Highton | | | | | | | -1.112 |
| | | | | | | | (0.764) |
| Constant | -1.095*** | -1.606*** | -1.532*** | -1.885*** | -1.634*** | -2.348*** | -1.157 |
| | (0.370) | (0.402) | (0.406) | (0.441) | (0.449) | (0.634) | (0.861) |
| Observations | 1,586 | 1,586 | 1,586 | 1,586 | 1,486 | 1,486 | 1,113 |
| $R^2$ | 0.302 | 0.312 | 0.314 | 0.317 | 0.319 | 0.606 | 0.578 |
| $chi^2$ | 336.227*** (df = 12) | 348.489*** (df = 13) | 350.840*** (df = 14) | 355.296*** (df = 15) | 342.877*** (df = 16) | 736.692*** (df = 17) | 485.843*** (df = 17) |
| *Note:* | | | | | | | *p<0.1; **p<0.05; ***p<0.01 |

**Table 8. Summary statistics, number of words in majority opinion**

| Dissent | Remission | Mean | Median | 25th quantile | 75th quantile | Standard Deviation |
|---|---|---|---|---|---|---|
| Formulaic dissent | No | 895.17 | 822 | 609 | 1054 | 480.77 |
| No dissent | No | 1359.82 | 885.5 | 505.5 | 1631.5 | 1343.77 |
| Reasoned dissent | No | 4147.95 | 1763 | 1295.5 | 4202.5 | 5021.14 |
| Remission dissent | No | 1832.62 | 1733.5 | 1484.25 | 2057.5 | 791.57 |
| Formulaic dissent | Yes | 149.06 | 159 | 98 | 175 | 66.52 |
| No dissent | Yes | 158.8 | 119 | 89 | 189 | 134.68 |
| Reasoned dissent | Yes | 124.67 | 85.5 | 75.75 | 107.5 | 127.84 |
| Remission dissent | Yes | 180.41 | 118.5 | 105.25 | 132 | 311.71 |

**Table 9. Regression results, robust standard errors**

| | *Dependent variable:* | | | | |
|---|---|---|---|---|---|
| | Log number of words in majority opinion | | | | |
| | (1) | (2) | (3) | (4) | (5) |
| Dissent | 0.115** | | | | |
| | (0.045) | | | | |
| Remission | -2.063*** | -2.020*** | -2.071*** | -2.054*** | -2.052*** |
| | (0.087) | (0.080) | (0.081) | (0.077) | (0.076) |
| Judicial Department N2 | 0.234*** | 0.254*** | 0.228*** | 0.224*** | 0.225*** |
| | (0.069) | (0.070) | (0.073) | (0.072) | (0.072) |
| Judicial Department N3 | -0.169 | -0.158 | -0.136 | -0.191 | -0.187 |
| | (0.159) | (0.147) | (0.190) | (0.180) | (0.180) |
| Judicial Department N4 | -0.116* | -0.121* | -0.073 | -0.059 | -0.057 |
| | (0.064) | (0.064) | (0.071) | (0.070) | (0.070) |
| Judicial Department N5 | 0.119 | 0.086 | 0.105 | 0.090 | 0.086 |
| | (0.123) | (0.116) | (0.125) | (0.123) | (0.121) |
| Judicial Department N6 | 0.069 | 0.066 | 0.095 | 0.090 | 0.080 |
| | (0.099) | (0.099) | (0.102) | (0.099) | (0.099) |
| Judicial Department N7 | 0.243*** | 0.239*** | 0.260*** | 0.266*** | 0.269*** |
| | (0.066) | (0.065) | (0.069) | (0.068) | (0.067) |
| Decision in 2013 | 0.127*** | 0.122*** | 0.144*** | 0.131*** | 0.131*** |
| | (0.041) | (0.040) | (0.039) | (0.039) | (0.039) |
| REF | 0.142*** | 0.112** | 0.103** | 0.066 | 0.059 |
| | (0.050) | (0.050) | (0.049) | (0.049) | (0.049) |
| RHE | 0.010 | 0.006 | 0.031 | 0.037 | 0.031 |
| | (0.039) | (0.038) | (0.039) | (0.039) | (0.039) |
| Fed/Nat jurisdiction | -0.070 | -0.047 | -0.034 | 0.019 | 0.023 |
| | (0.137) | (0.123) | (0.173) | (0.164) | (0.164) |
| Local jurisdiction | 0.088 | 0.093 | 0.118 | 0.083 | 0.085 |
| | (0.094) | (0.092) | (0.096) | (0.092) | (0.092) |
| National jurisdiction | 0.171** | 0.168** | 0.183*** | 0.159** | 0.173*** |
| | (0.067) | (0.067) | (0.066) | (0.064) | (0.065) |
| No dissent | | -0.032 | -0.024 | -0.054 | -0.009 |
| | | (0.049) | (0.052) | (0.053) | (0.057) |
| Reasoned dissent | | 0.443** | 0.488** | 0.415** | 0.387** |
| | | (0.206) | (0.209) | (0.202) | (0.195) |
| Remission Dissent | | 0.105 | 0.134 | 0.109 | 0.076 |
| | | (0.102) | (0.113) | (0.108) | (0.110) |

| | | | | | |
|---|---|---|---|---|---|
| Total times at Justices offices | | | -0.016*** | -0.013*** | -0.014*** |
| | | | (0.005) | (0.005) | (0.005) |
| Separate opinion | | | | 0.315*** | 0.312*** |
| | | | | (0.062) | (0.062) |
| 2 or more dissenters | | | | | 0.133* |
| | | | | | (0.079) |
| Constant | 6.623*** | 6.646*** | 6.743*** | 6.733*** | 6.698*** |
| | (0.114) | (0.103) | (0.114) | (0.110) | (0.110) |
| Observations | 1,138 | 1,137 | 1,092 | 1,092 | 1,092 |
| R2 | 0.629 | 0.633 | 0.638 | 0.651 | 0.652 |
| Adjusted R2 | 0.624 | 0.628 | 0.632 | 0.645 | 0.646 |

*Note:* *p<0.1; **p<0.05; ***p<0.01. The number of observations is lower in regressions (3)-(5) due to missing observations. Robust standard errors in parentheses.

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## APPENDIX

### (alternative explanation)

It could be possible, though, that the legal theory explaining appeal admissibility (not the cost of dissent) justifies our *Arbitrariedad* results. In fact, some legal scholars and CSJN officials believe that *Arbitrariedad* admissibility is based on a standard while *REF* admissibility is based on a rule.[52] As a result, different Justices may interpret differently whether *the required Arbitrariedad standard* has been met, making *Arbitrariedad* decisions more prone to dissents, regardless of costs considerations.

To explore this hypothesis, we reviewed each *Arbitrariedad* decision to identify the type of problem prompting each Justice in the majority to consider the arbitrariness of the lower court's decision. To that effect, we used a classification established by Carrió (1967), adding a couple of additional levels admitted by CSJN later on. Then, for each case we classified the *Arbitrariedad* criterion as a rule or a standard. To be precise, we classified an *Arbitrariedad* decision as being based on a rule if at least *one rule criterion* was used to justify the decision. Table 10 shows the types of *Arbitrariedad* and whether we classified them as a rule or a standard.

[Insert table 10 here]

We used this information to compare dissents in *Arbitrariedad* decisions based on whether the majority opinion made a remission[53] and on whether at least one of the grounds for finding the lower court decision arbitrary was a rule. Table 11 presents the results.

[52]While the idea that CSJN uses a standard for *Arbitrariedad* is conceivable, many of the *Arbitrariedad* decisions we reviewed failed to explicit the use of a standard. Further, there is no unique standard used by the court.

[53] In those cases where the majority made a remission, we traced the opinion the majority referenced to identify the type(s) of *Arbitrariedad* invoked.

[Insert table 11 here]

The dissent rate is higher in decisions based on rules than on standards, both in cases with remission and without remission. In cases without remission, at least one dissenting opinion appears in about 44% of the decisions based on one or more standards, while appearing in 48% of the decisions based at least in one *Arbitrariedad* rule. Similarly, in cases where the majority opinion made a remission to a previous decision at least one dissenting opinion appears in 40% of the decisions based on one or more standards, while appearing in 61% of the decisions based at least on one *Arbitrariedad* rule. Finally, the percentage of partial or fully dissenting votes in *Arbitrariedad* decisions based at least on one rule is 10%, a result similar to the rate for all *Arbitrariedad* decisions reported above. These results suggest that the degree of uncertainty is not driving the higher rate of dissent observed in *Arbitrariedad*.

**Table 10. Classification of type of *Arbitrariedad* as rule or standard**

| *Type of Arbitrariedad* | *Rule/Standard* |
|---|---|
| Not deciding issues brought up | Rule |
| Deciding issues not brought up | Rule |
| Taking the Judge the role of the legislator | Standard |
| Leave aside the applicable norm | Rule |
| Apply non-current law | Rule |
| Ground the decision in excessively lax terms | Standard |
| Leave aside decisive proofs | Standard |
| Invoke non-existent proofs | Rule |
| Contradict other elements of the case | Standard |
| Ground the decision in dogmatic claims | Standard |
| Excessive ritual rigor | Standard |
| Self-contradiction | Standard |
| Violation of a final decision | Standard |
| Omit the analysis of precedents | Standard |
| Lack of substantial coincidence on decision grounds | Standard |
| Other | Standard |

**Table 11. Number of *Arbitrariedad* decisions, by rule or standard**

| | No remission | Remission |
|---|---|---|
| **Standard in *Arbitrariedad*** | | |
| No dissent | 10 | 60 |
| Dissent | 8 | 40 |
| **Rule in *Arbitrariedad*** | | |
| No dissent | 15 | 66 |
| Dissent | 14 | 101 |

**(mostly not intended for publication)**

**Table A.1. Thematic area of specialization of each Judicial Department**

| | **Area of specialization** |
|---|---|
| **Nº 1** | **Commercial Law, Legal Fees, Intellectual Property and Conflicts of Competence (except for criminal ones)** |
| **Nº 2** | **Civil Law, Social Security Law, Freedom of Expression and Lawyers Sanctions** |
| **Nº 3** | **Criminal Law and Conflicts of competence pertaining to Criminal Cases** |
| **Nº 4** | **Public Law and Election Law** |
| **Nº 5** | **Institutionally Relevant Cases and Human Rights Law** |
| **Nº 6** | **Labor Law** |
| **Nº 7** | **Tax Law, Customs Law and Banking Law** |

*** Adapted from Sabelli (2007).**

**Table A.2. Binomial logit regression results, excluding abstentions**

| | *Dependent variable:* | | | | | |
|---|---|---|---|---|---|---|
| | Dissent or partial dissent = 1 | | | | | |
| | (1) | (2) | (3) | (4) | (5) | (6) |
| Justices ideal points | 0.653*** | 0.639*** | 0.667*** | 0.668*** | 0.662*** | 0.410*** |
| | (0.042) | (0.041) | (0.042) | (0.042) | (0.046) | (0.055) |
| *Arbitrariedad* | 0.981*** | 0.993*** | 0.942*** | 0.930*** | 0.883*** | 0.682*** |
| | (0.152) | (0.152) | (0.153) | (0.153) | (0.174) | (0.200) |
| *Article 280* | -0.824** | -0.780** | -0.847** | -0.786** | -0.791* | -0.824** |
| | (0.325) | (0.325) | (0.331) | (0.345) | (0.408) | (0.405) |
| Remission to PGN | -0.825*** | -0.822*** | -0.831*** | -0.827*** | -0.916*** | -1.104*** |
| | (0.196) | (0.196) | (0.197) | (0.198) | (0.237) | (0.262) |
| Remission to previous decision | 0.143 | 0.158 | 0.143 | 0.144 | 0.211 | -0.060 |
| | (0.169) | (0.170) | (0.174) | (0.175) | (0.209) | (0.216) |
| Decision in 2013 | -0.171 | -0.180 | -0.180 | -0.170 | -0.148 | -0.273 |
| | (0.125) | (0.125) | (0.127) | (0.127) | (0.144) | (0.179) |
| Judicial Department N1 | -0.580* | -0.573* | -0.614* | -0.619* | -0.599 | |
| | (0.306) | (0.306) | (0.316) | (0.319) | (0.388) | |
| Judicial Department N2 | -0.196 | -0.165 | -0.214 | -0.225 | -0.213 | |
| | (0.300) | (0.299) | (0.309) | (0.310) | (0.396) | |
| Judicial Department N3 | 0.327 | 0.338 | 0.313 | 0.311 | 0.460 | |
| | (0.280) | (0.281) | (0.294) | (0.294) | (0.375) | |
| Judicial Department N4 | -0.837*** | -0.833*** | -0.890*** | -0.905*** | -0.921** | |
| | (0.313) | (0.312) | (0.325) | (0.327) | (0.410) | |
| Judicial Department N6 | 0.035 | 0.036 | 0.012 | 0.012 | -0.099 | |
| | (0.298) | (0.298) | (0.309) | (0.310) | (0.403) | |
| Judicial Department N7 | -1.243*** | -1.245*** | -1.332*** | -1.334*** | -1.342*** | |
| | (0.327) | (0.327) | (0.340) | (0.342) | (0.408) | |
| RHE appeal | -0.309** | -0.320** | -0.318** | -0.315** | -0.245 | -0.164 |
| | (0.144) | (0.144) | (0.145) | (0.146) | (0.168) | (0.200) |
| Total times at Justices offices | 0.084*** | 0.083*** | 0.084*** | 0.085*** | 0.081*** | 0.133*** |
| | (0.015) | (0.015) | (0.016) | (0.016) | (0.019) | (0.024) |
| Justice's age | | 0.018*** | 0.019*** | 0.019*** | 0.022*** | 0.011** |
| | | (0.004) | (0.004) | (0.004) | (0.005) | (0.005) |
| Separate opinion | | | -10.030*** | -10.002*** | -10.124*** | -9.600*** |
| | | | (0.172) | (0.175) | (0.202) | (0.355) |
| CSJN pres in majority | | | | 0.179 | 0.081 | -0.071 |
| | | | | (0.184) | (0.205) | (0.207) |
| Nat'l government as party | | | | | 0.032 | -0.256 |
| | | | | | (0.182) | (0.187) |
| Rapporteur Lorenzetti | | | | | | -1.095** |

| | | | | | | |
|---|---|---|---|---|---|---|
| | | | | | | (0.547) |
| Rapporteur Maqueda | | | | | | -1.573*** |
| | | | | | | (0.600) |
| Rapporteur Petracchi | | | | | | -1.318*** |
| | | | | | | (0.507) |
| Rapporteur Fayt | | | | | | -0.216 |
| | | | | | | (0.591) |
| Rapporteur Zaffaroni | | | | | | -0.569 |
| | | | | | | (0.518) |
| Rapporteur Highton | | | | | | -0.818 |
| | | | | | | (0.508) |
| Constant | -2.475*** | -3.768*** | -3.693*** | -3.885*** | -3.985*** | -2.750*** |
| | (0.340) | (0.420) | (0.437) | (0.536) | (0.651) | (0.679) |
| Observations | 7,643 | 7,643 | 7,643 | 7,643 | 6,113 | 4,536 |
| $R^2$ | 0.205 | 0.209 | 0.225 | 0.225 | 0.219 | 0.143 |
| $chi^2$ | 604.819*** (df = 14) | 616.403*** (df = 15) | 663.907*** (df = 16) | 665.594*** (df = 17) | 518.798*** (df = 18) | 235.069*** (df = 18) |

*Note:* * p<0.1, ** p<0.05, *** p<0.01. The number of observations is lower in regressions (5) and (6) due to missing observations. Clustered standard errors at the decision level. Regression (6) includes rapporteur's fixed effects

**Table A.3. Binomial logit regression results (excluding abstentions), Justices fixed effects**

| | *Dependent variable:* | | | |
|---|---|---|---|---|
| | Dissent or partial dissent = 1 | | | |
| | (1) | (2) | (3) | (4) |
| Argibay | 1.826*** | 1.954*** | 1.953*** | 1.991*** |
| | (0.154) | (0.157) | (0.157) | (0.184) |
| Fayt | -1.061*** | -1.039*** | -1.045*** | -0.957*** |
| | (0.289) | (0.290) | (0.290) | (0.337) |
| Lorenzetti | -1.602*** | -1.583*** | -1.640*** | -1.577*** |
| | (0.272) | (0.272) | (0.292) | (0.321) |
| Maqueda | -1.056*** | -1.055*** | -1.062*** | -1.035*** |
| | (0.202) | (0.202) | (0.203) | (0.222) |
| Petracchi | 0.286* | 0.326* | 0.338** | 0.367* |
| | (0.167) | (0.167) | (0.168) | (0.189) |
| Zaffaroni | -0.215 | -0.209 | -0.212 | -0.135 |
| | (0.165) | (0.166) | (0.166) | (0.177) |
| *Arbitrariedad* | 1.015*** | 0.965*** | 0.940*** | 0.922*** |
| | (0.158) | (0.161) | (0.162) | (0.184) |
| *Article 280* | -0.963*** | -1.060*** | -0.950*** | -0.939** |
| | (0.337) | (0.349) | (0.358) | (0.425) |
| Remission to PGN | -0.829*** | -0.843*** | -0.837*** | -0.922*** |
| | (0.201) | (0.202) | (0.204) | (0.244) |
| Remission to previous decision | 0.147 | 0.121 | 0.124 | 0.194 |
| | (0.173) | (0.180) | (0.182) | (0.218) |
| Decision in 2013 | -0.161 | -0.168 | -0.146 | -0.132 |
| | (0.129) | (0.131) | (0.132) | (0.150) |
| Judicial Department N1 | -0.624** | -0.684** | -0.696** | -0.731* |
| | (0.312) | (0.326) | (0.331) | (0.400) |
| Judicial Department N2 | -0.226 | -0.304 | -0.328 | -0.342 |
| | (0.307) | (0.321) | (0.323) | (0.410) |
| Judicial Department N3 | 0.255 | 0.212 | 0.206 | 0.326 |
| | (0.288) | (0.304) | (0.304) | (0.384) |
| Judicial Department N4 | -0.888*** | -0.966*** | -0.999*** | -1.094*** |
| | (0.320) | (0.336) | (0.340) | (0.422) |
| Judicial Department N6 | -0.010 | -0.046 | -0.050 | -0.196 |
| | (0.307) | (0.320) | (0.323) | (0.415) |
| Judicial Department N7 | -1.355*** | -1.498*** | -1.502*** | -1.580*** |
| | (0.334) | (0.352) | (0.355) | (0.419) |
| RHE appeal | -0.311** | -0.308** | -0.302** | -0.217 |
| | (0.149) | (0.151) | (0.151) | (0.175) |
| Total times at Justices offices | 0.088*** | 0.091*** | 0.092*** | 0.088*** |
| | (0.016) | (0.017) | (0.017) | (0.020) |
| Separate opinion | | -9.812*** | -9.772*** | -9.838*** |
| | | (0.194) | (0.191) | (0.222) |

| | | | | |
|---|---|---|---|---|
| CSJN pres in majority | | | 0.329* | 0.215 |
| | | | (0.194) | (0.218) |
| Nat'l government as party | | | | 0.140 |
| | | | | (0.193) |
| Constant | -2.781*** | -2.670*** | -2.938*** | -2.882*** |
| | (0.349) | (0.371) | (0.409) | (0.503) |
| Observations | 7,643 | 7,643 | 7,643 | 6,113 |
| $R^2$ | 0.257 | 0.273 | 0.275 | 0.268 |
| $chi^2$ | 764.027*** (df = 19) | 816.178*** (df = 20) | 821.846*** (df = 21) | 642.482*** (df = 22) |

*Note:* * p<0.1, ** p<0.05, *** p<0.01. The number of observations is lower in regressions (5) and (6) due to missing observations. Clustered standard errors at the decision level.

**Table A.4. Binomial logit regression results**

| | *Dependent variable:* | | | | | |
|---|---|---|---|---|---|---|
| | Dissent, partial dissent or abstention = 1 | | | | | |
| | (1) | (2) | (3) | (4) | (5) | (6) |
| Justices ideal points | 0.433*** | 0.417*** | 0.433*** | 0.435*** | 0.458*** | 0.474*** |
| | (0.018) | (0.018) | (0.018) | (0.018) | (0.020) | (0.024) |
| *Arbitrariedad* | 0.112*** | 0.118*** | 0.074* | 0.103*** | 0.113** | 0.128** |
| | (0.038) | (0.040) | (0.039) | (0.039) | (0.046) | (0.064) |
| *Article 280* | 0.386*** | 0.409*** | 0.354*** | 0.290*** | 0.356*** | 0.454*** |
| | (0.061) | (0.065) | (0.064) | (0.062) | (0.071) | (0.086) |
| Remission to PGN | -0.007 | -0.007 | -0.031 | -0.042 | -0.019 | -0.040 |
| | (0.054) | (0.057) | (0.057) | (0.055) | (0.065) | (0.071) |
| Remission to previous decision | 0.186*** | 0.197*** | 0.181*** | 0.195*** | 0.227*** | 0.243*** |
| | (0.055) | (0.058) | (0.059) | (0.056) | (0.065) | (0.074) |
| Decision in 2013 | 0.055* | 0.059* | 0.081** | 0.044 | 0.020 | -0.029 |
| | (0.032) | (0.034) | (0.035) | (0.034) | (0.040) | (0.054) |
| Judicial Department N1 | -0.064 | -0.068 | -0.086 | -0.067 | -0.018 | |
| | (0.082) | (0.087) | (0.088) | (0.086) | (0.099) | |
| Judicial Department N2 | 0.056 | 0.060 | 0.053 | 0.057 | 0.107 | |
| | (0.080) | (0.085) | (0.085) | (0.084) | (0.097) | |
| Judicial Department N3 | 0.009 | 0.010 | 0.021 | -0.049 | 0.052 | |
| | (0.078) | (0.083) | (0.083) | (0.082) | (0.098) | |
| Judicial Department N4 | -0.014 | -0.014 | -0.036 | -0.023 | -0.007 | |
| | (0.079) | (0.084) | (0.085) | (0.083) | (0.095) | |
| Judicial Department N6 | 0.029 | 0.031 | 0.037 | 0.052 | 0.083 | |
| | (0.084) | (0.089) | (0.089) | (0.087) | (0.099) | |
| Judicial Department N7 | -0.082 | -0.086 | -0.079 | -0.119 | -0.113 | |
| | (0.078) | (0.082) | (0.085) | (0.082) | (0.094) | |
| RHE appeal | -0.038 | -0.040 | -0.053 | -0.070** | -0.045 | 0.013 |
| | (0.033) | (0.035) | (0.034) | (0.033) | (0.039) | (0.046) |
| Total times at Justices offices | -0.020*** | -0.021*** | -0.023*** | -0.022*** | -0.022*** | -0.0002 |
| | (0.004) | (0.004) | (0.004) | (0.004) | (0.005) | (0.007) |
| Justice's age | | 0.046*** | 0.049*** | 0.049*** | 0.054*** | 0.048*** |
| | | (0.002) | (0.002) | (0.002) | (0.002) | (0.002) |
| Separate opinion | | | -12.225*** | -12.302*** | -11.292*** | -11.189*** |
| | | | (0.091) | (0.092) | (0.108) | (0.151) |

| | | | | | | |
|---|---|---|---|---|---|---|
| CSJN pres in majority | | | | -0.358*** | -0.358*** | -0.348*** |
| | | | | (0.028) | (0.035) | (0.039) |
| Nat'l government as party | | | | | 0.053 | -0.002 |
| | | | | | (0.040) | (0.046) |
| Rapporteur Lorenzetti | | | | | | -0.287 |
| | | | | | | (0.214) |
| Rapporteur Maqueda | | | | | | -0.191 |
| | | | | | | (0.216) |
| Rapporteur Petracchi | | | | | | -0.268 |
| | | | | | | (0.209) |
| Rapporteur Fayt | | | | | | -0.133 |
| | | | | | | (0.251) |
| Rapporteur Zaffaroni | | | | | | -0.304 |
| | | | | | | (0.214) |
| Rapporteur Highton | | | | | | -0.145 |
| | | | | | | (0.212) |
| Constant | -0.435*** | -3.819*** | -3.932*** | -3.656*** | -4.094*** | -3.629*** |
| | (0.096) | (0.173) | (0.175) | (0.174) | (0.202) | (0.293) |
| Observations | 11,102 | 11,102 | 11,102 | 11,102 | 8,827 | 6,489 |
| $R^2$ | 0.089 | 0.156 | 0.187 | 0.192 | 0.213 | 0.198 |
| $chi^2$ | 741.426*** (df = 14) | 1,337.598*** (df = 15) | 1,626.389*** (df = 16) | 1,674.266*** (df = 17) | 1,481.417*** (df = 18) | 1,001.745*** (df = 18) |

*Note:* * p<0.1, ** p<0.05, *** p<0.01. The number of observations is lower in regressions (5) and (6) due to missing observations. Clustered standard errors at the decision level. Regression (6) includes rapporteur's fixed effects

**Table A.5. Binomial logit regression results, Justices fixed effects**

| | *Dependent variable:* | | | |
|---|---|---|---|---|
| | Dissent, partial dissent or abstention = 1 | | | |
| | (1) | (2) | (3) | (4) |
| Argibay | -0.362*** | -0.336*** | -0.334*** | -0.321*** |
| | (0.071) | (0.076) | (0.076) | (0.084) |
| Fayt | -1.481*** | -1.555*** | -1.564*** | -1.595*** |
| | (0.077) | (0.079) | (0.080) | (0.091) |
| Lorenzetti | -1.757*** | -1.816*** | -1.819*** | -1.999*** |
| | (0.086) | (0.087) | (0.087) | (0.098) |
| Maqueda | -2.423*** | -2.500*** | -2.513*** | -2.715*** |
| | (0.103) | (0.105) | (0.105) | (0.123) |
| Petracchi | -0.966*** | -1.020*** | -1.025*** | -1.152*** |
| | (0.069) | (0.070) | (0.071) | (0.080) |
| Zaffaroni | -1.807*** | -1.883*** | -1.892*** | -1.904*** |
| | (0.088) | (0.088) | (0.089) | (0.100) |
| *Arbitrariedad* | 0.120*** | 0.072* | 0.102*** | 0.112** |
| | (0.041) | (0.040) | (0.039) | (0.046) |
| *Article 280* | 0.415*** | 0.354*** | 0.288*** | 0.354*** |
| | (0.066) | (0.065) | (0.063) | (0.072) |
| Remission to PGN | -0.007 | -0.034 | -0.044 | -0.022 |
| | (0.057) | (0.058) | (0.056) | (0.065) |
| Remission to previous decision | 0.200*** | 0.181*** | 0.196*** | 0.227*** |
| | (0.059) | (0.059) | (0.057) | (0.065) |
| Decision in 2013 | 0.059* | 0.082** | 0.043 | 0.019 |
| | (0.035) | (0.036) | (0.035) | (0.041) |
| Judicial Department N1 | -0.068 | -0.091 | -0.072 | -0.023 |
| | (0.088) | (0.089) | (0.087) | (0.100) |
| Judicial Department N2 | 0.061 | 0.056 | 0.060 | 0.109 |
| | (0.086) | (0.086) | (0.085) | (0.098) |
| Judicial Department N3 | 0.010 | 0.019 | -0.053 | 0.048 |
| | (0.084) | (0.084) | (0.083) | (0.099) |
| Judicial Department N4 | -0.015 | -0.041 | -0.027 | -0.010 |
| | (0.085) | (0.086) | (0.084) | (0.096) |
| Judicial Department N6 | 0.032 | 0.034 | 0.049 | 0.080 |
| | (0.091) | (0.090) | (0.088) | (0.100) |
| Judicial Department N7 | -0.088 | -0.087 | -0.129 | -0.122 |
| | (0.084) | (0.085) | (0.083) | (0.095) |
| RHE appeal | -0.041 | -0.053 | -0.070** | -0.046 |
| | (0.035) | (0.035) | (0.034) | (0.040) |
| Total times at Justices offices | -0.021*** | -0.024*** | -0.022*** | -0.022*** |
| | (0.004) | (0.005) | (0.004) | (0.005) |
| Separate opinion | | -12.241*** | -12.320*** | -11.319*** |
| | | (0.091) | (0.093) | (0.109) |

| | | | | |
|---|---|---|---|---|
| CSJN pres in majority | | | -0.367*** | -0.367*** |
| | | | (0.029) | (0.035) |
| Nat'l government as party | | | | 0.053 |
| | | | | (0.040) |
| Constant | 0.473*** | 0.615*** | 0.921*** | 0.879*** |
| | (0.113) | (0.116) | (0.115) | (0.134) |
| Observations | 11,102 | 11,102 | 11,102 | 8,827 |
| $R^2$ | 0.175 | 0.206 | 0.211 | 0.230 |
| $chi^2$ | 1,510.290*** (df = 19) | 1,802.548*** (df = 20) | 1,851.968*** (df = 21) | 1,610.556*** (df = 22) |

*Note:* * p<0.1, ** p<0.05, *** p<0.01. The number of observations is lower in regression (4) due to missing observations. Clustered standard errors at the decision level.

**Table A.6. Binomial logit regression results**

| | *Dependent variable:* | | | | | |
|---|---|---|---|---|---|---|
| | Not with majority = 1 | | | | | |
| | (1) | (2) | (3) | (4) | (5) | (6) |
| Justices ideal points | 0.449*** | 0.431*** | 0.433*** | 0.435*** | 0.458*** | 0.474*** |
| | (0.018) | (0.018) | (0.018) | (0.018) | (0.020) | (0.024) |
| *Arbitrariedad* | 0.003 | 0.003 | 0.074* | 0.103*** | 0.113** | 0.128** |
| | (0.037) | (0.039) | (0.039) | (0.039) | (0.046) | (0.064) |
| *Article 280* | 0.221*** | 0.237*** | 0.354*** | 0.290*** | 0.356*** | 0.454*** |
| | (0.059) | (0.064) | (0.064) | (0.062) | (0.071) | (0.086) |
| Remission to PGN | -0.066 | -0.071 | -0.031 | -0.042 | -0.019 | -0.040 |
| | (0.054) | (0.058) | (0.057) | (0.055) | (0.065) | (0.071) |
| Remission to previous decision | 0.119** | 0.127** | 0.181*** | 0.195*** | 0.227*** | 0.243*** |
| | (0.056) | (0.060) | (0.059) | (0.056) | (0.065) | (0.074) |
| Decision in 2013 | 0.084** | 0.090** | 0.081** | 0.044 | 0.020 | -0.029 |
| | (0.034) | (0.037) | (0.035) | (0.034) | (0.040) | (0.054) |
| Judicial Department N1 | -0.084 | -0.089 | -0.086 | -0.067 | -0.018 | |
| | (0.086) | (0.092) | (0.088) | (0.086) | (0.099) | |
| Judicial Department N2 | 0.073 | 0.079 | 0.053 | 0.057 | 0.107 | |
| | (0.081) | (0.086) | (0.085) | (0.084) | (0.097) | |
| Judicial Department N3 | 0.042 | 0.045 | 0.021 | -0.049 | 0.052 | |
| | (0.078) | (0.084) | (0.083) | (0.082) | (0.098) | |
| Judicial Department N4 | -0.066 | -0.070 | -0.036 | -0.023 | -0.007 | |
| | (0.081) | (0.087) | (0.085) | (0.083) | (0.095) | |
| Judicial Department N6 | 0.061 | 0.065 | 0.037 | 0.052 | 0.083 | |
| | (0.084) | (0.090) | (0.089) | (0.087) | (0.099) | |
| Judicial Department N7 | -0.093 | -0.100 | -0.079 | -0.119 | -0.113 | |
| | (0.081) | (0.087) | (0.085) | (0.082) | (0.094) | |
| RHE appeal | -0.055* | -0.059* | -0.053 | -0.070** | -0.045 | 0.013 |
| | (0.032) | (0.034) | (0.034) | (0.033) | (0.039) | (0.046) |
| Total times at Justices offices | -0.022*** | -0.024*** | -0.023*** | -0.022*** | -0.022*** | -0.0002 |
| | (0.004) | (0.005) | (0.004) | (0.004) | (0.005) | (0.007) |
| Justice's age | | 0.049*** | 0.049*** | 0.049*** | 0.054*** | 0.048*** |
| | | (0.002) | (0.002) | (0.002) | (0.002) | (0.002) |
| Separate opinion | | | 12.780*** | 12.694*** | 11.757*** | 11.881*** |
| | | | (0.105) | (0.103) | (0.118) | (0.150) |

| | | | | | | |
|---|---|---|---|---|---|---|
| CSJN pres in majority | | | | -0.358*** | -0.358*** | -0.348*** |
| | | | | (0.028) | (0.035) | (0.039) |
| Nat'l government as party | | | | | 0.053 | -0.002 |
| Rapporteur Lorenzetti | | | | | | -0.287 |
| | | | | | | (0.214) |
| Rapporteur Maqueda | | | | | | -0.191 |
| | | | | | | (0.216) |
| Rapporteur Petracchi | | | | | | -0.268 |
| | | | | | | (0.209) |
| Rapporteur Fayt | | | | | | -0.133 |
| | | | | | | (0.251) |
| Rapporteur Zaffaroni | | | | | | -0.304 |
| | | | | | | (0.214) |
| Rapporteur Highton | | | | | | -0.145 |
| | | | | | | (0.212) |
| Constant | -0.207** | -3.819*** | -3.932*** | -3.656*** | -4.094*** | -3.629*** |
| | (0.100) | (0.173) | (0.175) | (0.174) | (0.202) | (0.293) |
| Observations | 11,102 | 11,102 | 11,102 | 11,102 | 8,827 | 6,489 |
| $R^2$ | 0.093 | 0.170 | 0.212 | 0.217 | 0.237 | 0.220 |
| $chi^2$ | 787.899*** (df = 14) | 1,476.776*** (df = 15) | 1,879.362*** (df = 16) | 1,927.239*** (df = 17) | 1,684.469*** (df = 18) | 1,130.488*** (df = 18) |

*Note:* * p<0.1, ** p<0.05, *** p<0.01. The number of observations is lower in regressions (5) and (6) due to missing observations. Clustered standard errors at the decision level. Regression (6) includes rapporteur's fixed effects.

**Table A.7. Binomial logit regression results, Justices fixed effects**

| | *Dependent variable:* | | | |
|---|---|---|---|---|
| | Not with majority = 1 | | | |
| | (1) | (2) | (3) | (4) |
| Argibay | -0.304*** | -0.336*** | -0.334*** | -0.321*** |
| | (0.076) | (0.076) | (0.076) | (0.084) |
| Fayt | -1.572*** | -1.555*** | -1.564*** | -1.595*** |
| | (0.079) | (0.079) | (0.080) | (0.091) |
| Lorenzetti | -1.788*** | -1.816*** | -1.819*** | -1.999*** |
| | (0.085) | (0.087) | (0.087) | (0.098) |
| Maqueda | -2.484*** | -2.500*** | -2.513*** | -2.715*** |
| | (0.102) | (0.105) | (0.105) | (0.123) |
| Petracchi | -1.016*** | -1.020*** | -1.025*** | -1.152*** |
| | (0.070) | (0.070) | (0.071) | (0.080) |
| Zaffaroni | -1.888*** | -1.883*** | -1.892*** | -1.904*** |
| | (0.087) | (0.088) | (0.089) | (0.100) |
| Arbitrariedad | 0.003 | 0.072* | 0.102*** | 0.112** |
| | (0.040) | (0.040) | (0.039) | (0.046) |
| Article 280 | 0.240*** | 0.354*** | 0.288*** | 0.354*** |
| | (0.065) | (0.065) | (0.063) | (0.072) |
| Remission to PGN | -0.072 | -0.034 | -0.044 | -0.022 |
| | (0.059) | (0.058) | (0.056) | (0.065) |
| Remission to previous decision | 0.129** | 0.181*** | 0.196*** | 0.227*** |
| | (0.061) | (0.059) | (0.057) | (0.065) |
| Decision in 2013 | 0.092** | 0.082** | 0.043 | 0.019 |
| | (0.037) | (0.036) | (0.035) | (0.041) |
| Judicial Department N1 | -0.091 | -0.091 | -0.072 | -0.023 |
| | (0.093) | (0.089) | (0.087) | (0.100) |
| Judicial Department N2 | 0.080 | 0.056 | 0.060 | 0.109 |
| | (0.088) | (0.086) | (0.085) | (0.098) |
| Judicial Department N3 | 0.045 | 0.019 | -0.053 | 0.048 |
| | (0.085) | (0.084) | (0.083) | (0.099) |
| Judicial Department N4 | -0.071 | -0.041 | -0.027 | -0.010 |
| | (0.088) | (0.086) | (0.084) | (0.096) |
| Judicial Department N6 | 0.066 | 0.034 | 0.049 | 0.080 |
| | (0.092) | (0.090) | (0.088) | (0.100) |
| Judicial Department N7 | -0.101 | -0.087 | -0.129 | -0.122 |
| | (0.088) | (0.085) | (0.083) | (0.095) |
| RHE appeal | -0.060* | -0.053 | -0.070** | -0.046 |
| | (0.035) | (0.035) | (0.034) | (0.040) |
| Total times at Justices offices | -0.024*** | -0.024*** | -0.022*** | -0.022*** |
| | (0.005) | (0.005) | (0.004) | (0.005) |
| Separate opinion | | 12.781*** | 12.707*** | 11.766*** |
| | | (0.118) | (0.116) | (0.135) |

| | | | | |
|---|---|---|---|---|
| CSJN pres in majority | | | -0.367*** | -0.367*** |
| | | | (0.029) | (0.035) |
| Nat'l government as party | | | | 0.053 |
| | | | | (0.040) |
| Constant | 0.739*** | 0.615*** | 0.921*** | 0.879*** |
| | (0.119) | (0.116) | (0.115) | (0.134) |
| Observations | 11,102 | 11,102 | 11,102 | 8,827 |
| $R^2$ | 0.190 | 0.230 | 0.235 | 0.254 |
| $chi^2$ | 1,662.387*** (df = 19) | 2,055.521*** (df = 20) | 2,104.942*** (df = 21) | 1,813.608*** (df = 22) |

*Note:* * p<0.1, ** p<0.05, *** p<0.01. The number of observations is lower in regression (4) due to missing observations. Clustered standard errors at the decision level.

# האם שופטים מצייתים לחוק?


**מאת**

## אורן גזל־איל,* חיים אזולאי ואיתי המר*



התפיסה המקובלת היא כי שופטים מאמצים מיד חוק חדש שנחקק, או הלכה חדשה שנקבעה. מחקרנו בוחן סוגיה זו באמצעות ניתוח אמפירי של מידת הציות של שופטי בתי משפט השלום ושופטי בית המשפט העליון להוראות תיקון 113 לחוק העונשין בשנים הראשונות לכניסתו לתוקף. אחד ממרכיבי התיקון מורה לשופטים לקבוע מתחם עונש הולם לעבירה לפי חומרת מעשה העבירה ונסיבותיו, ומידת אשמו של הנאשם. מצאנו שבבתי משפט השלום החובה לקבוע מתחם לא קוימה ביותר מרבע מגזרי הדין שניתנו בתקופה הנחקרת. עם זאת נמצא כי עם הזמן הוטמע החוק טוב יותר ופחתו שיעורי הפרתו. ממצאים אלה מלמדים שבתחילת הדרך רבים אמנם נמנעו מלקיים את החוק, אך בחלוף הזמן הוטמעה החובה לציית לו בבתי משפט השלום. המחקר בחן גם אילו מאפיינים השפיעו על מידת הציות לחוק. נמצא מתאם מובהק בין גיל השופט או הוותק שלו למידת נטייתו לקבל את הוראות החוק החדשות. שופטים מבוגרים יותר או ותיקים יותר נטו להתעלם מדרישות החוק פעמים רבות יותר. בדקנו גם את היקף הציות של שופטי בית המשפט העליון. התמקדנו רק במקרים שבהם בית המשפט העליון קיבל ערעור על העונש ולא אימץ את המתחם שקבע בית המשפט המחוזי, שכן בתיקים אלו אין מחלוקת בדבר חובתו של בית המשפט העליון לקבוע מתחם. מצאנו שמידת הציות של בית המשפט העליון לתיקון 113 פחותה בהרבה מזו של בתי משפט השלום. חשוב מכך, מצאנו שלעומת שופטי בתי משפט השלום, שיעור הציות של שופטי בית המשפט העליון הלך ופחת ככל שחלף הזמן. בעוד כל שופטי בתי משפט השלום הטמיעו את החובה לציית לחוק אף על פי שלא היה אהוד, שופטי בית המשפט העליון, שעליהם אין ערכאת ערעור, המשיכו פעמים רבות להתעלם מחובה זו בשיעורים הולכים וגדלים. מצאנו אינדיקציות חזקות לכך שהתעלמות בית המשפט העליון מהחוק אינה נובעת מהתרשלות אלא מאי־ציות מכוון, הנובע מחוסר שביעות רצון מהחוק. ממצאים אלו נדונים בסיכום המאמר.


**מבוא. א. רקע תיאורטי.** 1. חוסר ציות של בעלי משרה לכללים; 2. התנגדות שופטים לכללים חדשים; 3. השפעת הגיל, המגדר והמוצא האתני על מידת הציות; 4. תיקון 113 לחוק העונשין. **ב. מחקר 1 – הציות לחוק בבתי משפט השלום.** 1. השערות המחקר; 2. שיטת המחקר; 3. תוצאות. **ג. מחקר 2 – הציות בבית המשפט העליון.** 1. השערת


* דיקן הפקולטה למשפטים באוניברסיטת חיפה.

** בוגרי הפקולטה למשפטים באוניברסיטת חיפה.



תודה למיכאל בירנהק, ענת גופן, קרן וינשל־מרגל, יוסף זוהר, רענן סוליציאנו־קינן, רות קנאי, יאיר שגיא, קרני שגל, אדם שנער, משתתפי הסמינרים המחלקתיים בפקולטות למשפטים באוניברסיטת בר אילן, באוניברסיטת תל אביב, במרכז למשפט ועסקים ובמרכז הבינתחומי, הסמינר המחלקתי של בית הספר לקרימינולוגיה בחיפה ותלמידי הסמינר על מערכת המשפט הפלילית בחיפה, על הערותיהם לטיוטה הראשונה של מאמר זה.

המחקר ושיטת המחקר; 2. תוצאות. **ד. דיון**. 1. השפעת גיל או ותק על הציות לחוק; 2. מוצא אתני ומין; 3. היקפי אי-הציות הגבוהים בשנים הראשונות לאחר החקיקה; 4. הגידול בשיעור הציות לחוק בחלוף הזמן בבתי משפט השלום; 5. הגידול בשיעור הציות לחוק בחלוף הזמן בבתי משפט השלום. **ה. מסקנות**.

## מבוא

> אפילו יש ממש בטענות העירייה בדבר הקשיים באכיפתן [...] של הוראות כאלה ואחרות שבחוק – ובעניין זה לא נחווה דעתנו – אין צורך לומר שהעירייה אינה יכולה לעשות דין לעצמה ולפעול בניגוד לחוק.[1]

המובאה שבפתיח מבטאת את עמדת בית המשפט העליון כלפי רשויות שלטון המסרבות ליישם את הדין מטעמים של קושי מנהלי, עלויות גבוהות או חוסר נוחות. אולם מה הדין כאשר הרשות הנדרשת לציית לחוק המכביד היא הרשות השופטת?

התפיסה המקובלת היא כי משנחקק חוק חדש, או משנקבעה הלכה חדשה, השופטים מאמצים אותם מיד. אמנם שופטים עשויים להיות מושפעים מתפיסות העולם ומהאידיאולוגיה שהם מצדדים בהן בפרשם את החוק. הם גם מושפעים, ככל אדם, מהטיות אנושיות שעשויות להביא ליישום שגוי של הדין. אולם כאשר מדובר בחוק ברור המופנה אליהם, מקובל להניח ששופטים יצייתו לו מיד עם כניסתו לתוקף, בין שהחוק נושא חן בעיניהם בין לאו.

מחקרנו בוחן סוגיה זו באמצעות בדיקה אמפירית של מידת הציות של שופטי שלום ושופטים של בית המשפט העליון להוראות תיקון 113 לחוק העונשין (תיקון מס׳ 113), התשע״ב–2012 (להלן: תיקון 113) בשנים הראשונות לאחר כניסתו לתוקף.[2] התיקון קבע, בין היתר, הסדר דיוני חדש המורה לשופטים כיצד לגזור את הדין ואיך לנמקו. אחד ממרכיבי ההסדר מורה לשופטים לקבוע מתחם עונש הולם לעבירה לפי חומרת מעשה העבירה ונסיבותיו, ואשמו של הנאשם. הוראה זו ברורה: החובה לקבוע מתחם עונש הולם (להלן גם: מתחם) אינה כפופה לשיקול דעת שיפוטי, ואין לה חריגים.[3] לפיכך היא מאפשרת בחינה אמפירית הן של מידת הציות והן של מאפייני השופטים המשפיעים על מידת ציות זו. הבחינה של מידת הציות לתיקון זה מעניינת גם בשל התנגדותם של שופטים רבים לכניסתו לתוקף, התנגדות שהובעה בהרצאות שנתנו ובפסקי הדין שלהם.

מצאנו שבבתי משפט השלום החובה לקבוע מתחם לא קוימה ביותר מרבע מגזרי הדין שניתנו בתקופה הנחקרת. למעשה מדובר בהערכת חסר ניכרת של מידת הציות לחוק, שכן לצורך המחקר בחנו רק החלטות שבהן נקבע עונש מאסר, שאז מידת הציות לחוק רבה יותר, והגדרנו רק התעלמות מלאה מהחובה לקבוע מתחם כמקרה של אי־ציות, להבדיל

1 בג״ץ 2126/99 **דה הס נ׳ עיריית תל־אביב־יפו**, פ״ד נד(1) 468, 477 (2000).

2 ראו חוק העונשין, התשל״ז–1977 (להלן: חוק העונשין או החוק).

3 בהמשך נתייחס לספקות שהועלו באשר לתחולת החוק על גזרי דין הניתנים בהתבסס על הסדרי טיעון לעונש. ראו להלן טקסט ליד ה״ש 73.

מהתעלמות חלקית. כך, שופטים שקבעו מתחם מופשט ולא מספרי, כגון מתחם ענישה ש״בין כמה חודשי מאסר לכמה שנות מאסר״, סווגו כמי שצייתו לחוק, אף שספק רב אם ניתן לראות בקביעת מתחם כזה ציות. זאת ועוד, התעלמות מהוראות אחרות של החוק, מהותיות יותר, גם היא לא נכללה בהגדרה האמורה, כדי להימנע מהצורך להתמודד עם הערכה סובייקטיבית יותר של החובות שהחוק מטיל. למרות פירוש מצמצם זה, שיעור אי־הציות לחוק ניכר. עם זאת, נמצא כי ככל שחלף הזמן, הוטמע החוק טוב יותר ופחתו שיעורי הפרתו. בשנת 2015, כשלוש שנים לאחר כניסת החוק לתוקפו, שיעור הציות לחובה לקבוע מתחמים היה כמעט מלא. ממצא זה מלמד שבתחילת הדרך רבים אמנם נמנעו מלקיים את החוק, אך בחלוף הזמן הוטמעה החובה לציית לו בבתי משפט השלום.

המחקר בחן גם אילו מאפיינים השפיעו על מידת הציות לחוק. לא נמצאה השפעה של סוג העבירות או מאפייני הנאשמים על מידת קיום ההוראה. גם המוצא האתני של השופטים או המגדר שלהם לא נמצאו משפיעים על מידת הציות לחוק. מנגד, נמצא מתאם מובהק בין גיל השופט או הוותק שלו למידת נטייתו לקבל את הוראות החוק החדשות. שופטים מבוגרים יותר או ותיקים יותר נטו להתעלם מדרישות החוק פעמים רבות יותר. כאמור לעיל, גם בקרב שופטים אלו, ככל שחלף הזמן, הוטמע החוק, ובחלוף שנים מספר הציות שלהם לחוק היה כמעט מלא.

כדי להבין אם השינוי במידת הציות נבע משינוי ביחסו של בית המשפט העליון לחוק, בדקנו גם את היקף הציות של שופטי בית המשפט העליון. התמקדנו רק במקרים שבהם בית המשפט העליון קיבל ערעור על העונש ולא אימץ את המתחם שקבע בית המשפט המחוזי, שכן בתיקים אלו חובתו של בית המשפט העליון לקבוע מתחם אינה שנויה במחלוקת. מצאנו שמידת הציות של בית המשפט העליון לתיקון 113 פחותה בהרבה מזו של בתי משפט השלום. חשוב מכך, מצאנו שלעומת בתי משפט השלום, שיעור הציות של שופטי בית המשפט העליון הלך ופחת ככל שחלף הזמן. בעוד כל שופטי השלום הטמיעו את החובה לציית לחוק אף על פי שהחוק לא היה אהוד, שופטי בית המשפט העליון, שעליהם אין ערכאת ערעור, המשיכו פעמים רבות להתעלם מחובה זו בשיעורים הולכים וגדלים בחלוף הזמן. מצאנו אינדיקציות חזקות לכך שהתעלמות בית המשפט העליון מהחוק אינה נובעת מהתרשלות אלא מאי־ציות מכוון, הנובע מחוסר שביעות רצון מהחוק.

המשך המאמר ייבנה כך. בחלקו הראשון נציג את המחקרים העוסקים באי־ציות של שופטים לחוק ולפסיקה, ונראה כי כמה מחקרים מצאו תופעות של אי־ציות רך של שופטים לחוק – בעיקר באמצעות שימוש יתר בחריגים הקבועים בחקיקה והמאפשרים לסטות ממנה, אך כמעט אין מחקרים המראים אי־ציות קשה, דהיינו החלטות של שופטים המפרות בבירור חוק שמשמעותו מוסכמת ואין לו חריגים.

בחלק השני נסקור את שיטת מחקרנו בבתי משפט השלום. המחקר מתבסס על 585 גזרי דין של 70 שופטים של בתי משפט השלום, ובוחן את היקף ההפרה של החובה החוקית לקבוע מתחמי ענישה בגזר הדין. בחלק השלישי נדווח על תוצאות המחקר. לפי ממצאיו, שופטים מפרים את החוק בשיעור של 26% לפחות, וככל שהשופטים מבוגרים יותר, שיעור הציות קטן יותר. עם זאת, בחלוף הזמן החוק הוטמע במערכת וגם שופטים מבוגרים צייתו לו בהיקף כמעט מלא. לאור ממצא זה נביא בחלק הרביעי נתונים על שיעור הציות של

שופטי בית המשפט העליון לחוק, ועל ההכשרות שקיבלו השופטים והעוזרים המשפטיים מכל הערכאות בנושא החוק, כדי לבחון את הקשר בין נתונים אלו לעלייה בשיעורי הציות. בחלק זה נראה כי מחד גיסא, בית המשפט העליון העיר לשופטים שלא קבעו מתחמים כנדרש בחוק, ומאידך גיסא שופטי בית המשפט העליון נמנעו גם הם, בשיעורים גבוהים, מלציית לחוק. בשונה משופטי השלום, חלוף הזמן לא הגדיל את מידת הציות בבית המשפט העליון. בחלק החמישי נדון בתוצאות ובמסקנות הנגזרות ממחקר זה.

## א. רקע תיאורטי

### 1. חוסר ציות של בעלי משרה לכללים

לא אחת בעלי משרה ציבורית פועלים בניגוד לדין.[4] הסיבות להפרת החוק על ידי בעלי משרה הן מגוונות. ההרגלים, עומס העבודה, אידיאולוגיה ושיקולים רבים אחרים מביאים בעלי תפקידים, ולעיתים גם רשויות שלמות, לידי הימנעות מקיום הדין. לעיתים פקידים מאמצים בפעולותיהם מדיניות הסותרת את המדיניות המוצהרת המתחייבת מן הדין ומן ההנחיות שהם כפופים להם.[5] לרוב מדובר בסוג של ״אי־ציות רך״, דהיינו שימוש בשיקול הדעת המוקנה לבעלי המשרה בדין באופן הסותר את הכללים, או הסתמכות רווחת על הוראות המסמיכות את הרשות לסטות מהמדיניות במקרים חריגים. כך תובעים שסברו שעונשי מינימום חדשים שנקבעו בחוק מחמירים מדי, שינו את כתבי האישום והמירו את סעיפי האישום שבהם הואשמו נאשמים בסעיפים קלים יותר כדי לעקוף את דרישות החוק.[6] בדומה, בארצות הברית שוטרים לעיתים מתשאלים חשודים לפני שהם עוצרים אותם, בעודם חופשיים לכאורה לעזוב, כדי שלא תקום החובה להזהיר את החשודים בדבר זכות השתיקה והזכות לליווי משפטי (אזהרת Miranda), אזהרה שלתפיסת השוטרים תפגע ביעילות החקירה.[7] פעולות אלו אינן החלטות אינדיווידואליות הסותות מהמדיניות אלא גישה גורפת היוצרת למעשה מדיניות אחרת, שונה מזו שכתובה עלי ספר.[8]

עם זאת במקרים מעטים בעלי המשרה מפרים את החוק במפורש, במה שנכנה כאן ״אי־ציות קשה״. אי־ציות קשה משמעו שכל החלטה בנפרד מפרה בבירור את הכללים. כך,

4 ראו Adam Shinar, *Dissenting from Within: Why and How Public Officials Resist the Law*, 40 FLA. ST. U. L. REV. 601, 643–644 (2013).

5 MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY, DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES (2010).

6 David Bjerk, *Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum Sentencing*, 48 J.L. & ECON. 591, 603–609 (2005).

7 Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 881–884 (1996). ראו גם Richard J. Medalie, Leonard Zeitz & Paul Alexander., *Custodial Police Interrogation in our Nation's Capital: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1374 (1968) (מחקר אמפירי שנערך בסמוך לאחר קבלתם של כללי ה־”Miranda“, והראה כי שוטרי וושינגטון הבירה נמנעים לא אחת מליישם כללים אלו).

8 ראו LIPSKY, לעיל ה״ש 5.

מחקרים מצביעים על שימוש משטרתי שיטתי בכוח במקרים שבהם אין לשוטרים כל סמכות להפעיל כוח,[9] והתברר ששימוש זה נובע מתפיסתם של שוטרים שלעיתים יש לפעול על פי ״הגיון הרחוב״ ולאו דווקא על פי ההוראות הכתובות.[10] מחקרים גם מראים שפקידי רווחה עוקפים הנחיות מפורשות המגבילות את יכולתם לסייע לפונים אליהם.[11]

אחד השיקולים לאי־הציות הוא עומס העבודה.[12] כך, מחקר אחד הראה כיצד קציני מבחן של בית משפט לנוער במערב התיכון של ארצות הברית מסווגים מחדש נוער עבריין גם בלי שהייתה לכך כל הצדקה עניינית, רק משום שהסיווג המתוקן אִפשר להם לצמצם את מספר הפגישות עם אותם נערים ובדרך זו להקטין את עומס העבודה שלהם, והקל עליהם לעמוד ביעדים שהוצבו להם.[13] בארץ, שאלונים שהופצו לשופטים לפני כשלושה עשורים חשפו ששופטים עודדו עריכת הסדרי טיעון גם בתקופה שבה אסרה הפסיקה מעורבות שיפוטית כזאת, ועשו כן כדי לייעל את ההליכים.[14]

## 2. התנגדות שופטים לכללים חדשים

ספרות ענפה עוסקת באי־ציות, אולם רק מחקרים מעטים עוסקים באי־ציות של שופטים. יש כמה סיבות להניח שלעומת בעלי משרה אחרים, שופטים יימנעו מהפרת החוק גם אם הם סבורים שהוא שגוי.

ראשית, שופטים אמונים על יישום ואכיפת החוק. כשהפקידות ברשות אחרת מתעלמת מהכללים הדיוניים החלים עליה, השופטים מבקרים את החלטתה, ולעיתים גם פוסלים אותה בשל הפגם הדיוני. תפיסה זו עשויה לגרום לשופטים להקפיד יותר על קיום הכללים החלים עליהם, כדי שלא ייטען נגדם שהם מעמידים לאחרים סטנדרטים שהם עצמם אינם עומדים בהם. שנית, התכלית של הרשות השופטת, המטרה שלשמה פועלים השופטים, היא להבטיח שהחוק יקוים. היעד של השופטים הוא קיום החוק ואילו התכלית של בעלי המשרה

9 Robert E. Worden, *The Causes of Police Brutality: Theory and Evidence on Police Use of Force*, *in* AND JUSTICE FOR ALL: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE 31, 39 (Betsy Wright & Ronald W. Walker eds., 1995) (עומדים על ההבחנה בין שימוש מוגזם בכוח לשימוש מיותר בכוח).

10 Hans Toch, *The Violence Prone Police Officer*, *in* AND JUSTICE FOR ALL: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE 99, 105–107 (Betsy Wright & Ronald W. Walker eds., 1995).

11 ראו STEVEN W. MAYNARD-MOODY & MICHAEL C. MUSHENO, COPS, TEACHERS COUNSELORS STORIES FROM THE FRONT LINES OF PUBLIC SERVICES 6–8 (2003). שם מתואר מקרה של פקיד רווחה אשר בניגוד לכללים הקצה כספים לאחת הפונות כדי שתוכל לרכוש מכונית שתאפשר לה להתחיל לעבוד בעבודה חדשה ורחוקה, בעודו מדווח כי הכספים נועדו למטרות אחרות, ובהבינו כי אם יפעל על פי הכללים התקציביים, הפונה תישאר מובטלת. בכך הוא העדיף את הגשמת מטרת הארגון (סיוע לפונה) על פני ההנחיות שהורו לו כיצד לנהוג.

12 למרכזיותו של עומס העבודה בתהליכי קבלת ההחלטות של פקידות זוטרית ראו LIPSKY, לעיל ה״ש 5, פרק 3.

13 Judith Rumgay & Mary Brewster, *Restructuring Probation in England and Wales: Lessons from an American Experience*, 76 PRISON J. 331, 340–341 (1996).

14 אליהו הרנון וקנת מן **עסקות טיעון בישראל: הלכה ומעשה על רקע השוואתי** 101–110 (1981).

האחרים, כגון עובדים סוציאליים, רופאים, שוטרים או מורים, היא לקדם את הרווחה, הבריאות, הסדר הציבורי או החינוך. לכן בעלי משרה אלו עשויים להתייחס לחוק כאל מכשול המגביל אותם בדרך להשגת יעדים אלו. כיוון ששופטים מופקדים על שמירה על שלטון החוק, ההגבלה המוטלת עליהם היא גם חלק מהיעד הארגוני שלהם, ולכן יש לצפות שהם ייתנו משקל גדול יותר לציות לחוק מבעלי משרה אחרים.[15] שלישית, ההחלטות השיפוטיות גלויות ומפורסמות לעין כול, בשונה ממרבית הפעולות של מורים, עובדים סוציאליים או אחיות, למשל, והדבר עשוי להרתיע שופטים מלהפר את הכללים. רביעית, השופטים נדרשים לפסוק לפי חקיקה ותקדימים מחייבים, בעוד בעלי משרה אחרים פועלים לרוב מכוח מדיניות המוכתבת על ידי דרגים מנהליים או רגולציה שאינה חקיקה, והבדל זה גם הוא עשוי להוביל לתוצאות שונות.

ספרות המחקר כמעט אינה עוסקת בציות של שופטים לחוק. המחקרים הקיימים התמקדו באופן הציות ולא בעצם הציות. למשל, מחקרים מצאו כי בהקשרים רבים שופטים מפרשים את הדין באופן שאינו מתיישב עם תכליתו המקורית, באמצעות שימוש נרחב בחריגים הקבועים בדין. אולם מחקרים אלו אינם עוסקים ב״אי־ציות קשה״, דהיינו הפרה מפורשת של הוראת חוק, אלא במה שהגדרנו לעיל ״אי־ציות רך״. לדוגמה, כמה מחקרים בחנו את היקף השימוש בסמכות לסטות מההנחיות הפדרליות לענישה בארצות הברית, והראו שבמחוזות שונים שם הנחיות הענישה נעקפות פעמים רבות באמצעות שימוש נרחב יחסית באותם חריגים.[16] מחקר אחר בחן את ההשפעה של הלכת *Campbell* על תחום זכויות היוצרים האמריקאי.[17] בעניין *Campbell* בית המשפט העליון של ארה״ב הפך, במידה רבה, את הלכת *Sony*,[18] שבה נקבעה חזקה כי שימוש בחומר מוגן לפי דיני זכויות יוצרים, למטרות מסחריות או לשם הפקת רווח, לא ייחשב לשימוש הוגן. כאמור, בעניין *Campbell* שונתה הלכה זו במפורש ונקבע שאין מקום עוד לחזקה כזאת, ובתי המשפט צריכים לאזן בין מכלול השיקולים הרלוונטיים בהחליטם אם השימוש ביצירה הוא הוגן. למרות זאת, המחקר הראה שבכ־7% מההחלטות של בתי המשפט הפדרליים בנושא המשיכו השופטים להסתמך על הלכת *Sony* הישנה שבוטלה.[19]

15 ראו למשל אהרן ברק ״על תפקידי כשופט״ **משפט וממשל** ז 33, 51 (2004). לדבריו: ״עקרון שלטון החוק חל בראש ובראשונה על השופטים עצמם [...] החופש הנתון למחוקק ליצור כלים חדשים אינו נחלתו של השופט. הקוביות שבאמצעותן אנו בונים את המבנים שלנו מוגבלות. כוחנו להגשים את תפקידנו מונח ביכולתנו לעצב מבנים חדשים באמצעות הקוביות הישנות״.

16 Brian D. Johnson, Jeffery T. Ulmer & John H. Kramer, *The Social Context of Guidelines Circumvention: The Case of Federal District Courts*, 46 CRIMINOLOGY 737 (2008). ראו גם Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations under the Federal Sentencing Guidelines: Guideline Circumvention and its Dynamics in the Post-Mistretta Period*, 91 NW. U. L. REV. 1284 (1996).

17 Campbell v. Acuff-Rose Meusic, Inc., 510 U.S. 569 (1994).

18 Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984).

19 Barton Beebe, *An Empirical Study of US Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 601–602 (2008). לפני הלכת *Campbell* כ־41% מההחלטות נומקו באמצעות אזכור הלכת *Sony*.

מחקר דומה במידת מה למחקרנו נערך בארצות הברית סמוך לאחר אימוץ הרפורמה הפדרלית לענישה שם.[20] עם חקיקת הרפורמה נדרשו שופטים פדרליים רבים ברחבי ארצות הברית לבחון את חוקתיות הרפורמה, שהכפיפה את שיקול הדעת השיפוטי בענישה להנחיות שנקבעו על ידי נציבות גזירת דין פדרלית. התקיפה של חוקתיות ההנחיות המשיכה עד שבית המשפט העליון החליט בעניין *Mistretta* כי ההנחיות חוקתיות.[21] המחקר לא מצא השפעה מובהקת של הגיל, הוותק, המוצא האתני־גזעי או המגדר של השופטים על הנטייה שלהם לקבוע שהרפורמה אינה חוקתית. אף שגם המחקר האמור בחן את השפעת המאפיינים של השופט על יישום רפורמה חדשה של הנחיות ענישה, אי־אפשר להסיק ממנו על מידת הציות, שכן לפני ההכרעה של בית המשפט העליון של ארצות הברית בסוגיה, לא הייתה תשובה ברורה לשאלה אם ההנחיות חוקתיות, ולכן לא הייתה הכרעה שהיה ניתן להגדירה כחוסר ציות.

מחקר כמותי מקיף על מידת הציות של שופטים נערך בענף משפטי אחר – בתחום המשפט המנהלי בארצות הברית.[22] המחקר בחן את השפעת הנטייה המפלגתית של שופטים בבתי משפט פדרליים לערעורים בארצות הברית (שנקבעה על פי זהות הנשיא שמינה אותם) על מידת הציות לתקדים של בית המשפט העליון בעניין *Chevron*,[23] הלכה שהתפרשה כמעניקה לרשות שיקול דעת נרחב יחסית בפירוש החוק בתחום סמכותה. החוקרים מצאו כי בית המשפט מאשר יותר את עמדת הרשות (דהיינו מקבל את שיקול הדעת של הרשות בהתאם להלכת *Chevron*) אם לפחות אחד השופטים בהרכב נוטה פוליטית לעמדה של הרשות. טענתם היא כי מספיק ששופט אחד יתמוך בעמדת הרשות כדי למנוע מההרכב לסטות מהתקדים. הם מסיקים ששופטי הרוב אינם סוטים מההלכה כאשר יושב עמם לדין שופט מיעוט העשוי לחשוף, באמצעות דעת מיעוט, את הסטייה. מנגד הם מרשים לעצמם לציית פחות להלכה כאשר כל שלושת שופטי ההרכב נוטים לעמדה פוליטית אחת המתיישבת עם אי־ציות לתקדים.

בעוד מחקר זה מראה קשר ברור בין אחד מהמאפיינים השיפוטיים (הנטייה המפלגתית) למידת הציות, החוקרים מבהירים גם כאן כי אי־אפשר לקבוע בנוגע למקרה פרטני זה או אחר אם השופטים צייתו להלכת *Chevron* אם לאו.[24] זאת מכיוון שגם הלכת *Chevron* לא אסרה על השופטים לקבוע שהרשות טעתה בפירוש החוק במקרים המתאימים. מסקנתם שהרכבים אחידים פוליטית מצייתים פחות לתקדים נובעת מכך ששיעור המקרים שבהם

20 Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377 (1998).

21 Mistretta v. United States 488 U.S. 361 (1989).

22 Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155 (1998).

23 Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

24 Cross & Tiller, לעיל ה״ש 22, בעמ׳ 2165: "While one may disagree with the rationale and even question its sincerity, it is impossible to demonstrate conclusively that any particular opinion's rationale for nondeference is insincere or disobedient. Nevertheless, the opinion may be disobedient, as conclusive demonstrations of sincerity are also lacking. By looking at a pattern of cases, we strive to test for disobedience".

הרכבים אלו קיבלו את שיקול דעתה של הרשות היה קטן יותר משיעור המקרים שהרכבים מעורבים עשו זאת. מטעם זה קשה לקבוע שאכן מדובר שם באי־ציות לתקדים ולא ביישום של התקדים שהושפע, שלא בהכרח במודע, מהטיה פוליטית.

אם נחזור לתחום הענישה, גם בישראל מחקרים הראו ששופטים שומרים על עצמאותם. כך, בשנת 2001 החליט בית המשפט העליון לדון בהרכב של שלושה שופטים בבקשת רשות ערעור על גזר דין בעבירה של הלנה, העסקה והסעת שוהים שלא כדין, ״כדי להבהיר מה רמת הענישה הראויה בעבירות מהסוג הנדון״. פסק הדין, שכונה אחר כך ״הלכת **ח׳טיב**״, כלל הנחיה ברורה לענישה: ״יש לגזור עליו [על מי שהורשע בעבירה זו] – ואפילו הוא אדם מן היישוב שעשה מעשיו מתוך תמימות או מחמת צורך דוחק כלשהו – עונש מאסר לריצוי בפועל בלי מתן אפשרות להמירו בעבודות שירות״, אלא ״בנסיבות היוצאות מגדר הרגיל״, כאשר בפסק הדין הובהר שעבר נקי וכורח כלכלי אינם נסיבות כאלה.[25] למרות זאת, מחקר שבחן את מידת הציות להלכה הראה כי יותר מ־70% מגזרי הדין שניתנו אחרי אותה החלטה, לא כללו עונש מאסר בפועל, עוד לפני שהלכת **ח׳טיב** רוככה בהחלטה אחרת.[26] בדומה, מחקרים מראים שבתי המשפט לתעבורה אינם מצייתים לחקיקה המחייבת הטלת עונשי מינימום של שנתיים פסילה בעבירה של נהיגה בשכרות, ולפסיקה שקבעה שככלל את העונש המזערי אין להתנות וכי החריגים המאפשרים סטייה מעונש זה מצומצמים מאוד. למעשה, מחקר אחד מצא כי כמעט ב־80% מהמקרים בית המשפט מטיל על המורשעים עונש קל מזה שקבוע בחוק.[27] מחקר אחר אישש ממצאים אלו גם באמצעות מדגם רחב בהרבה וגם בהסתמך על סקרים שנערכו בקרב עורכי דין.[28]

אך גם דוגמאות אלו, המלמדות כי שופטים סוטים פעמים רבות מרוחו של הדין, כמו הדוגמאות מארצות הברית, אינן עוסקות בסרבנות ברורה לציית לדין. אף שהתמונה הכוללת המצטיירת מריבוי השימוש בחריגים או מפירוש מוקשה שניתן להוראות הדין היא של אי־ציות, אין לומר בנוגע לשום החלטה בנפרד, כי השופט שהחליטה פעל בניגוד לדין. כך, ניתן לומר ששימוש בחריג שהיה אמור להיות שמור לנסיבות יוצאות מגדר הרגיל, בכ־70% מהמקרים, משקף אי־ציות, אולם קשה לקבוע באילו מהמקרים השימוש בחריג היה מוצדק על פי הדין ובאילו מהם הוא נבע מסירוב לציית. ייתכן שבכל אחד מהמקרים שבהם השופטים החליטו להישען על החריג, הם סברו שנסיבות אותו מקרה עומדות בקריטריונים של הפסיקה או החוק. בעוד התמונה הכוללת מבטאת שימוש יתר בחריגים, התבוננות בכל

25 רע״פ 5198/01 **ח׳טיב נ׳ מדינת ישראל**, פ״ד נו(1) 769, פס׳ 4–5 לפסק דינו של השופט טירקל (2001).

26 Oren Gazal-Ayal, Hagit Turjeman & Gideon Fishman, *Do Sentencing Guidelines Increase Prosecutorial Power: An Empirical Study*, 76 LAW & CONTEMP. PROBS. 131 (2013). הנתונים מתייחסים לתקופה שלאחר מתן פסק הדין בעניין **ח׳טיב** ולפני שההלכה רוככה במידה מסוימת ברע״פ 3674/04 **אבו סאלם נ׳ מדינת ישראל** (פורסם בנבו, 12.2.2006).

27 שומרון מויאל ומימי אייזנשטדט ״פערי ענישה בעבירות נהיגה בשכרות״ **משפטים** מד 933, 955 (2015).

28 אברהם טננבוים ״הענישה בישראל על נהיגה בשכרות – מבט אמפירי״ **מאזני משפט** יא 321 (2016). למעשה, אם בוחנים רק גזרי דין של נאשמים שנדונו בנוכחותם, עולה כי שופטי התעבורה חרגו מהעונש המזערי בכ־88% מהמקרים.

פסק דין בנפרד, שבו בחר בית המשפט להישען על החריג הקבוע בדין, לא בהכרח מלמדת על סרבנות לציית.

עם זאת, כפי שהראה מת׳יו טוקסון,[29] ישנם גם מחקרים אחדים החושפים קיומה של סרבנות שיפוטית ברורה לציית, דהיינו החלטות הסוטות מחובה מוסכמת וברורה הקבועה בדין. כך, מחקר אחד הראה שיעורים גבוהים של אי־ציות של שופטים לכללים להנחיית המושבעים בארצות הברית.[30] המחקר, שהסתמך על סקר שנערך בקרב שופטים, עורכי דין ובעלי משרה בבתי המשפט, הראה שרבים מהכללים החדשים בתחום ניהול המושבעים אינם מקוימים. מחקר אחר בחן את יישומו של חוק שנועד להתמודד עם בקשות חסרות בסיס להגשת תובענות ייצוגיות. החוק קבע כי בתום כל הליך על השופט לציין במפורש בנוגע לכל אחד מעורכי הדין ומהצדדים, אם הוא הגיש בקשות מטעמים פסולים ואם בקשותיו היו מבוססות מבחינה משפטית וראייתית. נמצא כי ברוב המקרים בתי המשפט מתעלמים מהוראה זו, ככל הנראה בשל הזמן והמשאבים הדרושים לקבלת הכרעה שהצדדים אינם מעוניינים בה כלל.[31] מחקר אמריקאי מצא כי 30% מהמורשעים בעבירות נהיגה בשכרות באינדיאנה וניו מקסיקו, ריצו עונש נמוך מיומיים מאסר בפועל – עונש המינימום הקבוע בחוק – אף שהחוק שם, שלא כבישראל, לא התיר לשופטים לחרוג מעונש זה.[32]

מעניין לציין כי למעט המחקר האחרון, המחקרים הספורים שהציגו מקרים של אי־ציות קשה של שופטים, עסקו כולם באי־ציות להוראות דיוניות המופנות כלפי שופטים. גם המחקר שלנו מתמקד בהוראה דיונית כזאת, שכן עניינו הוא אופן כתיבת ההנמקה של גזר הדין. מובן שהפרוצדורה עשויה להשפיע על המהות, ויתכן ששופטים שלא צייתו להוראות הדיוניות, גזרו גם עונש שונה מזה שהיו גוזרים אילו היו מצייתים לחוק. אף שיש בסיס לחשש שהשופטים מסרבים גם לאמץ את השינויים המהותיים שנקבעו בחוק,[33] הרי לאור הרקע התיאורטי כמו גם המיקוד של המחקר הזה, לא יהיה אפשר להסיק ממצאיו לעניין רמות הציות לחוקים שאינם דיוניים. מצד שני, דווקא לבחינת מידת הציות של השופטים לחוקים דיוניים המופנים כלפיהם כשופטים (להבדיל מאכיפת דין מהותי המופנה כלפי הצדדים המתדיינים) חשיבות מיוחדת, שכן שופטים לא אחת מבקרים גופים שלטוניים אחרים המתעלמים מחקיקה, גם דיונית, המופנית כלפי אותם גופים, ולכן היה ניתן לצפות שהם יקפידו יותר לקיים הוראות המופנות במישרין אליהם.

מכל מקום, בשל מיעוט המחקרים החושפים סרבנות שיפוטית כזאת, התפיסה המקובלת היא כי במקרי הוראת חוק מפורשת המכוונת כלפי השופטים, הם יצייתו לה.[34] גם המחקרים

29 Matthew Tokson, *Judicial Resistance and Legal Change*, 82 U. CHI. L. REV. 901 (2015).

30 Paula L. Hannaford-Agor, *Judicial Nullification? Judicial Compliance and Non-Compliance with Jury Improvement Efforts*, 28 N. ILL. U. L. REV. 407, 419 (2007).

31 ראו Tokson, לעיל ה״ש 29, בעמ׳ 936–940.

32 H. Laurence Ross & James P. Foley, *Judicial Disobedience of the Mandate to Imprison Drunk Drivers*, 21 LAW & SOC'Y REV. 315 (1987).

33 ראו טקסט להלן ליד ה״ש 65–67.

34 לסקירת הגישה המקובלת, תוך התמקדות בסוגיית הציות של ערכאות משפט לתקדימים של בית המשפט העליון בארצות הברית ראו Tokson, לעיל ה״ש 29, בעמ׳ 905–907.

המעטים הקיימים בתחום זה, הסתפקו בהצגת קיומם של חוקים שלהם נמצאה רמה גבוהה של אי־ציות שיפוטי, ולא עסקו כלל במאפיינים של השופטים ובקשר בינם ובין מידת הציות שלהם לחקיקה. כך טרם נבחן הקשר בין גיל השופט, מוצאו האתני, המגדר ומאפיינים נוספים למידת הציות שלו לכללים.

## 3. השפעת הגיל, המגדר והמוצא האתני על מידת הציות

כאמור, מחקרים על אי־ציות שיפוטי לא בחנו את השפעת מאפייני השופטים על מידת הציות. גם במחקרים שניתחו התנהגות של עובדי ציבור אחרים, השפעת המשתנים האישיים של מקבל ההחלטות – כגון גזע, מוצא אתני, מגדר וגיל – על עיצוב הכללים בארגונים ציבוריים והציות להם, כמעט לא נבחנה.[35] שנון פורטילו ערכה את אחד המחקרים היחידים שבחנו סוגיה זו.[36] היא ראיינה פקידים מקבוצות גיל, מגדר וגזע שונות, בניסיון לאמוד את מידת ההישענות שלהם על הכללים הפורמליים לביסוס סמכותם. מהראיונות היא הסיקה כי לציות לכללים משמעות דואלית, כיוון שמחד גיסא הכללים מעניקים עוצמה לפקיד, ומאידך גיסא, נראוּת של מחויבות כלפיהם פוגמת בתדמית הפקיד בעיני הציבור. תופעה זו כונתה במחקר ״פרדוקס הכללים״.[37] התיאוריה שהציעה פורטילו התבססה על ספרות מחקר שלפיה הציות לכלל נועד לפצות על חולשה יחסית של הביורוקרט בתוך הארגון.[38] יתרה מזו, היא זיהתה כי פקידים גברים, לבנים, בגיל העמידה (המשתייכים לכאורה לקבוצות חזקות יותר), כמעט אינם דנים בכללים במישרין, עובדה שמאפשרת להם להפעיל את שיקול דעתם. מאחר שפרטי הכללים אינם נדונים באופן ספציפי, קל יותר ״לכופף״ אותם.[39] לעומתם, נשים, אנשים כהי עור וצעירים, דנים כדבר שבשגרה בכללים ומשתמשים באמירות פורמליות של הסמכות הביורוקרטית כבסיס לסמכות הארגונית. האינטראקציה הישירה הזאת עם כללים מספקת לפקידים משאבי עוצמה לגיוס סמכות,[40] אך היא גם

35 ניתן למצוא כמה מחקרים שבחנו את השפעת המגדר על מידת הציות לכללים והנטייה לכופף אותם. ראו Shannon Portillo & Leisha DeHart-Davis, *Gender and organizational Rule Abidance*, 69 PUBLIC ADM. REV. 339 (2009), אולם כמעט אין מחקרים שהתמקדו במאפיינים אחרים שבהם אנו עוסקים במחקר זה, כמו גיל, ותק ומוצא אתני.

36 Shannon Portillo, *The Paradox of Rules: Rules as Resources and Constraints*, 44 ADM. & SOC. 87 (2012). החוקרת ערכה ראיונות מובנים למחצה עם 49 גורמים ממשלתיים משמונה רשויות מקומיות ושבע מחלקות משטרתיות. כ״צעירים״ הוגדרו נשאלים שגילם מתחת ל־30 מקרב הביורוקרטים ברשויות המקומיות, ומתחת ל־25 מקרב השוטרים. הנשאלים נחלקו לשתי קבוצות: המשתייכים לסטטוס חברתי נמוך מסורתית (כהי עור, נשים, צעירים) והמשתייכים לסטטוס חברתי גבוה (גברים, לבנים, בגיל העמידה). הנשאלים יכלו להשתייך ליותר מקבוצה אחת בעלת סטטוס נמוך. כמו כן, בהנחה שהיכללות בקבוצה של סטטוס גבוה במובן אחד, אינה שוללת את ערכה של ההיכללות בקבוצת סטטוס נמוך – כללה החוקרת בקבוצת הסטטוס הנמוך כל מי שהשתייך לאחת משלוש הקבוצות (כלומר נשים, כהי עור או צעירים).

37 שם, בעמ׳ 104.

38 שם; Portillo & DeHart-Davis, לעיל ה״ש 35. נראה שטיעונים דומים הושמעו במחקרים מוקדמים יותר, לא מעט בהקשר של מיקומן של נשים בארגונים. ראו למשל ROSABETH M. KANTER, MEN AND WOMEN OF THE CORPORATION (1977).

39 ראו Portilo, לעיל ה״ש 36, בעמ׳ 104.

40 שם.

מגבילה את שיקול הדעת בדרכים ייחודיות לסטטוס החברתי של הפקידים.[41] מאחר שטענת הסמכות של המשתייכים לקבוצות חזקות פחות, מאותגרת לעתים תכופות יותר, וכיוון שאינם יכולים להסתמך על סטטוס חברתי כהגנה, עליהם להסתמך על כללים וזכויות רשמיות.[42] הממד הפורמלי של הסמכות הופך אותה לפתוחה לביקורת, ועל כן מעמיד את הפקידים בפני פרדוקס של כללים: עליהם להסתמך על כללים פורמליים כמפתח לסמכותם, אך הסתמכות זו הופכת את הנראוּת של סמכותם למלאכותית.[43] ייתכן גם שחולשת הנטייה של שופטים ותיקים או מבוגרים לציית לחוק נובעת מקושי שלהם, כמי שפעלו שנים רבות יותר על פי השיטה הישנה, להתאים את דרך פעולתם לשינוי.[44]

יש לציין כי כמו מרבית המחקרים בתחום, גם המחקר של פורטילו היה מחקר איכותני. המחקר הסתמך על ראיונות עם 25 פקידים ו־24 שוטרים, ורק מעטים מהם היו צעירים, שחורים או נשים. כמו מחקרים אחרים בתחום, המחקר לא בחן את ההחלטות שקיבלו הנבדקים אלא דיווח עצמי שלהם על פעולתם.

לא מצאנו מחקרים שבחנו את השפעת הוותק של הפקיד על מידת הציות שלו לכללים. ניתן לסבור כי ככל שמדובר בכללים חדשים יותר, לפקידים ותיקים יהיה קושי רב יותר לאמץ אותם, עקב ההרגלים הוותיקים שלהם. לאור ממצאיה של פורטילו, פקידים ותיקים עשויים גם להרגיש בעלי סמכות עצמאית, ולכן להרגיש כפופים פחות לאותם כללים, שהפקידים החדשים יותר במערכת יחששו להפר. עם זאת, כאמור, אין בידינו מחקרים קודמים שבחנו משתנה זה.

בנושא החלטות שופטים ישנם מחקרים שבחנו את השפעת הגיל על חומרת העונש שהם מטילים,[45] כמו גם על יעילותם,[46] וממצאיהם אינם אחידים. מכל מקום, לא מצאנו כאמור

41 שם.

42 שם. לפי Portilo, סמכותם היא לכן פורמלית יותר מאי־פורמלית, מפורשת יותר ממשתמעת.

43 יש טענות שלפיהן אף שלביורוקרטים יש פוטנציאל לציית או להתנגד לכלל בכל מצב נתון, הם בוחרים זהות אחת עקיבה. ראו למשל Zachary W. Oberfield, *Rule Following and Discretion at Government's Frontlines: Continuity and Change during Organizational Socialization*, 20 J. PUB. ADMIN. RES. & THEORY 735, 753 (2010).

44 השוו Cornelia Niessen, Christine Swarowsky & Markus Leiz, *Age and Adaptation to Changes in the Workplace*, 25 J. MANAGE. PSYCHOL. 356 (2010) (מראים באמצעות מחקר המבוסס על שאלונים שעובדים מבוגרים יותר מתקשים יותר להתאים עצמם לשינויים בארגון).

45 ראו למשל Brian D. Johnson, *The Multilevel Context of Criminal Sentencing: Integrating Judge – and County – Level Influences*, 44 CRIMINOLOGY 259 (2006), שמצא כי שופטים צעירים יותר מחמירים יותר, ומנגד השוו Martha A. Myers, *Social Background and the Sentencing Behavior of Judges*, 26 CRIMINOLOGY 649 (1988), שמצאה כי שופטים מבוגרים יותר דווקא מחמירים יותר.

46 ראו למשל Joshua C. Teitelbaum, *Age, Tenure and Productivity of the US Supreme Court: Are Term Limits Necessary?*, 34 Fla. St. U. L. Rev. 161 (2006) (לא מצא השפעה ברורה של הגיל על מידת היעילות של בית המשפט העליון); RICHARD A. POSNER, AGING AND OLD AGE, ch. 8 (1995), שמצא כי יעילותם של שופטים אכן נפגעת עם הגיל, אולם רק כשהם מגיעים לגילאים מבוגרים מאוד, של שמונים שנה לפחות; Mita Bhattacharya & Russell Smyth, *Aging and Productivity Among Judges: Some Empirical Evidence from the High Court of Australia*, 40 AUSTL. ECON. PAPERS 199, 209–210 (2001) (מצאו שהפרודוקטיביות של שופטים עולה עם השנים ואז יורדת כשהם מתקרבים לגיל פרישה).

מחקרים שבחנו את השפעת הגיל על הציות של שופטים לחוק או על המהירות שבה הם מסתגלים לדין חדש.

מחקר זה מבקש למלא את החסר האמור באמצעות בדיקת מידת הציות של שופטים, והמשתנים המשפיעים על מידת הציות לחוק חדש המופנה כלפיהם במישרין – תיקון 113 לחוק העונשין.

## 4. תיקון 113 לחוק העונשין

תיקון 113 לחוק העונשין קבע לראשונה שיטה מסודרת ומובנית לגזירת הדין. עובר לתיקון לא היו בחוק הוראות באשר לשיקולים האמורים להנחות שופטים בקביעת העונש ובאשר לאופן שקילתם. חוץ מהחובה הכללית לנמק את גזר הדין, שנקבעה בפסיקה, נהנו השופטים מחופש רחב בגזירת הדין.

התיקון הביא למהפכה בהליך גזירת הדין. מבחינת הדין המהותי, הוגדרו בתיקון השיקולים לגזירת הדין: הלימה,[47] שיקום,[48] הגנה על שלום הציבור[49] והרתעה,[50] ופורטו בו הנסיבות האמורות להשפיע על גזירת הדין.[51] מבחינה ראייתית נקבעה מידת ההוכחה הנדרשת לביסוס הנסיבות האמורות.[52] מבחינה דיונית, וזה העיקר לענייננו, נקבעה בתיקון שיטה מפורטת לקביעת גזר הדין. בשלב הראשון על השופט לקבוע את מתחם העונש ההולם, דהיינו טווח מזערי ומרבי של עונשים אפשריים, בהתאם לחומרת מעשה העבירה בנסיבותיו ומידת אשמו של הנאשם.[53] בשלב השני על השופט לקבוע אם לחרוג מהמתחם שנקבע מטעמי שיקום או הגנה על הציבור, ואם החליט שלא לחרוג, בשלב השלישי עליו לקבוע את העונש בתוך המתחם, בהתחשב בנסיבות שאינן קשורות בביצוע העבירה (כגון עברו הפלילי של הנאשם ושיקולים אחרים הקשורים בו ובמשפחתו).[54] כל השלבים הללו חייבים להיות מפורטים בהחלטה הכתובה, כחלק מחובת ההנמקה הקבועה בחוק.[55]

החוק התקבל בחוסר אהדה בולט בקרב השופטים.[56] חלק מהביקורת עסק במרכיבים המהותיים של החוק, אולם דברי הביקורת העיקריים הוטחו בסרבול הרב שהחוק יוצר והזמן הרב שנדרש כעת לכתיבת כל גזר דין. נשיאת בית המשפט המחוזי בתל אביב, השופטת דבורה ברלינר, ביקרה את החוק על העומס שהוא ייצור, בייחוד בבתי משפט השלום שבהם השופטים נדרשים לכתוב גזרי דין רבים.[57] היועץ המשפטי לממשלה לשעבר, ומי שכיום מכהן כשופט בית המשפט העליון מני מזוז אמר שהחוק יגרום לסרבול

47 ראו ס׳ 40ב לחוק העונשין.
48 ראו ס׳ 40ד לחוק.
49 ראו ס׳ 40ה לחוק.
50 ראו ס׳ 40ו–ז לחוק.
51 ראו ס׳ 40ט, 40יא לחוק.
52 ראו ס׳ 40י לחוק.
53 ראו ס׳ 40ג(א) לחוק.
54 ראו ס׳ 40ג(ב) לחוק.
55 ראו ס׳ 40יד לחוק.
56 הילה רז ״השופטים נגד החוק לצמצום שיקול דעתם בענישה: מסובך ולא ישים״ **TheMarker** (22.5.2012) https://goo.gl/vckNs6.
57 שם.

ההליך וריבוי ערעורים, ולא ישיג את מטרת החוק העיקרית – אחידות בענישה.[58] השופט דוד רוזן כתב בגזר הדין בפרשת הולילנד כי לדעתו בית המשפט צריך לשקול את העקרונות הקבועים בחוק, אך כיוון שמלאכת גזירת הדין היא עדינה, הוא אינו אמור לפעול על פי המסגרות הנוקשות המוגדרות בתיקון לחוק.[59] הגדיל לעשות שופט בית המשפט העליון אורי שהם שתקף את הסרבול שכרוך בגזירת הדין על פי החוק, את ״בזבוז הזמן והמשאבים״ שהוא מסב, וכינה אותו ״תקלה חקיקתית״ וחוק שאין לו תוחלת ואשר על הכנסת לשנותו.[60]

גישה ביקורתית זו עלתה גם משאלונים שהופנו לשופטים בנושא התיקון. כך, כל השופטים שהשיבו על השאלונים במחקרה של הדר מסורי, שבחן את יחסם לתיקון, הגיבו בשלילה כלפיו. שופט אחד ציין כי ״התיקון הפך את גזירת הדין **למסורבלת**״; אחר כתב כי גזר הדין הנכתב כיום מחייב כתיבה טכנית וההנמקה **מכבידה** וגוזלת זמן מיותר; שלישי כתב כי ״התיקון גורם **להתמשכות** זמן כתיבת גזירת הדין״ ורביעי ציין כי ״זמן הכתיבה **הוכפל אם לא שולש**״; שופט אחר ציין בשאלון כי ״ההשפעה המשמעותית ביותר אינה כלל וכלל במישור המהותי אלא אך **בנטל הבלתי נסבל והמיותר** המוטל על השופט בעת גזירת הדין״. ממחקר זה עולה שהביקורת בקרב השופטים על התיקון, ובייחוד על הסרבול והעומס שהוא יוצר, היא רחבה וגורפת.[61]

עם זאת, בפסיקה עצמה הקפידו השופטים לקבוע כי למרות הביקורת, כל עוד החוק קיים הוא מחייב את בתי המשפט. בכמה פסקי דין הבהירו בית המשפט העליון ובתי משפט אחרים, כי החוק האמור מכוון לשופטים, וכי למרות הביקורת עליו, הם נדרשים לקיימו כ״גזירת הכתוב״.[62] בית המשפט העליון גם קבע בכמה פסיקות מנחות כיצד על הערכאות הדיוניות ליישם את החוק,[63] וציין במפורש כי יש לקבוע מתחם ענישה בכל תיק ותיק, גם אם הצדדים הגיעו להסדר טיעון לעניין העונש.[64]

58 ראו משה גורלי ״נאמן: אני לא הייתי עובר היום את בחינות הלשכה״ **כלכליסט** (21.5.2012) https://goo.gl/tWfP4J.

59 ת״פ (מחוזי ת״א) 10291-01-12 **מדינת ישראל נ׳ צרני**, פס׳ 14 לפסק דינו של השופט רוזן (פורסם בנבו, 13.5.2014). ראו גם ״פרשת הולילנד: גזר הדין המלא״ **הארץ** (13.5.2014) https://goo.gl/Rsbgpf.

60 איתמר לוין ״שופט ביהמ״ש העליון אורי שהם: הבניית שיקול הדעת בענישה – תקלה חקיקתית״ **מחלקה ראשונה – News1** (26.5.2014) https://goo.gl/WcWjyS.

61 הדר מסורי מבט קונסטרוקטיביסטי על הרפורמה להבניית שיקול הדעת השיפוטי במקרה של עבירות התעללות בילדים: רטוריקה או מהות? 49–50 (חיבור לשם קבלת תואר דוקטור לפילוסופיה, אוניברסיטת חיפה, 2016).

62 ע״פ 512/13 **פלוני נ׳ מדינת ישראל**, פס׳ 14 לפסק דינו של השופט (כתוארו אז) מלצר (פורסם בנבו, 4.12.2013) (״אין אני נכנס כאן לסוגיה האם תיקון 113 השיג את מטרתו וכן לקשיים שהוא מעורר ולביקורת, שנמתחת עליו הן באקדמיה והן בפרקטיקה, שהרי אנו כפופים, כמובן, למצוות המחוקק, שהיא בבחינת ׳גזירת הכתוב׳ [...] ״) (להלן: ע״פ 512/13). ראו עניין **צרני**, לעיל ה״ש 59, פס׳ 14 לפסק דינו של השופט רוזן, אשר לאחר הטחת ביקורת בחוק כתב: ״תהא דעתי אשר תהא, עם כל הכבוד לעמדתי, כל עוד לא קבע המחוקק אחרת – הנני מצווה להרכין את ראשי ולפעול במתווה החוק הקיים [...]״.

63 לפסקי דין מנחים של בית המשפט העליון בעניין יישום החוק ראו ע״פ 8641/12 **סעד נ׳ מדינת ישראל** (פורסם בנבו, 5.8.2013); ע״פ 4910/13 **ג׳אבר נ׳ מדינת ישראל** (פורסם בנבו, 29.10.2014).

64 ראו ע״פ 512/13, לעיל ה״ש 62, פס׳ 12–19 לפסק דינו של השופט (כתוארו אז) ח׳ מלצר (יש לקבוע את מתחם העניש גם כאשר נערך הסדר טיעון כדי להבטיח שקיפות, פומביות הדיון וכדי לאפשר בקרה

חוסר האהדה של בתי המשפט לחוק נגע לאופן יישומו במובנים מהותיים יותר מזה של קביעת המתחם. בתי המשפט, ובכללם בית המשפט העליון, התקשו לקבל את השינויים המהותיים שניסה המחוקק להשיג. כך, המחוקק ביקש להעלות את קרנו של השיקום בתוך שיקולי הענישה. התיקון קבע כי בעבירות שאינן בעלות חומרה יתרה, בית המשפט רשאי לגזור את עונשו של הנאשם על פי שיקולי שיקומו אם הוכח סיכוי של ממש לשיקום. בתי המשפט, מנגד, קבעו כבר בשלבים מוקדמים כי גם כאשר יש סיכוי של ממש לשיקום, וגם כשאין חומרה יתרה, בכל זאת יוטלו עונשי מאסר על נאשמים גם אם מאסר כזה יפגע בשיקומם.[65] בדומה, הנחיית החוק לחרוג מהמתחם לחומרה כאשר יש חשש ממשי שהנאשם יחזור ויבצע עבירות, זכתה להתעלמות כמעט מוחלטת בפסיקה. מחקר שבחן אמפירית את יישום החוק, לא מצא ולו גזר דין אחד שבו חרג בית המשפט מהמתחם מטעמי הגנה על הציבור.[66] גם דרישת המחוקק להגביל עד מאוד את מעמדו של שיקול ההרתעה לא זכתה ליחס אוהד בפסיקה. הצעת החוק אמנם הבהירה כי אין בידע המחקרי הקיים בסיס מספק להנחה כי החמרה בענישה מקדמת הרתעה כללית או אישית, ולכן נקבע בחוק כי שיקולי ההרתעה יובאו בחשבון רק אם הוכח ״סיכוי של ממש״ כי ההחמרה תקדם הרתעה, אולם בתי המשפט המשיכו כבעבר לציין את שיקול ההרתעה כבסיס להחמרה בענישה, בלי לציין, ולו כדי לצאת ידי חובת החוק, שהתנאי של ״סיכוי של ממש״ להרתעה התקיים.[67]

אולם בחינת יישום החוק מבחינה מהותית אינה פשוטה. אף שסביר להניח שמידת השימוש בשיקולי ההרתעה רבה מדי, ומידת השימוש בשיקולי השיקום וההגנה על הציבור קטנה מזו שנדרשה על פי רוח החוק, אי־אפשר לקבוע בנוגע לכל החלטה בנפרד, אם בית המשפט הפר את החוק בבחירת השיקולים שהנחו אותו. המחוקק לא שלל את שיקול הדעת השיפוטי אלא ביקש להגבילו או להרחיבו באמצעות ביטויים כמו ״סיכוי של ממש״ או ״חשש ממשי״, שהפירוש שלהם ואופן יישומם בכל מקרה ומקרה נתון לשיקול דעת שיפוטי. גם את ההתעלמות מהדרישה להראות ״סיכוי של ממש״ אי־אפשר להגדיר בכל

עמוקה יותר של הסדרי הטיעון הן בשלבי עריכתם והן בשלבי אישורם בפני בית המשפט); ע״פ 9246/12 **חמאיסה נ׳ מדינת ישראל**, פס׳ ח׳ לפסק דינו של השופט (כתוארו אז) רובינשטיין (פורסם בנבו, 24.3.2014) (״קביעת מתחם הענישה היא מצוות המחוקק בכל תיק [...]״); ע״פ 5953/13 **מדינת ישראל נ׳ דוידי**, פס׳ 20 לפסק דינו של השופט דנציגר (פורסם בנבו, 6.7.2014) (״על בית המשפט לקבוע תחילה את מתחם הענישה בהתאם להוראות הדין ולמדיניות הענישה הנוהגת, בשלב הבא, להשוותו לטווח הענישה עליו הסכימו הצדדים, וככל שהטווח מאושר – לקבוע את העונש בהתחשב בהסדר הטיעון״). אך ראו, לאחרונה, פקפוק בנוגע לחובה לקבוע מתחם במקרים שבהם נערך הסדר טיעון לעונש, בע״פ 2524/15 **שפרנוביץ׳ נ׳ מדינת ישראל**, פס׳ 18 לפסק דינו של השופט זילברטל (פורסם בנבו 8.9.16) (״תיקון 113 אינו כולל הוראה מפורשת בדבר קביעת מתחם העונש בהתקיים רף או טווח ענישה מוסכם במסגרת הסדר טיעון, וטרם גובשה הסכמה כללית לכך בפסיקה״).

65 ראו אורן גזל־אייל ״חריגה ממתחם העונש ההולם״ **ספר דורית ביניש** 539, 546–548 (קרן אזולאי ואח׳ עורכים, 2016); ע״פ 6943/16 **גלקין נ׳ מדינת ישראל** (פורסם בנבו, 28.1.2018) (בו נקבע כי אף שלפי גישה אחת בפסיקה חובה לקבוע מתחם עונש הולם גם כאשר נערך הסדר טיעון לעונש, ״ישנן גם גישות אחרות באשר לנדרש מן הערכאה המבררת ביחס לקביעת עונש במסגרת הסדר טיעון הכולל טווח ענישה מוסכם״).

66 קרן וינשל־מרגל וענבל גלון ״ההשפעה של תיקון החוק בעניין הבניית שיקול־הדעת השיפוטי בענישה על גזירת מאסרים״ **עיוני משפט** לח 221, 252 (2016).

67 ראו גזל־אייל ״חריגה ממתחם העונש ההולם״, לעיל ה״ש 65, בעמ׳ 546–547.

מקרה ומקרה כאי־ציות לחוק, שכן ייתכן שבית המשפט בחן את התקיימות התנאי ורק נמנע מלציין זאת בגזר הדין.

מנגד, בחינת הציות להוראה הטכנית יחסית של קביעת מתחמים פשוטה בהרבה. על פי החוק, בהליך גזירת הדין על בית המשפט לקבוע בשלב הראשון את מתחם העונש ההולם ולפרטו בהחלטה הכתובה.[68] אין בחוק כל סייג להוראה זו. גם בפסיקות המנחות של בית המשפט העליון בנושא, בתי המשפט מונחים במפורש לקבוע מתחם בכל גזר דין. לכלל האמור אין חריג. לפיכך ניתן לקבוע בבירור אם בית המשפט ציית לחוק או הפר אותו, בכל מקרה ומקרה. בדרך זו, תיקון 113 לחוק נותן בידינו הזדמנות חריגה לבחון את הנטייה של שופטים לציית לחוקים שאינם מקובלים עליהם, כמו גם לבחון אילו שופטים מפרים את החוקים יותר, ובאילו תנאים החוק מופר יותר.

## ב. מחקר 1 – הציות לחוק בבתי משפט השלום

### 1. השערות המחקר

המחקר הראשון בחן את היקף הציות לחוק בקרב שופטי בתי משפט השלום. ארבע השערות נבחנו במחקר זה:

1. שופטים לא תמיד מצייתים לחוק – שופטים אמונים על הציות לחוק והאתוס שלהם אמור להובילם לציית לו גם כאשר הדבר אינו לרוחם. נוסף על כך, פרסומן הפומבי של ההחלטות השיפוטיות צפוי לרסן נטייה של שופטים להתעלם מהחוק. למרות זאת השערת המחקר היא כי כמו בעלי משרה אחרים, שופטים יראו עצמם לעיתים כמי שמכירים טוב יותר מהמחוקק את צורכי המערכת, ולכן לעיתים יבחרו שלא לציית לחוק, בייחוד כשמדובר בחוק דיוני המטיל עליהם עומס שנתפס בעיניהם כמיותר. כפי שהראינו לעיל, שופטים רבים לא אהדו את השינוי. סלידה דומה של שופטים מהתערבות המחוקק בשיקול הדעת השיפוטי בענישה ניכרת גם במקומות אחרים בעולם.[69] האתוס המקצועי של כפיפות לחוק יידחה לפחות בחלק מהמקרים מפני התפיסה הפרופסיונלית של שופטים, שאין מקום להתערבות חקיקתית בסמכותם לאזן בין שיקולי הענישה בכל מקרה ומקרה,[70] ומפני התפיסה כי אין מקום לסרבל את הליך גזירת הדין בהוראות המוסיפות על עומס העבודה המוטל עליהם.

68 ראו ס׳ 40יד לחוק.

69 ראו למשל Mandeep K. Dhami, *Sentencing Guidelines in England and Wales: Missed Opportunities*, 76 LAW & CONTEMP. PROBS. 289, 301 (2013) (מראה ששופטים באנגליה שנשאלו על הסכמתם לטענה כי הנחיות הענישה מועילות, נתנו בממוצע ציון של 3.5 בסולם של 1–5); Tokson, לעיל ה״ש 29, בעמ׳ 954 (שופטים פדרליים בארצות הברית התנגדו להנחיות הענישה כשאלה נחקקו, סברו שהן מגבילות מדי את שיקול הדעת שלהם, ועד החלטת בית המשפט העליון לאשר את ההנחיות, רוב השופטים שדנו בנושא פסלו את ההנחיות כבלתי חוקתיות).

70 ראו גם חיים כהן ״ענישת ׳צדק׳ – הרהורים שלאחר השפיטה״ **פלילים** א 9, 21 (1990) המבקר גישה זו באומרו ״אמונתם של רבים מן השופטים שכדי לגזור דין צודק, די באינטואיציה שחנן אותם אלוהים. אין מן הצורך לבזבז זמן שיפוטי יקר על שיקולים ושקילות ולהעמיק חשוב וחקור: טביעת עינם מגלה להם מיד מה צודק ומה איננו צודק. מידת העונש היא עניין לתחושה בלבד, והתחושה הקולעת נחה על השופט, מכוח תפקידו, כמו רוח הקודש״.

2. שופטים מבוגרים יותר, גברים ויהודים יצייתו פחות לחוק – בהסתמך על ממצאיה של פורטילו לעיל,[71] שיערנו כי שופטים מבוגרים יותר, גברים ויהודים, דהיינו שופטים מקבוצה חזקה, ירשו לעצמם לציית פחות לכללים, ולכן יקבעו פחות מתחמים. שופטים ותיקים (ולכן לרוב מבוגרים יותר) יצייתו פחות לחוק גם מכיוון שהם מורגלים בגזירת הדין במתכונת הישנה, בלי כפיפות למבנה ההנמקה החדש שנקבע בתוקף החוק, וככל שהם ותיקים יותר, כך יקשה עליהם יותר לשנות את ההרגלים.[72] מנגד, שיערנו ששופטים חדשים יותר ינסו להוכיח עצמם יותר ולהציג את יכולותיהם להתמודד עם החוק הסבוך, למרות הנטל שהדבר מסב.
3. ככל שיחלוף זמן רב יותר מחקיקת החוק, מידת הציות לו תפחת – השפעת חלוף הזמן עשויה לפעול בשני מישורים שונים. מחד גיסא, ככל שחולף זמן, החוק מושרש טוב יותר במערכת, ולכן יש לצפות שהציות לו יגבר. מאידך גיסא, ככל שחלף זמן מחקיקת החוק, התברר יותר כי גם שופטי בית המשפט העליון מביעים מורת רוח מהחוק, וכי למעשה גם בית המשפט העליון אינו מציית לחוק, ובפסיקותיו הוא אינו מבקר שופטים שאינם מצייתים לחוק. הערכנו כי הרוח הנושבת מבית המשפט העליון תאותת לשופטי בתי משפט השלום כי אין צורך לציית לחוק, ולכן תגרום לצמצום הציות לו ככל שיחלוף זמן מעת חקיקתו.
4. כאשר הצדדים עורכים הסדר טיעון לעונש, השופטים יצייתו פחות לחוק – כאשר הצדדים עורכים הסדר טיעון לעונש, הסיכוי לערעור נמוך יותר. הדבר נכון בייחוד בהסדר טיעון ״סגור״ שבמסגרתו הצדדים מציעים עונש מוסכם ומבקשים מבית המשפט להטילו. כאשר בית המשפט מקבל את המלצת הצדדים (כפי שקורה כמעט בכל הסדרי הטיעון), הסיכוי שיערערו על גזר דין כזה נמוך מאוד. אמנם הפסיקה הבהירה כי גם כאשר נערך הסדר טיעון לעונש, על בית המשפט לבחון את ההסדר למול הוראות החוק,[73] אולם החשש שהחלטת בית המשפט תעמוד לביקורת של ערכאה גבוהה יותר קטן במידה ניכרת במקרים אלו. יתר על כן, הפסיקה הברורה המעודדת את בתי המשפט לקבל את המלצות הצדדים בהסדרי טיעון, עשויה לגרום לשופטים לסבור שהניתוח הארוך שקבוע בחוק מיותר, משום שהתוצאה הסופית של ההליך ידועה. ייתכן גם שהיו שופטים שסברו שאין חובה לקבוע מתחמים במקרים שבהם הצדדים ערכו הסדר טיעון לעונש, לפחות עד שבית המשפט העליון יכריע אחרת.[74] לפיכך שיערנו כי במקרים שבהם הצדדים ערכו הסדר טיעון לעונש, בית המשפט יציית פחות לחוק, ויקבע פחות מתחמי ענישה.

71 ראו Portillo, לעיל ה״ש 36.

72 ראו דברי אוליבר וונדל הולמס שציין זאת באומרו: "Judges commonly are elderly men, and are more likely to hate at sight any analysis to which they are not accustomed, and which disturbs repose of mind, than to fall in love with novelties" (Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. Rev. 443, 455 (1899)).

73 ראו ע״פ 512/13, לעיל ה״ש 62; עניין **חמאיסה**, לעיל ה״ש 64; ע״פ 3659/13 **פלוני נ׳ מדינת ישראל** (פורסם בנבו, 24.3.2014); ע״פ 6371/12 **שלום נ׳ מדינת ישראל** (פורסם בנבו, 10.12.2013). אך ראו עניין **שפרנוביץ׳**, לעיל ה״ש 64, שם, למרות ההפניה לעניין פלוני, נקבע כי טרם גובשה הסכמה כללית בסוגיה.

74 עניין **שפרנוביץ׳**, שם.

## 2. שיטת המחקר

### (א) כלי המחקר

המחקר מבוסס על נתונים שהופקו ממאגרי המידע המשפטיים ״נבו״, ״תקדין״, ״פדאור״ ו״נט המשפט״. המדגם כולל 585 גזרי דין של 70 שופטי בתי משפט השלום בכל רחבי הארץ, שניתנו מיום 1.1.2013 ועד יום 26.2.2015 (45 שופטים, 25 שופטות, 63 שופטים יהודים ו־7 שופטים ערבים). התיקון לחוק נכנס לתוקף ביום 10.7.2012, ובכל מקרה שבו הכרעת הדין ניתנה אחרי כניסת החוק לתוקפו, נדרש השופט לגזור את הדין בהתאם להוראות החוק. אם בעת הדגימה עלה כי הכרעת הדין ניתנה קודם לכניסת החוק לתוקפו (ולכן השופט לא היה חייב לפעול על פי החוק), גזר הדין לא נדגם (וכיוון שנדגמו רק גזרי דין שניתנו לפחות חצי שנה לאחר כניסת החוק לתוקפו, רק גזרי דין אחדים לא נדגמו מסיבה זו). המדגם כלל את כל שופטי השלום שנמצא כי הטילו עונשי מאסר בתקופה האמורה. מכל שופט או שופטת נאספו לכל היותר עשרה גזרי דין, וכך ממוצע גזרי הדין לשופט עומד על 8.357. במדגם נכללו רק גזרי דין שהוטל בהם עונש מאסר בפועל או מאסר בעבודות שירות. אמנם החובה לקבוע מתחם אינה מוגבלת לעונשי מאסר, אולם בתי המשפט מקפידים עליה יותר כאשר הם גוזרים עונש מאסר, ואנו החלטנו לבחון את מידת הציות בתנאים המקלים ביותר עם בתי המשפט, דהיינו בתיקים שבהם ברור שגם לפי הדין וגם לפי האופן שבו נהוג ליישמו, יש לקבוע מתחם. מטעם זה לא נכללו במדגם גזרי דין שעניינם עבירות כלכליות ועניינים מקומיים (כגון תכנון ובנייה, עבירות מס וכיוצא באלה).

כיוון שאנו מתמקדים באי־ציות קשה, מרבית הניתוחים יעסקו בגזרי דין שניתנו בלא שנערך הסדר טיעון לעונש, שכן כאמור לעיל, ייתכן שחלק מהשופטים סברו שהחובה לקבוע מתחמים אינה חלה כאשר גזר הדין ניתן על פי הסדר טיעון לעונש.

### (ב) המשתנה התלוי

ציות: כאשר נקבע מתחם ענישה כלשהו בגזר הדין, קידדנו משתנה זה כ־1, ואם לא כן כ־0. בשלב ראשון הגדרנו גם מתחם שאינו מספרי כלל, כגון ״בין מאסר של כמה שבועות למאסר של כמה חודשים״ כציות לחוק, אף שפירוש סביר של החוק מחייב מתחם מוגדר מספרית. לפיכך רק מקרה שבו הופר החוק בצורה ברורה, דהיינו שלא נקבע בו מתחם כלשהו, הוגדר כאי־ציות. עם זאת, להשלמת התמונה בחנו גם מתי נקבע מתחם מספרי חלקית לפחות, דהיינו מתחם שבו לפחות אחד משני גבולותיו הוגדר בצורה מספרית (למשל, ״עונש שבין מאסר על תנאי ובין מאסר בפועל של שלושה חודשים״), וכן מתי נקבע מתחם מספרי, דהיינו מתחם ששני גבולותיו מספריים (לדוגמה, ״בין חצי שנת מאסר לשנת מאסר״).

### (ג) המשתנים הבלתי תלויים

המשתנים הבלתי תלויים כללו את מחוז השיפוט (חמישה משתנים דיכוטומיים למחוזות מרכז, דרום, צפון, ירושלים וחיפה, ומחוז תל אביב משמש בסיס להשוואה), מגדר השופט (1=שופטת), מוצא אתני של השופט (1=לא יהודי), מוצא אתני של הנאשם (1=לא יהודי), עבר פלילי (1=יש לנאשם עבר פלילי), הודאה (1=הנאשם הורשע על פי הודאתו), כמה משתנים דיכוטומיים לסוג העבירה העיקרית בכתב האישום (סמים, אלימות, רכוש, מין,

אחר, ועבירות על חוק הכניסה לישראל משמשות בסיס להשוואה), תסקיר נאשם (1=הוגש תסקיר לגזר הדין), תסקיר נפגע (1=הוגש תסקיר נפגע), הודאה (1=הנאשם הורשע על פי הודאתו במשפט), הסדר לכתב האישום (1=נערך עם הנאשם הסדר טיעון ועל פיו תוקן כתב האישום), הסדר לעונש (1=נערך עם הנאשם הסדר טיעון שכלל הסכמות לעניין העונש), שנים מאז התיקון (הזמן שחלף בין כניסת התיקון לתוקף לגזר הדין בשנים), גיל השופט בעת התיקון (גיל השופט בעת כניסת התיקון לתוקף), ותק (ותק השופט בשנים בעת כניסת התיקון לתוקף). בשמונה מקרים מוצאו האתני של הנאשם לא היה ברור. במקרים אלו הנחנו שהנאשם יהודי בהתבסס על המקרה הנפוץ. בשלושה מקרים לא היה ברור אם לנאשם עבר פלילי. במקרים אלו הנחנו שאין לנאשם עבר פלילי.

## 3. תוצאות

### (א) סטטיסטיקה תיאורית

טבלה 1 להלן מציגה את הממוצעים והשכיחויות של המשתנים העיקריים. עיון בנתונים מלמד כי רק ב־74% מגזרי הדין צייתו השופטים לדרישה לקבוע מתחם ענישה כלשהו. כאשר בוחנים אם נקבע מתחם ענישה מספרי חלקית לפחות, דהיינו אם לפחות הרף העליון של המתחם היה תחום בצורה מספרית ברורה, שיעור הציות יורד ל־67%. עוד עולה כי רק ב־51% מגזרי הדין נקבע מתחם ענישה ששני קצותיו מוגדרים. עם זאת, מקובל שכאשר הרף התחתון של מתחם הענישה אינו כולל עונש מאותו סוג כמו הרף העליון, נמנע בית המשפט מלציין את מידת העונש ברף התחתון. כך, למשל, מקובל לקבוע מתחם כגון ״ממאסר על תנאי עד חצי שנת מאסר בפועל״, בלי לציין את משך המאסר המותנה ברף התחתון, מכיוון שהפרקטיקה שנוצרה היא שהמתחם נקבע רק בנוגע לסוג העונש המרכזי, דהיינו סוג העונש החמור ביותר. מטעם זה, ספק אם ניתן לראות אי־ציות בהימנעות השופטים מלקבוע מתחם מספרי בשני קצותיו, ולפיכך לא נתייחס מכאן ואילך למתחם מספרי כמדד לציות. אולם ברור כי הימנעות מוחלטת מקביעת מתחם מהווה אי־ציות, וסביר לראות גם מצב שבו לא נקבע רף עליון מספרי כמתחם אי־ציות.[75] מכאן ששיעור גזרי הדין שבהם לא צייתו השופטים לחוק נע בין 26% (אם קביעת מתחם שאינו מספרי כלל צריך להיחשב לציות לחוק) ובין 33% (אם המתחם צריך להיות מספרי לפחות באחד מגבולותיו). כשמנקים מהמדגם את התיקים שבהם ערכו הצדדים הסדר טיעון לעונש, עולה כי ב־91% מהתיקים קבע בית המשפט מתחם כלשהו, ב־83% נקבע מתחם אשר היה מספרי לפחות באחד מגבולותיו וב־66% נקבע מתחם מספרי מלא, כששני גבולות המתחם מוגדרים. מדובר בהיקפי ציות גבוהים יותר אך עדיין רחוקים מציות מלא.

75 דוגמאות למקרים שבהם נקבע מתחם כלשהו אולם לא נקבע מספר ברף העליון או התחתון ניתן למצוא בגזרי הדין האלה: ת״פ (שלום כ״ס) 30040-03-14 **מדינת ישראל נ׳ שביטה**, פס׳ 9 לגזר דינו של השופט ארנון (פורסם בנבו, 15.7.2014), ״מתחם העונש הראוי הוא בין מאסר על תנאי למספר חודשי מאסר בפועל״. לדוגמאות נוספות ראו ה״ש 76–77 להלן. לעיתים קבע בית המשפט את הרף התחתון של המתחם, אך נמנע מלהגדיר את הרף העליון. לדוגמה, בת״פ (שלום חי׳) 23887-02-13 **מדינת ישראל נ׳ גידאן**, פס׳ 9 לגזר דינו של השופט ליפשיץ (פורסם בנבו, 26.2.2013) נקבע: ״אני סבור כי מתחם הענישה הראוי במקרה זה, כמו גם ברובם של מקרים דומים אחרים, נע בין חודש מאסר למספר חודשי מאסר״. במקרים אלו הגדרנו את ההחלטה כמשקפת ציות לחוק, כיוון שאחד מקצות המתחם הוגדר מספרית, אף שהרף העליון לא הוגדר.

**טבלה 1: תיאור המדגם**

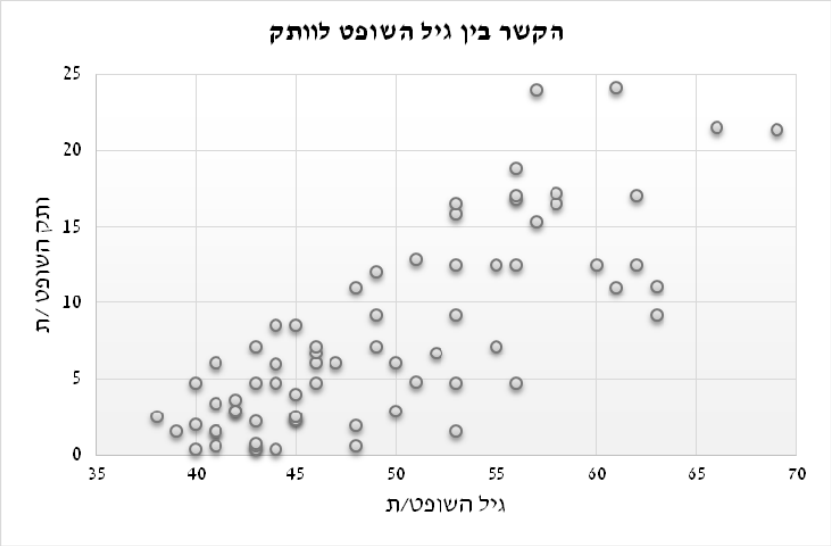
| | ללא הסדרים לעונש | | כל התיקים | |
|---|---|---|---|---|
| משתנה | ממוצע/שכיחות | סטיית תקן | ממוצע/שכיחות | סטיית תקן |
| מחוז מרכז | .28 | | .26 | |
| מחוז דרום | .18 | | .23 | |
| מחוז צפון | .05 | | .05 | |
| מחוז ירושלים | .23 | | .20 | |
| מחוז חיפה | .15 | | .15 | |
| מין השופט (אישה) | .35 | | .36 | |
| מוצא שופט (לא יהודי) | .08 | | .09 | |
| מוצא הנאשם (לא יהודי) | .42 | | .43 | |
| עבר פלילי לנאשם | .63 | | .62 | |
| הודאה בעודות כתב האישום | .85 | | .88 | |
| עבירת כניסה לישראל | .11 | | .12 | |
| עבירת סמים | .13 | | .14 | |
| עבירת אלימות | .33 | | .31 | |
| עבירת רכוש | .28 | | .25 | |
| עבירת מין | .04 | | .04 | |
| עבירה אחרת | .12 | | .14 | |
| הוגש תסקיר נאשם | .57 | | .49 | |
| הוגש תסקיר נפגע | .02 | | .02 | |
| היה הסדר טיעון | .42 | | .52 | |
| היה הסדר טיעון לעונש | 0 | | .24 | |
| ותק השופט כשהחוק נכנס לתוקף | 6.42 | 6.020 | 6.2183 | 5.94756 |
| גיל השופט כשהחוק נכנס לתוקף | 47.39 | 7.410 | 47.32 | 7.274 |
| נקבע מתחם מספרי | .63 | | .51 | |
| האם נקבע מתחם מספרי חלקית | .83 | | .67 | |
| נקבע מתחם כלשהו | .91 | | .74 | |
| N | 448 | | 585 | |

**(ב) המשתנים המשפיעים על קביעת מתחם**

בחינת השפעת המשתנים השונים על הסיכוי שייקבע מתחם נעשתה במודל היררכי (רמה 1 = רמת ההחלטה, רמה 2 = רמת השופט), כדי להביא בחשבון את הקשר שיש בין ההחלטות של כל שופט. כיוון שהמשתנה התלוי הוא דיכוטומי בכל הניתוחים, ערכנו רגרסיה לוגיסטית בשתי רמות כאמור (multilevel logistic regressions).

אחד הקשיים הצפויים בבחינה האמורה טמון במתאם הצפוי בין גילאי השופטים לוותק שלהם. בתרשים 1 להלן, כל נקודה מציינת שופט או שופטת אחת, והצירים מסמנים את הגיל והוותק של השופט בשנת 2014. כפי שניתן לראות בתרשים, ישנו קשר חיובי חזק למדי בין גיל השופט לוותק השיפוטי אף שהקשר אינו קשר לינארי מושלם, מכיוון ששופטים שונים ממונים לתפקידם בגילאים שונים. מטעם זה ערכנו מודלים שבהם רק גיל השופט נכנס לניתוח, ומודלים אחרים שבהם רק הוותק נכנס. לשם השלמת התמונה, נציג גם מודלים שבהם הן הגיל והן הוותק הוכנסו לניתוח, אולם לאור הקשר האמור בין המשתנים, יש להיזהר בפירוש מודלים אלו. כמו כן, כיוון שעד הכרעת בית המשפט העליון בסוגיה ייתכן שחלק מהשופטים סברו כי החובה לקבוע מתחמים אינה חלה כאשר גזר הדין ניתן על פי הסדר טיעון לעונש, הבחינה להלן תתייחס רק לתיקים במדגם שבהם לא נערך הסדר טיעון לעונש.

**תרשים 1: כל השופטים במדגם לפי גילם והוותק שלהם**




כיוון שבניתוחים שערכנו, להכנסת מחוז השיפוט וסוג העבירה לניתוח לא הייתה השפעה משמעותית על התוצאות, הורדנו משתנים אלו מהניתוח כדי לפשטו. טבלה 2 להלן מתארת את תוצאות הרגרסיה הלוגיסטית האמורה, בשלושה מודלים שונים. הגיל והוותק של השופט נמדדו ביום כניסתו של התיקון לתוקף. במודל הראשון נכללו גם גיל השופט וגם הוותק. במודל השני הגיל נכלל אך הוותק לא נכלל. בשלישי הוותק נכלל והגיל הוסר מהמודל.

**טבלה 2: המשתנים המשפיעים על קביעת מתחם כלשהו בהעדר הסדר טיעון לעונש**

| | OR (SE) | OR (SE) | OR (SE) |
|---|---|---|---|
| מגדר השופט (אישה) | 0.898<br>(0.520) | 0.825<br>(0.481) | 0.831<br>(0.484) |
| מוצא אתני השופט (לא יהודי) | 4.776<br>(6.383) | 5.955<br>(8.579) | 5.731<br>(8.260) |
| מוצא אתני הנאשם (לא יהודי) | 1.971<br>(0.989) | 2.139<br>(1.084) | 2.125<br>(1.077) |
| עבר פלילי | 1.533<br>(0.666) | 1.513<br>(0.662) | 1.517<br>(0.664) |
| תסקיר מבחן | 0.616<br>(0.307) | 0.643<br>(0.326) | 0.644<br>(0.326) |
| הודאה בעובדות כתב האישום | 1.324<br>(0.949) | 1.320<br>(0.958) | 1.322<br>(0.958) |
| הסדר לכתב האישום | 0.880<br>(0.440) | 0.887<br>(0.446) | 0.881<br>(0.444) |
| הזמן מהתיקון לחוק (שנים) | 5.195***<br>(2.290) | 5.576***<br>(2.433) | 5.504***<br>(2.419) |
| ותק | 0.872**<br>(0.040) | | 0.864*<br>(0.054) |
| גיל | | 0.855***<br>(0.039) | 0.986<br>(0.063) |
| Const. | 3.678<br>(3.552) | 2799.581<br>(6,697.703) | 1943.897<br>(5,616.525) |
| Ln(sigma u) | 0.486<br>(0.644) | 0.454<br>(0.613) | 0.441<br>(0.620) |
| P | .331**<br>(0.143) | .324**<br>(0.134) | .321**<br>(0.135) |

+ p<0.1; * p<0.05; ** p<0.01; *** p<0.001 N=448

מהטבלה עולה כי למרבית המשתנים שנבחנו לא נמצאה השפעה על היקף הציות לחוק. עם המשתנים שלא נמצאה השפעה מובהקת שלהם במרבית המודלים ניתן למנות את המין והמוצא האתני של השופטים (אף כי ניתן לראות נטייה לא מובהקת של שופטים ערבים לציית לחוק יותר משופטים יהודים), העבר הפלילי של הנאשם, מוצאו האתני, קיומו של תסקיר מבחן בהליך, הודאה בעובדות כתב האישום או הסדר טיעון לכתב האישום. כאמור בבדיקה נפרדת שאינה מדווחת כאן, לא מצאנו השפעה גם למחוז השיפוט ולסוג העבירה.

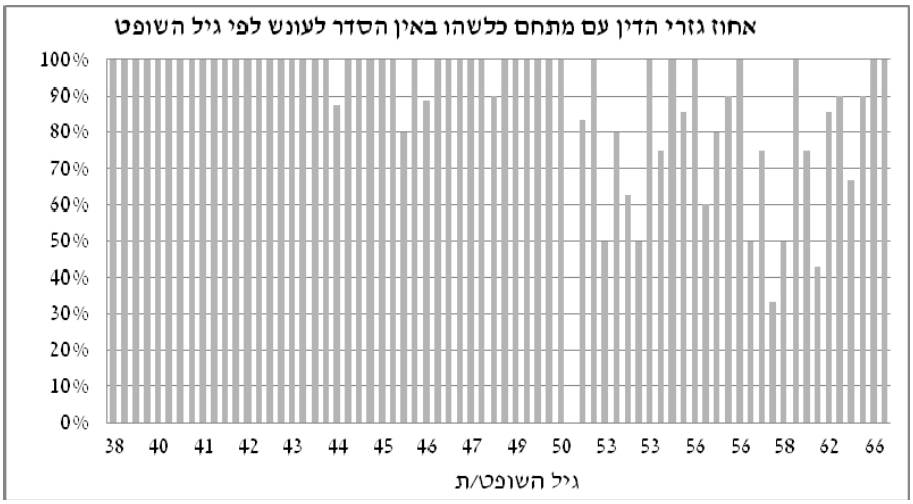
אשר לגיל ולוותק, במודל הראשון בחנו את השפעת שני המשתנים על סיכויי הציות לחוק. מהמודל עולה כי ככל שהשופט ותיק יותר, כך הסיכוי שיציית לחוק קטן יותר (OR=0.864, P<0.05), אולם הגיל לא נמצא משפיע על הסיכוי לציית. עם זאת, בשל המתאם הגבוה בין הגיל לוותק, יש לקרוא נתון זה בזהירות. לפיכך בחנו במודל השני את השפעת הגיל בלי לכלול את הוותק בין המשתנים הבלתי תלויים. במודל זה הגיל נמצא משפיע על הסיכוי שהשופט יציית לחוק (OR=0.855, P<0.001). במודל השלישי בדקנו את השפעת הוותק בלי לכלול את הגיל, וגם כאן נמצאה השפעה מובהקת, המראה שהציות לחוק קטן ככל שהשופט ותיק יותר (OR=0.872, P<0.01). נראה אפוא שהשפעת הגיל מעט חזקה יותר מהשפעת הוותק, אולם כאמור לאור המתאם הגבוה בין המשתנים האמורים, אי־אפשר לקבוע אם חוסר הציות גדל עם הגיל, הוותק או שני המשתנים גם יחד.

בבדיקת התיקים שבהם היו הסדרי טיעון לעונש (54 שופטים, 137 גזרי דין) לא נמצאה השפעה מובהקת לגיל או לוותק על מידת הציות (התוצאות אינן מדווחות כאן).

יצוין כי בדיקת כל התיקים יחדיו (אלו שבהם נערך הסדר לעונש ואלו שלא) הובילה גם היא לממצאים דומים. כאשר משתנה הוותק לא נכלל בניתוח, מצאנו כי לגיל השפעה מובהקת על הסיכוי שהשופט יציית לחוק (OR=0.924, P<0.01). כאשר הגיל הוצא מהמודל, נמצא כי לוותק השפעה על היקף הציות לחוק, אם כי מובהקות ההשפעה הייתה גבולית (OR=0.943, P<0.1) (הממצאים המלאים של בדיקה זו אינם מדווחים כאן).

את השפעת הגיל על מידת הציות ניתן לראות גם בתרשים 2 להלן. בתרשים זה מוצגים כל השופטים במדגם, כשהם מסודרים לפי גילם בשנת 2014 (ציר ה־X). העמודה של כל שופט מייצגת את שיעור גזרי הדין שבהם קבע השופט מתחם כלשהו, מתוך התיקים שלא כללו הסדר טיעון לעונש. ניתן לראות כי שופטים שגילם בשנת 2014 לא עלה על 50, צייתו כמעט תמיד להוראות החוק, לפחות בתיקים שבהם לא נערכו הסדרי טיעון לעונש. מנגד, היקף הציות של שופטים מעל גיל 50 היה נמוך בהרבה.

**תרשים 2**



כאמור, חלק מהשופטים אמנם קבעו מתחם עונש הולם, אולם מתחם זה לא היה מוגדר מספרית. כך, במקרה אחד ציין השופט במפורש כי אין בכוונתו לקבוע מתחם מספרי וקבע: ״מכל מקום לא באתי לקבוע מתחם עונש במספרים אלא אומר כי העונש הראוי הוא חודשי מאסר, שיש שירוצו בעבודות שירות עד למאסר בפועל ממש״.[76] במקרה אחר, נקבע כי ״מתחם הענישה בעבירות בהן הורשע הנאשם, נע בין מאסר מותנה ובין מאסר בפועל [...]״;[77] ובמקרה שלישי נקבע ״מתחם העונש ההולם לעבירות בהן הורשע הנאשם נע בין ענישה מוחשית אשר אינה כוללת רכיב של מאסר בפועל, לבין מאסר בפועל לתקופה קצרה״.[78]

ספק רב אם ניתן לכנות קביעת מתחמים לא מוגדרים כאלה כציות לחוק. לדעתנו, ברור כי מטרת המחוקק הייתה שבית המשפט יקבע מתחם מספרי. ראשית, מכיוון שמתוך השורש של המילה ״מתחם״ ניתן להבין כי הכוונה למרווח תחום, ולא לאזור שגבולותיו עמומים. שנית, גם בית המשפט העליון, בפסקי הדין שבהם הוא מיישם את החוק כדי להנחות את הערכאות האחרות, מקפיד לקבוע מתחם מספרי ברור לענישה, ולא טווח שגבולותיו עמומים.[79] למעשה, גם בית המשפט העליון קבע כי ״קביעת מתחם ענישה ראוי ככזה ה׳נע סביב מספר שנות מאסר׳ היא רחבה ועמומה מדי״ ואינה עומדת בתנאי תיקון 113.[80] מטעמים אלו, אם בית המשפט אינו קובע גבול מספרי, ולו באחד מצדי המתחם, נראה לנו כי אין מדובר בציות אמיתי לדרישת המחוקק. לפיכך בחנו מחדש את המשתנים המשפיעים על הציות לחוק, וציות הוגדר כמצב שבו בית המשפט קבע מתחם אשר לפחות אחד מגבולותיו (בדרך כלל העליון) היה מספרי. כך, אם קבע בית המשפט כי מתחם העונש ההולם הוא בין מאסר על תנאי ובין מאסר של שלושה חודשים, הוא ייחשב למי שציית לחוק. מנגד, אם נקבע כי העונש ההולם הוא בין מאסר על תנאי ובין מאסר של כמה חודשים, לא ייחשב הדבר לציות לחוק לפי הגדרה זו.

בטבלה 3 להלן מוצגת הרגרסיה, כשהמשתנה התלוי בה הוא הציות לחוק לפי ההגדרה המקפידה יותר, דהיינו הדרישה כי השופט יקבע גבול מספרי אחד לפחות למתחם, בתיקים שבהם לא היה הסדר טיעון לעונש. הממצאים דומים לאלו שעלו מהטבלאות הקודמות. בהיעדר הסדר טיעון לעונש, מידת הציות של השופטים המבוגרים והוותיקים קטנה מזו של השופטים הצעירים והחדשים יותר במערכת.

76 ת״פ (שלום ראשל״צ) 44119-07-12 **מדינת ישראל נ׳ שיבר** (פורסם בנבו, 3.12.2013).

77 ת״פ (שלום קריית גת) 47526-10-12 **מדינת ישראל נ׳ פלוני** (פורסם בנבו, 7.7.2014).

78 ת״פ (שלום י-ם) 47605-01-13 **מדינת ישראל נ׳ מלכה**, פס׳ 6 לגזר דינה של השופטת דנה כהן־לקח (פורסם בנבו, 1.1.2014).

79 ראו למשל עניין **סעד**, לעיל ה״ש 63; ע״פ 1127/13 **גברזגיי נ׳ מדינת ישראל** (פורסם בנבו, 15.1.2014).

80 ראו ע״פ 4152/13 **ישראלי נ׳ מדינת ישראל**, פס׳ 5 לפסק דינו של השופט הנדל (פורסם בנבו, 13.8.2014).

**טבלה 3: קביעת מתחם שלפחות אחד מגבולותיו מוגדר, בהיעדר הסדר טיעון**

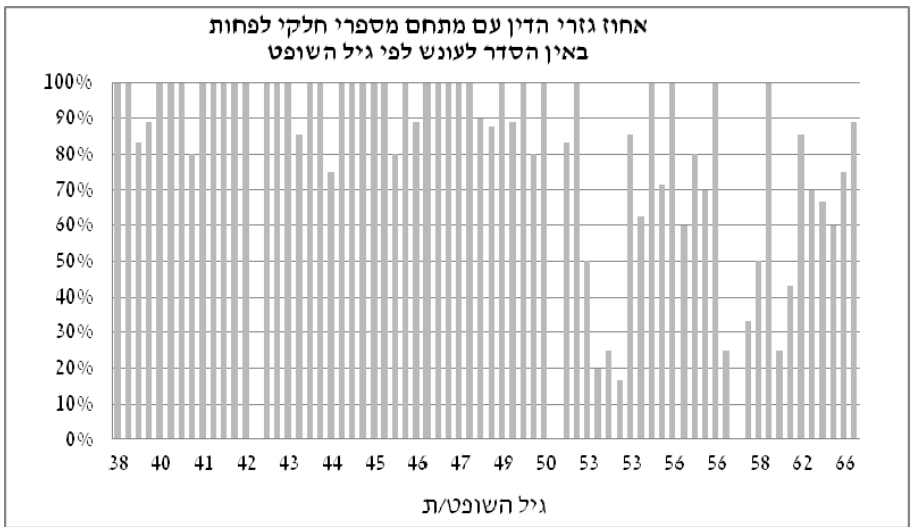
| | OR (SE) | OR (SE) | OR (SE) |
|---|---|---|---|
| מגדר השופט (אישה) | 1.597<br>(0.891) | 1.424<br>(0.751) | 1.461<br>(0.776) |
| מוצא אתני השופט (לא יהודי) | 3.184<br>(3.114) | 3.233<br>(3.120) | 3.145<br>(3.030) |
| מוצא אתני הנאשם (לא יהודי) | 1.992+<br>(0.750) | 2.010+<br>(0.754) | 2.006+<br>(0.752) |
| עבר פלילי | 0.766<br>(0.262) | 0.751<br>(0.257) | 0.754<br>(0.258) |
| תסקיר מבחן | 0.949<br>(0.355) | 0.989<br>(0.370) | 0.992<br>(0.370) |
| הודאה בעובדות כתב האישום | 0.614<br>(0.360) | 0.587<br>(0.342) | 0.593<br>(0.345) |
| הסדר לכתב האישום | 0.868<br>(0.343) | 0.904<br>(0.351) | 0.889<br>(0.348) |
| הזמן מהתיקון לחוק (שנים) | 2.184*<br>(0.686) | 2.251**<br>(0.694) | 2.220*<br>(0.688) |
| ותק | 0.865***<br>(0.038) | | 0.974<br>(0.060) |
| גיל | | 0.868***<br>(0.031) | 0.883*<br>(0.047) |
| Const. | 8.523*<br>(7.372) | 2972.478***<br>(5,836.892) | 1556.249**<br>(3,843.770) |
| Ln(sigma u) | 0.814<br>(0.434) | 0.647<br>(0.452) | 0.647<br>(0.453) |
| ρ | .407***<br>(0.105) | .367***<br>(0.105) | .367***<br>(0.105) |

+ p<0.1; * p<0.05; ** p<0.01; *** p<0.001 N=448

בדיקה של הקשר בין הגיל או הוותק ובין הציות לחוק בתיקים שבהם נערך הסדר טיעון לא העלתה ממצא מובהק (אולם נמצא קשר במובהקות גבולית בין הוותק ובין הציות לחוק לפי הגדרתו כאן, בתיקים שבהם נערך הסדר טיעון לעונש (OR=1.096, P=0.054, N=137). תוצאות בדיקה זו אינן מצורפות כאן).

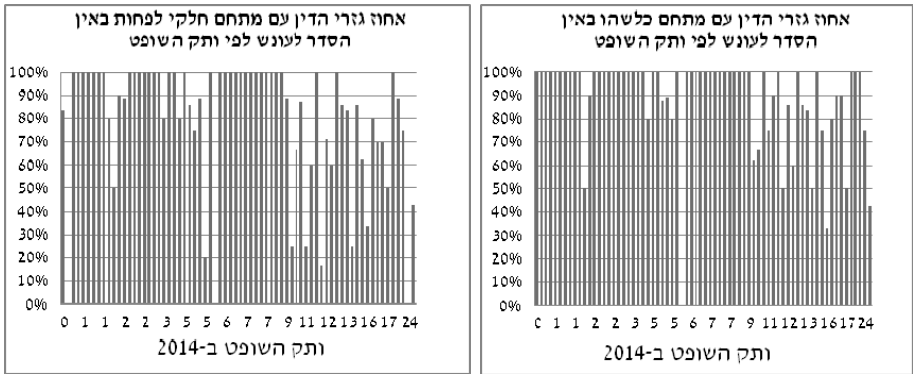
גם כאן ניתן לראות את הממצאים בדבר הקשר בין הגיל לציות בתרשים 3 להלן. גם לפי הגדרה זו של הציות, נמצא כי שיעור הציות של שופטים בני 50 ומעלה נמוך במידה ניכרת משיעור הציות של שופטים צעירים יותר.

**תרשים 3**




כדי לנסות להתרשם אם המשתנה המשפיע יותר על מידת הציות הוא הגיל או הוותק, ערכנו גם השוואה דומה של שיעורי הציות כאשר השופטים מסודרים לפי הוותק שלהם, ולא לפי הגיל.

**תרשים 4**



מהתרשימים לעיל נראה כי השפעת הוותק על הציות חד־משמעית פחות מהשפעת הגיל. עם זאת, בשל המתאם הגבוה בין המשתנים אי־אפשר לשלול את האפשרות שרושם זה מוטעה, ולכן אי־אפשר לקבוע אם ההשפעה על מידת הציות היא של הגיל או של הוותק.

יצוין כי הממצאים כפי שהוצגו באשר לתיקים שבהם לא נערך הסדר טיעון לעונש, לא השתנו במידה ניכרת גם כשהוספנו למדגם את התיקים שבהם נערך הסדר טיעון.

כיוון שמצאנו כי בחלוף הזמן שיעורי הציות לחוק עולים, החלטנו לבדוק אם חוסר הציות שהתגלה במחקר מבטא עמדה מתמשכת או רק תהליך של הטמעת החוק, וכך כעבור זמן שיעורי הציות יהיו כמעט מלאים. לשם כך בדקנו כמאה תיקים מהתקופה שלאחר סיום המחקר, דהיינו ממרץ 2015 ועד סוף אותה שנה. הבדיקה העלתה כי מתוך כ־100 גזרי דין, רק בארבעה לא צייתו השופטים לחובה לקביעת מתחמים, ציות מלא.[81] נראה אפוא כי בחלוף השנים הציות הופך כמעט מלא. המסקנה מבדיקה זו היא כי חוסר הציות מאפיין בעיקר שופטים ותיקים ומבוגרים בתקופה הסמוכה לקבלת התיקון, ואילו בחלוף הזמן התיקון מוטמע בעיקרו וכמעט כל השופטים מצייתים לו. נעמוד על הסיבות האפשריות לשינוי זה בהיקפי הציות בהמשך.

## ג. מחקר 2 – הציות בבית המשפט העליון

### 1. השערת המחקר ושיטת המחקר

אם כן, מה מסביר את שיעור אי־הציות הגדול בתחילת הדרך, ואת העלייה בשיעורי הציות בחלוף הזמן בבתי משפט השלום? אפשרות אחת היא שבתי משפט השלום ראו בחלוף הזמן כי בית המשפט העליון מקפיד על ביצוע החוק. הראינו לעיל כי גם שופטי בית המשפט העליון לא אהדו את החוק, אולם בפסקי הדין נקבע כי יש לקיימו כגזירת הכתוב.[82] מטעם זה, לאחר שמצאנו שמידת הציות בבתי משפט השלום עלתה עם הזמן, החלטנו לבחון גם את מידת הציות של שופטי בית המשפט העליון לחוק. בתחילה, מטרתו של מחקר זה הייתה לבחון את השפעת התנהגות שופטי בית המשפט העליון על ההחלטות של שופטי השלום, אולם ממצאי המחקר העלו כי סוגיית הציות לחוק בבית המשפט העליון מעניינת כשלעצמה. בהתאם לממצאים מהמחקר הראשון שיערנו שגם בבית המשפט העליון שיעור הציות לחוק לא יהיה מלא, אולם ככל שיחלוף הזמן, יוטמע החוק ומידת הציות לו תעלה.

81 בתיק אחד השופטת נימקה את ההימנעות מקביעת המתחם בקיומו של הסדר טיעון (אף שהסדר הטיעון היה לכתב האישום בלבד ולא לעונש (ת״פ (השלום ת״א) 30154-03-12 **מדינת ישראל – מפלג תביעות ת״א נ׳ עבדל כרים כורדי** (פורסם בנבו, 18.5.2015)); בתיק השני נקבע כי ״מתחם העונש ההולם נע בין עונש הצופה פני עתיד, ועד מספר חודשי מאסר בפועל״ (ת״פ (השלום רמ׳) 22213-09-13 **משטרת ישראל תביעות – שלוחת רמלה נ׳ דור** (פורסם בנבו, 19.11.2015)); בשלישי קבע השופט שלא היו מחלוקות של ממש בין הצדדים בנוגע למתחם (אף שההגנה לא הציעה מתחם כלל) (ת״פ (השלום ת״א) 1540-09-13 **מדינת ישראל נ׳ חביב** (פורסם בנבו, 9.9.2015)), וברביעי לא הוזכרה כלל החובה לקבוע מתחם (ת״פ (השלום פ״ת) 11145-01-14 **מדינת ישראל נ׳ עוזרי** (פורסם בנבו, 27.10.2015)).

82 ראו לעיל ה״ש 62 והטקסט שלידה.

לצורך בדיקה זו דגמנו פסקי דין בערעורים על העונש שהתקבלו בבית המשפט העליון בין אפריל 2013 לדצמבר 2016. הדגימה נעשתה באמצעות חיפוש באתר נבו.[83] איתרנו 289 ערעורים כאלה בתקופה האמורה. לא דגמנו פסקי דין של קטינים או הליכים שהכרעת הדין בהם קדמה לכניסת התיקון לתוקף. בחנו רק ערעורים שהתקבלו (בין ערעורים של התביעה ובין של ההגנה) מכיוון שכאשר בית המשפט דוחה ערעור, הוא לרוב מאמץ במשתמע את המתחם שנקבע בבית המשפט המחוזי, ולכן אין לדעת אם הימנעותו מקביעת מתחם מהווה אי־ציות. מתוך 289 הערעורים שמצאנו, ב־83 מקרים הערעור התקבל אף שבית המשפט העליון אימץ במפורש או במשתמע את המתחם שקבע בית המשפט המחוזי. על כן הסקנו אימוץ משתמע גם במקרים שבהם בית המשפט לא הזכיר כלל את המתחם, אולם הסביר את החלטתו לקבל את הערעור בנסיבות אשר על פי החוק אינן קשורות בביצוע העבירה ולכן אינן אמורות להשפיע על המתחם. כיוון שבמקרים אלו בית המשפט העליון אינו צריך לקבוע מתחם, התמקדנו ב־206 הערעורים הנותרים, ומהם לא עלה כי בית המשפט העליון אימץ את המתחם.

## 2. תוצאות

### (א) היקף הציות לחוק בבית המשפט העליון

ב־118 מגזרי הדין במדגם, דחה בית המשפט העליון במפורש את המתחם שקבע בית המשפט המחוזי. למרות זאת ב־69 ערעורים מתוך ה־118 הללו נמנע בית המשפט מלקבוע מתחם חדש וגזר את הדין שלא על פי הוראות תיקון 113. ב־69 מקרים נוספים התערב בית המשפט בעונש בלי לקבוע אם המתחם שקבע המחוזי היה נכון או שגוי, ולפיכך גם כאן הוא נמנע מלקבוע מתחם למרות החובה שבחוק.[84] ברוב אותם מקרים (40 מתוך 69) בית

83 החיפוש נעשה בהליכים מסוג ע״פ בבית המשפט העליון שבהם הופיעה המילה ״ערעור״ ולא הופיע הביטוי ״הערעור נדחה״ בתאריכים המפורטים להלן. הובאו בחשבון רק החלטות שסומנו כ״פסק דין״ וניתנו בהרכב של שופטים (ולא על ידי דן יחיד). פסקי הדין שעלו בחיפוש נבחנו כדי לראות אם יש לדגום את פסק הדין. פסקי דין שלא היו כפופים לתיקון 113 מכיוון שהכרעת הדין ניתנה לפני כניסת התיקון לתוקף או מכיוון שהנאשם היה קטין בעת ביצוע העבירה, לא נדגמו.

84 כך, במקרים רבים הוא ציין כי חומרת המעשה מחייבת עונש כבד יותר או קל יותר, בלי להתייחס כלל למתחם שנקבע בבית המשפט המחוזי (לדוגמה, ע״פ 5992/13 **שרחה נ׳ מדינת ישראל** (פורסם בנבו, 17.3.2014); ע״פ 1034/14 **מדינת ישראל נ׳ פלוני** (פורסם בנבו, 30.12.2014)). לעיתים ציין בית המשפט העליון בערבוביה נסיבות הקשורות לביצוע העבירה האמורות להשפיע על המתחם, ונסיבות שאינן קשורות לביצוע העבירה האמורות להשפיע על העונש בתוך המתחם או בחריגה ממנו, כשיקולים לקבלת הערעור, ולכן אי־אפשר לדעת עד כמה המתחם שקבע בית המשפט המחוזי היה שגוי (לדוגמה, ע״פ 6006/13 **שוריק נ׳ מדינת ישראל** (פורסם בנבו, 6.11.2014); ע״פ 6761/14 **מדינת ישראל נ׳ רכאב** (פורסם בנבו, 8.2.2015)). בחלק מהמקרים הוא קבע עונש מחוץ למתחם שנקבע בבית המשפט המחוזי, בלא לקבוע כי הוא חורג מהמתחם (למשל ע״פ 939/13 **אכתילאת נ׳ מדינת ישראל** (פורסם בנבו, 11.11.2013); ע״פ 1505/14 **לידאוי נ׳ מדינת ישראל** (פורסם בנבו, 4.11.2014)), ובמקרים אחרים ציין בית המשפט שיקולים שאינם מופיעים בחוק (כגון עקרון ההדרגתיות או עקרון אחידות הענישה) כשיקולים לקבלת הערעור בלי להסביר אם שיקולים אלו משפיעים על המתחם עצמו או על העונש בתוך המתחם, גם אם לעיתים העונש שהוטל חרג מהמתחם שנקבע בבית המשפט המחוזי (ע״פ 6602/13

המשפט העליון לא ציין כלל בהחלטתו את המתחם שקבע בית המשפט המחוזי, אף לא בתיאור גזר הדין מושא הערעור.

שלושה עשר ערעורים נוספים (מתוכם שלושה שנדונו יחדיו) נסבו על גזרי דין שבהם בית המשפט המחוזי לא קבע מתחם. התייחסות בית המשפט העליון למקרים אלו מעניינת במיוחד. בארבעה פסקי דין מתוכם (שעסקו בשישה ערעורים שהתקבלו) ביקר בית המשפט העליון, לעיתים בחריפות, את אי־הציות של בית המשפט המחוזי, וקבע מתחם בעצמו.[85]

בשני פסקי דין נוספים מתוך ה־13 הנדונים, בית המשפט העליון גם התעלם מהפרת הדין של בית המשפט המחוזי וגם לא קבע מתחם.[86] אך את העניין הרב ביותר ניתן למצוא בהתנהלות בית המשפט בחמשת פסקי הדין הנותרים מקבוצה זו. בפסקי דין אלו בית המשפט העליון ביקר, לא אחת בחריפות, את בית המשפט המחוזי על הימנעותו מלקבוע מתחם, או על כך שהמתחם שקבע לא היה מוגדר דיו (״מספר שנות מאסר״). ואז, למרות הביקורת על הפרת החוק, בכל חמשת פסקי הדין האלה גזר בית המשפט העליון את העונש בלי לקבוע מתחם כנדרש בחוק.[87] במילים אחרות, בחמישה פסקי דין בית המשפט העליון ביקר את בית המשפט המחוזי על אי־הציות, ובו בזמן באותם פסקי דין נמנע בעצמו מלציית לחוק.

**פלוני נ׳ מדינת ישראל** (פורסם בנבו, 11.5.2015); ע״פ 707/14 **פלוני נ׳ מדינת ישראל** (פורסם בנבו, 6.7.2015) ועוד).

85 כך, בע״פ 2674/13 **מדינת ישראל נ׳ הוואש**, פס׳ 10 לפסק דינה של השופטת ארבל (פורסם בנבו, 22.1.2014) קבעה השופטת ארבל כי ״גזירת הדין, כשנעשית בסטייה מן החוק או תוך יישומו החלקי, יש בה כדי לפגוע באמון הציבור במערכת המשפט ולהעביר מסר בלתי רצוי ואף מסוכן לפיו החוק החרות אינו מחייב את בתי המשפט״; בע״פ 2148/13 **פלוני נ׳ מדינת ישראל**, פס׳ ט״ז לפסק דינו של השופט (כתוארו אז) רובינשטיין (פורסם בנבו, 16.12.2014) קבע השופט רובינשטיין כי ״באי קביעת המתחם, בכל הכבוד, לא נהג כהלכה. מצוות המחוקק היא לקבוע מתחם ענישה, וגם אם בית המשפט אינו מתלהב מכך, עליו למלא את מצוות המחוקק״; בע״פ 5653/13 **ביידון נ׳ מדינת ישראל** (פורסם בנבו, 2.1.2014) השופט זילברטל הוא שביקר את אי־הציות (ראו פס׳ 19 לפסק דינו המבהירה כי חובה היה לקבוע מתחם כאמור) אך נמנע מלקבוע מתחם ברור; בע״פ 8641/12 **סעד נ׳ מדינת ישראל** (פורסם בנבו, 5.8.2013), הביקורת נשמעה מפי השופט סולברג (ראו פס׳ 23 לפסק דינו על החובה החוקית לקבוע מתחם).

86 ע״פ 1186/15 **יונס נ׳ מדינת ישראל** (פורסם בנבו, 23.11.2016); ע״פ 1497/16 **בולוס נ׳ מדינת ישראל** (פורסם בנבו, 8.12.2016).

87 ע״פ 6917/13 **טייברג נ׳ מדינת ישראל**, פס׳ 11 לפסק דינה של השופטת ארבל (פורסם בנבו, 23.12.13) (״בהקשר זה אעיר כי מסיבה שאינה ברורה, נמנע בית המשפט המחוזי מקביעת עונשו של המערער בהתאם להוראות תיקון 113 לחוק העונשין (ואין זאת הפעם הראשונה [...]). רואה אני להסב את תשומת הלב לחובת ההנמקה הקבועה בסעיף 40יד לחוק״); ע״פ 4815/13 **מדינת ישראל נ׳ אלעוקבי**, פס׳ 12 לפסק דינו של השופט שהם (פורסם בנבו, 1.1.2014) (״הננו חוזרים ומפנים את תשומת הלב להערותינו אלה, על מנת שיקויים התהליך הקבוע בתיקון 113, כמצוותו של המחוקק״); ע״פ 4741/13 **מדינת ישראל נ׳ נעאמנה**, פס׳ 13–15 לפסק דינו של השופט (כתוארו אז) מלצר (פורסם בנבו, 10.6.2014) (״בתאריך 1.06.2012 נכנס לתוקף, כידוע, תיקון 113 [...] על פי המתווה שנקבע בתיקון 113 הליך גזירת העונש הוא תלת שלבי [...] שלב השני – על בית המשפט לקבוע את מתחם הענישה [...] במקרה דנן נמנע בית המשפט קמא הנכבד מקביעה של מתחם ענישה [...] יש איפוא מן הצדק בדברי בא־כח המערערת הטוען כי לו גזר בית המשפט הנכבד קמא את עונשו של המשיב בהתאם למסלול שהותווה בתיקון 113, קרוב לוודאי שהיה מגיע לתוצאה אחרת״). ראו גם ע״פ 396/13 **גבארין נ׳ מדינת ישראל** (פורסם בנבו, 1.8.2013); ע״פ 4152/13 **ישראלי נ׳ מדינת ישראל** (פורסם בנבו, 13.8.2014).

בשישה ערעורים נוספים קיבל בית המשפט העליון את הערעור בחלקו, לעניין ההרשעה, ולפיכך הקל גם בעונשם של המערערים לאור קביעה זו. כיוון שבמקרים אלו לא היה ניתן עוד להסתמך על מתחם הענישה שקבע בית המשפט המחוזי, לאור השינוי בעובדות שנקבע שהוכחו, בית המשפט העליון היה אמור לקבוע מתחם ענישה טרם שיקבע את העונש. אולם בחמישה מתוך השישה התעלם בית המשפט מהחובה האמורה, וגזר את הדין בלא לקבוע מתחם. מסיכום הדברים עולה כי ב־150 מתוך 206 ערעורים שבהם היה בית המשפט העליון חייב לקבוע מתחם, הוא הפר חובה זו. מכאן שהיקף הציות של בית המשפט העליון היה נמוך מאוד, כמפורט גם להלן בטבלה 6, ועמד רק על 28% מהערעורים שבהם היה עליו לקבוע מתחם.

**טבלה 6: ציות בית המשפט העליון לחובה לקבוע מתחמים**

| ערעורים שהתקבלו ושבהם בית המשפט העליון היה אמור לקבוע מתחם | האם העליון קבע מתחם | | סה״כ |
|---|---|---|---|
| | לא | כן | |
| העליון דחה את המתחם של המחוזי | 69 | 49 | 118 |
| העליון לא התייחס למתחם של המחוזי | 69 | 0 | 69 |
| המחוזי לא קבע מתחם (או שקבע מתחם שהעליון קבע שאינו מוגדר דיו) | 7 | 6 | 13 |
| העליון זיכה חלקית ולכן העובדות שלפיהן הורשע הנאשם השתנו | 5 | 1 | 6 |
| סך הכול | 150 | 56 | 206 |

כפי שהראינו לעיל, בכמה מקרים שבהם בית המשפט המחוזי לא ציית לחובה לקבוע מתחמים, בית המשפט העליון נזף בו. לאור ממצאים אלו ייתכן כי למרות רמת הציות הנמוכה של בית המשפט העליון לחוק, דרישתו מהערכאות הנמוכות לציית השפיעה עליהן והביאה לגידול במידת הציות לחוק. מהאמור לעיל עולה כי אף שמידת הציות לחוק בבית המשפט העליון הייתה נמוכה מזו של בתי משפט השלום, ייתכן שהביקורת שמתח בית המשפט העליון על גזרי דין שבהם לא נקבע המתחם הובילה לגידול הדרגתי בציות.

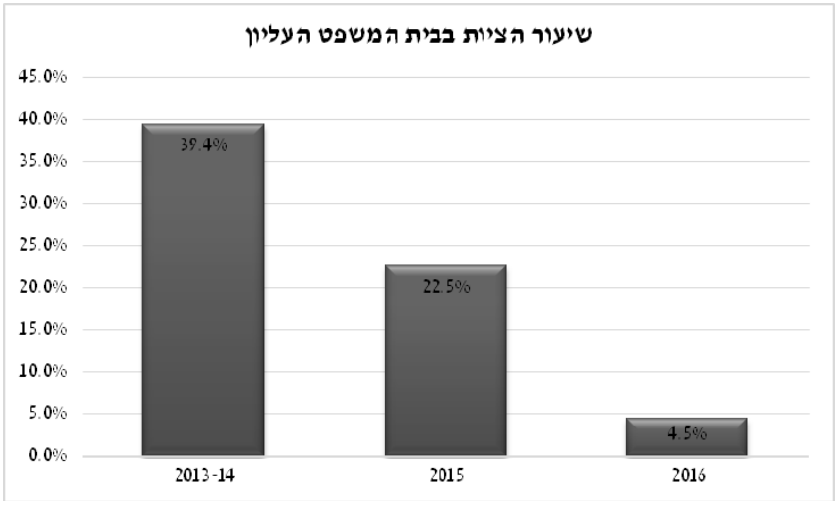
יצוין כי בדיקת מידת הציות של 16 השופטים מבית המשפט העליון שבמדגם חושפת כי אין ולו שופט אחד שנוהג דרך קבע לציית לחוק. מידת הציות הגבוהה ביותר היה של שופט שקבע מתחמים בעשרה מתוך 19 הערעורים שבהם הדבר נדרש לפי החוק (53%). המידה הנמוכה ביותר הייתה של שלושה שופטים שלא קבעו מתחמים כלל.[88] עם זאת במדגם התיקים של בית המשפט העליון, המספר הקטן של השופטים והמספר הקטן יחסית של תיקים לשופט בחלק מהמקרים אינם מאפשרים לבחון את השפעת המאפיינים של השופטים על היקפי הציות שלהם.

88 אחד השופטים דן באחד עשר תיקים שבהם היה צריך לקבוע מתחם, אחר – בעשרה, והשופטת השלישית – בשני תיקים כאלה.

**(ב) השפעת חלוף הזמן על מידת הציות בבית המשפט העליון**

לעומת הממצאים מבתי משפט השלום, בבית המשפט העליון הציות לחוק לא גדל אלא דווקא קטן ככל שחלף הזמן. כך, בשנים 2013–2014 קבע בית המשפט העליון מתחם ב־26 מתוך 66 הערעורים שבהם היה עליו לקבעו (39.4%), בשנת 2015 נקבעו מתחמים ב־25 ערעורים מתוך 111 שבהם נדרשה קביעת מתחם (22.5%) ואילו בחודשים שנדגמו משנת 2016 נקבעו מתחמים רק בחמישה מתוך 112 התיקים שבהם נדרש בית המשפט העליון לקבוע מתחם (4.5%), כמומחש בתרשים 5 שלהלן.

**תרשים 5**




בחינת ההשפעה של חלוף הזמן על הסיכוי שבית המשפט העליון יקבע מתחם, באמצעות רגרסיה לוגיסטית, מראה ממצא דומה, המתואר להלן בטבלה 7. בבדיקה זו, המשתנה הבלתי תלוי הוא משתנה רציף של חלוף הזמן בשנים (כל יום מהווה 1/365 של שנה), והמשתנה התלוי הוא קביעת מתחם בבית המשפט העליון (המקבל את הערך 0 אם לא נקבע מתחם, ו־1 אם נקבע).

**טבלה 7: קביעת מתחם בבית המשפט העליון בערעורים לעונש שהתקבלו**

| | OR( SE) |
|---|---|
| הזמן מהתיקון (בשנים) | ***0.297278<br>(0.218223) |
| קבוע | 12.551157<br>(0.625714) |

+ p<0.1; * p<0.05; ** p<0.01; *** p<0.001 N=129

השפעת הזמן נותרה מובהקת גם כאשר הוספנו 15 משתני דמה לצורך התחשבות באפקטים קבועים של 16 השופטים שבמדגם (P<0.001 ,OR=0.266873) (תוצאות אלו אינן מדווחות כאן).

# ד. דיון

## 1. השפעת גיל או ותק על הציות לחוק

כפי ששיערנו, לגיל הייתה השפעה ברורה על הציות לחוק בשנתיים הראשונות. שיעורי הציות של שופטי השלום שגילם יותר מחמישים היו נמוכים בהרבה משיעורי הציות של השופטים הצעירים יותר. ממצא זה מתיישב עם ממצאיה של פורטילו שלפיהם בעלי משרה מבוגרים יותר חשים חובה פחותה להסתמך על הכללים וההנחיות. הוא מתיישב גם עם מחקרים המראים כי אנשים מבוגרים מתקשים יותר להסתגל לשינויים במקום העבודה.[89] בבחירה בין גיל לוותק, נראה שלגיל השפעה ברורה יותר, אולם אין לשלול את האפשרות שההבדלים בשיעור הציות של השופטים המבוגרים יותר נובעים דווקא מהיותם ותיקים יותר ולא מהיותם מבוגרים יותר.

## 2. מוצא אתני ומין

בניגוד להשערות, לא נמצא ממצא באשר להשפעת המוצא האתני או המין של השופט על מידת הציות לחוק. לפחות באשר למוצאו האתני של השופט, ההסבר יכול להיות טמון בגודל המדגם, שכן נמצאה נטייה רבה יותר של שופטים ערבים לציית לחוק, אף שזו לא הייתה מובהקת.

אשר לנאשמים, נמצא כי הסיכוי שייקבע מתחם לנאשם ערבי מעט גדול יותר מהסיכוי שייקבע מתחם לנאשם יהודי, אם כי תוצאה זו אינה מובהקת. מחקרים קודמים מראים ששופטים, בייחוד שופטים יהודים, מחמירים יותר עם נאשמים ערבים.[90] ייתכן שכאשר שופט או שופטת מעוניינים להקל, הם נשענים פחות על ההליכים הפורמליים הקבועים בחוק, ואילו כאשר הם מחמירים, הם מבקשים להקפיד יותר על הכללים כדי להסביר את החלטתם. עם זאת, כיוון שלא הייתה לנו השערה מוקדמת לביסוס ממצא זה, וכיוון שממצא זה אינו מובהק, יהיה נחוץ מחקר נוסף כדי לבחון אם אין מדובר בממצא מקרי.

89 ראו למשל Niessen, Swarowsky & Leiz, לעיל ה״ש 44.

90 ראו אורן גזל־אייל, רענן סוליציאנו־קינן, גל עינב ועטאללה שובאש ״ערבים ויהודים בהליכי הארכת מעצר ראשוני״ **משפטים** לח 627 (2009); ARYE RATTNER & GIDEON FISHMAN, JUSTICE FOR ALL? JEWS AND ARABS IN THE ISRAELI CRIMINAL JUSTICE SYSTEM (1998); Guy Grossman, Oren Gazal-Ayal, Samuel D. Pimentel & Jeremy M. Weinstein, *Descriptive Representation and Judicial Outcomes in Multiethnic Societies*, 60 AM. J. POLIT. SCI. 44 (2016).

### 3. היקפי אי־הציות הגבוהים בשנים הראשונות לאחר החקיקה

כיצד ניתן להסביר את השיעור הגבוה יחסית של אי־הציות של שופטי השלום בשנים הראשונות שלאחר חקיקת החוק? אפשרות אחת היא שאין מדובר באי־ציות אלא בכך שהשופטים לא הכירו את התיקון בתחילת הדרך, וככל שחלף הזמן למדו על החובה לקיימו ואז צייתו לו. אף שייתכן שדובר בתהליך הטמעה, אנחנו סבורים שאיין לייחס את אי־הציות בתחילת הדרך לחוסר מודעות לקיומה של החובה לקבוע מתחמים. תיקון 113 עורר רעש גדול. עם חקיקתו פורסמו מאמרים רבים עליו בעיתונים ובכתבי עת מקצועיים. שופטים עסקו בו, וכפי שהראינו לעיל גם ביקרו אותו, לעיתים בחריפות. עם חקיקתו מונתה ועדה של שמונה שופטים, בראשות השופטת דבורה ברלינר, שהפיצה לכל השופטים מסמך הסבר על החוק שהיה אמור לסייע לשופטים ליישמו. אין מדובר בחוק שכוח־אל ששופטים לא שמעו עליו אלא בחלוף זמן. כל השופטים העוסקים במשפט הפלילי ידעו על חקיקתו, ועל החובה לקבוע מתחמים, שהיא ״ליבו ונשמתו של תיקון קשה ומורכב זה״.[91] לפיכך לא סביר להניח שהשופטים לא היו מודעים לתיקון ולחובה לקבוע מתחמים.

סביר יותר להניח כי השופטים, או לפחות המבוגרים שבהם, התקשו להסכים לשינוי שיצר החוק, לעומס החדש שהוא הטיל עליהם ולפגיעה שנראָה שהוא גרם לעצמאותם בקביעת גזרי הדין.[92] סביר גם להניח שבתחילת הדרך ציות לחוק היה כרוך בהשקעת מאמצים רבים, שכן דובר בחוק סבוך, שבלא בקיאות טובה בכלליו החדשים, בחריגים לכללים אלו, ובחריגים לחריגים, יישומו חייב משאבי זמן גדולים שלא היו בידי השופטים. זאת ועוד, בתחילת הדרך הכתיבה על החוק הייתה מוגבלת, ובייחוד לא היו בנמצא פסקי דין של בית המשפט העליון שהדגימו כיצד יש ליישם את הוראותיו. כל אלו הפכו את הציות לחוק להליך סבוך הדורש משאבים רבים, ולפיכך שופטים רבים העדיפו להימנע מכך. ואכן, בחינת אורכי גזרי הדין לפני התיקון לחוק ואחריו מאששת את ההשערה כי ציות לתיקון חייב את השופטים להשקיע משאבים רבים יותר מאלה שחייבה גזירת הדין בשיטה הישנה.[93]

### 5. הגידול בשיעור הציות לחוק בחלוף הזמן בבתי משפט השלום

כיצד אפוא ניתן להסביר את בחירת שופטי השלום לציית לחוק בשיעורים הולכים וגדלים ככל שחלף הזמן? הסבר אפשרי אחד טמון בהשתלמויות שופטים. כך, במהלך השנים 2012–2014 התקיימו מדי שנה שתי השתלמויות שופטים בנושא ענישה והבניית שיקול הדעת בענישה מטעם המכון להשתלמות שופטים.[94] באותה תקופה גם המכון להשתלמות

91 עפ״ג (מחוזי ת״א) 47301-01-14 **רשות המסים, היחידה המשפטית אזור מרכז ותיקים מיוחדים נ׳ פ.מ.מ. בע״מ**, פס׳ 9 לפסק דינה של הנשיאה (כתוארה אז) ברלינר (פורסם בנבו, 16.6.2014).

92 אף שספק אם מדובר בפגיעה ממשית או מדומה, שכן החוק אינו שולל מהשופט את שיקול הדעת אלא רק מכווין אותו באשר לשיקולים ולדרך ההנמקה.

93 ראו וינשל־מרגל וגלון, לעיל ה״ש 66, בעמ׳ 235 (מראות גידול של ממש במספר עמודי הפרוטוקול בתיקים שנדונו לאחר כניסת התיקון לתוקף וגידול של ממש במספר עמודי גזר הדין בתיקים שבהם לא נערך הסדר טיעון סגור לעונש).

94 הנתונים על ההשתלמויות נמסרו לכותב על ידי המכון להשתלמות שופטים.

עוזרים משפטיים ערך חמש השתלמויות בנושא הבניית שיקול הדעת בענישה. השתלמויות אלו, שהיו השתלמויות חובה לעוזרים משפטיים של שופטים העוסקים במשפט הפלילי, כללו הדרכות מפורטות על אופן כתיבת גזרי הדין לפי החוק.[95] ייתכן מאוד שהשתלמויות אלו, שהדריכו את השופטים והעוזרים המשפטיים בדבר שלביה השונים של כתיבת גזרי הדין לפי החוק, סייעו להפנמת חשיבות הציות לו. ייתכן גם שלאחר ההשתלמויות, כמו גם לאחר רכישת ניסיון, השופטים התקשו פחות בכתיבת גזר דין לפי החוק, ולכן עלות הציות לחוק הייתה נמוכה יותר מאשר בתחילת הדרך.

הסבר אחר, אך קשור לקודמו, הוא כי הציות לחוק הפך בכללו לפשוט יותר. ככל שחלף הזמן ניתנו פסיקות לדוגמה של בית המשפט העליון שהבהירו כיצד יש ליישם את החוק, והצטברה גם כתיבה אקדמית שהסבירה את הוראותיו, וכך פחתו הקשיים שנבעו ממורכבות החוק.[96] מחקר אחד אכן מלמד שאף שהתיקון הביא לתוספת של כשני עמודים באורך הממוצע של גזרי הדין, בחלוף הזמן גזרי הדין התקצרו, והפער בין אורך גזרי הדין שקדמו לתיקון לאורכם שנה אחרי כניסתו לתוקף עמד עתה על עמוד אחד בלבד.[97] זאת ועוד, אף שמידת הציות לחוק בבית המשפט העליון הייתה נמוכה, בכמה החלטות לדוגמה פירט בית המשפט העליון כיצד יש ליישם את החוק,[98] ובהחלטות אחרות נזף בבתי משפט שנמנעו מלציית לו.[99]

ממצאים אלו מלמדים כי אף שהתנגדותם של שופטים לחקיקה עשויה להביא לאי־ציות, פעולות הטמעה באמצעות השתלמויות והכוונה של ערכאות ערעור יכולות לצמצם תופעה זו ואף להעלימה, ולהבטיח שאי־הציות יהיה תופעה זמנית בלבד.

## 5. היקף הציות בבית המשפט העליון

כאמור, כשנחקק תיקון 113, אחת הטענות המרכזיות נגדו הייתה העומס שיטיל על שופטי בתי משפט השלום. כך, השופטת ברלינר, שכאמור לעיל עמדה בראש הוועדה הפנימית של השופטים שניסתה לסייע לשופטים באמצעות הכנת מסמך הסבר של הוראות התיקון, טענה כי לה לא יהיה קושי להתמודד עם התיקון, שכן בבית המשפט המחוזי היא נדרשת לכתוב רק מספר קטן יחסית של גזרי דין. הדאגה שלה הופנתה לשופטי בתי משפט השלום שכותבים הרבה יותר גזרי דין, ולעומס שהתיקון ייצור אצלם.[100]

אם בבתי המשפט המחוזיים קביעת מתחמים נדרשת רק פעמים מעטות, בבית המשפט העליון לא כל שכן. כפי שהראינו, רק במקרים המעטים שבהם בית המשפט העליון מקבל ערעור על העונש, ונמנע מלאמץ את המתחם שקבע בית המשפט המחוזי, מוטלת עליו חובה

95 הנתונים על ההשתלמויות נמסרו לכותב על ידי מרכזת ההדרכה במכון עוזמ״ת.

96 ראו למשל יניב ואקי ויורם רבין ״הבניית שיקול הדעת השיפוטי בענישה: תמונת מצב והרהורים על העתיד לבוא״ **הפרקליט** נב 413 (2013); אורן גזל־אייל ״מתחמים לא הולמים: על עקרון ההלימה בקביעת מתחם העונש ההולם״ **משפטים על אתר** ו 1 (2013).

97 ראו וינשל־מרגל וגלון, לעיל ה״ש 66, בעמ׳ 254 (גזר דין ממוצע לפני התיקון השתרע על פני 5.4 עמודים, ואילו מיד אחריו על פני 7.5 עמודים. בחלוף שנה התקצרו גזרי הדין לכ־6.5 עמודים בממוצע).

98 ראו למשל עניין **סעד**, לעיל ה״ש 63.

99 ראו לעיל ה״ש 85.

100 ראו רז, לעיל ה״ש 56.

לקבוע מתחם ענישה. לפיכך היה ניתן לצפות שבית המשפט העליון יציית להוראות אלו בחוק.

מה אפוא מסביר את שיעורי הציות הנמוכים? ברי כי רבים משופטי בית המשפט העליון לא אהבו, בלשון המעטה, את החוק, כמו רבים מעמיתיהם בערכאות הנמוכות יותר.[101] אולם מדוע שיעור ההימנעות מלציית לחוק בבית המשפט העליון היה גבוה יותר מזה שבבתי משפט השלום, אף שהשפעת התיקון על העומס של שופטי בית המשפט העליון קטנה בהרבה, שכן הם נדרשים לקבוע מתחם רק במקרים מעטים?

ניתן אולי לטעון כי החוק אינו מופנה כלל לבית המשפט העליון וכי שופטיו אינם חייבים לקיימו.[102] לדעתי אין לכך כל בסיס בחוק או בהגיון, ונראה שגם אין בסיס לעמדה כזאת בפסיקת בית המשפט העליון. ייתכן, כמובן, שכאשר בית המשפט העליון מאמץ את המתחם שקבעו הערכאות האחרות, הוא אינו נדרש לבחון מחדש מתחם זה ולנמקו, שכן נימוקי הערכאה הדיונית מספקים. מטעם זה לא דגמנו תיקים שבהם אומץ המתחם של הערכאה דלמטה. אולם באותם מקרים שבהם נמנע בית המשפט מלאמץ את המתחם, חובתו לגזור את הדין על פי הוראות תיקון 113 לשלביו. אם לא כן, ייווצר מצב שבו דווקא במקרים המעטים יחסית שבהם העונש נקבע בבית המשפט העליון לראשונה, הוא נקבע על פי הדין הישן ולא לפי הוראות החוק המעודכנות. העמדה האמורה גם אינה תואמת את פסיקת בית המשפט העליון עצמו, שבמקרים רבים דווקא קבע מתחמים כאשר סבר שהערכאות האחרות שגו ביישום החוק.

אפשרות אחרת היא לטעון כי אין מדובר בחוסר ציות מכוון אלא ברשלנות של שופטי בית המשפט העליון, או חוסר תשומת לב לחובה לקבוע מתחמים. אולם אנו סבורים שגם הסבר זה אינו סביר. ראשית, שופטי בית המשפט העליון מקבלים לידיהם גזרי דין הכוללים מתחמים, ומזכירים את המתחמים בפסק דינם. ברי כי הם ערים בעת הכתיבה לחובה לקבעם. שנית, כפי שראינו, לא אחת ביקרו שופטי בית המשפט העליון את בית המשפט המחוזי על שלא קבע מתחם עונש הולם, לעיתים בחריפות.[103] שלישית, באחד המקרים שבהם דווקא קבע בית המשפט העליון מתחם, ארבעה ימים אחרי פרסום פסק הדין הוציא ההרכב החלטה מתקנת ובה נכתב כך:

> 1. עקב תקלה שוחרר לפרסום נוסח מוקדם יותר של פסק הדין.
>
> 2. נוכח האמור בפיסקה 1 דלעיל, יתוקן פסק הדין באופן שהסיפא בפיסקה השניה לסעיף 4 לפסק הדין החל מהמילים ״ומתחם הענישה״ ועד סוף הפיסקה – ימחקו.

101 ראו לעיל טקסט ליד ה״ש 56–60.

102 יצוין כי ממצאים דומים באשר לשיעורי הציות הנמוכים של בית המשפט העליון עולים ממחקר שנערך במקביל למחקר זה ושבדק את היקף הציות בערעורים של המדינה בלבד. ראו סיגל קוגוט, אפרת חקאק ואיתמר גלבפיש ״מי מפחד מהבניית שיקול הדעת השיפוטי בענישה? על ערכאת הערעור ותיקון 113״ **משפט חברה ותרבות – משפט צדק?: ההליך הפלילי בישראל – כשלים ואתגרים** 267 (אלון הראל עורך, 2018).

103 ראו לעיל ה״ש 85 ו־87 והטקסט שלידן.

החלטה מודעת זו למחוק את המשפטים שבהם הופיע המתחם בפסק הדין, מלמדת כי היה חשוב לבית המשפט להימנע במכוון מלהיראות כמי שקובע מתחם ענישה כנדרש בחוק.[104] החלטה מתקנת מעין זו היא חריגה למדי. החלטת בית המשפט לפרסמה, אף שלא היה בה כדי לשנות את תוצאת פסק הדין, מלמדת כי לבית המשפט העליון היה חשוב להדגיש שאי־הציות לחובה לקבוע מתחם הוא מכוון.

אם כן, מהם ההסברים האפשריים לאי־הציות של שופטי בית המשפט העליון לחוק? ראשית, גם כאן הגיל עשוי להסביר את הממצא. כמעט כל שופטי בית המשפט העליון הם בני יותר מ־50. כפי שהראינו לעיל, שיעורי הציות של שופטים בגיל זה לחוק נמוכים. שנית, שלא כמו החלטותיהם של שופטי הערכאות האחרות, ההחלטות של שופטי בית המשפט העליון אינן נתונות לערעור. לפיכך ככל ששופטי בתי משפט השלום הושפעו ממנגנון הערעור בהחלטתם לציית לחוק, מנגנון זה לא השפיע על שופטי בית המשפט העליון. הסבר זה משתלב גם בממצא ששופטי השלום מיעטו לציית לחוק כאשר הם אישרו הסדר טיעון לעונש, שאז הם יכלו להניח בסבירות גבוהה שאיש לא יערער על החלטתם.[105] למעשה, באופן פרדוקסלי הביקורת החריפה שהטיח בית המשפט העליון בשופטים שלא צייתו לחוק, השפיעה ככל הנראה על שופטים מכל בתי המשפט, למעט שופטי בית המשפט העליון עצמם. שלישית, שופטי בית המשפט העליון אינם נוהגים להגיע להשתלמויות שופטים (אלא אם כן הם מוזמנים כמרצים), שלא כעמיתיהם בערכאות הנמוכות. גם מנגנון הטמעה זה של החוק ככל הנראה לא השפיע על הערכאה העליונה. זאת ועוד, העוזרים המשפטיים של שופטי בית המשפט העליון אינם מחויבים להשתתף בהשתלמויות הרלוונטיות, ואכן רק מיעוט מאותם עוזרים משפטיים השתתף באותן השתלמויות.[106]

הסברים אלו נותנים מענה גם לשאלה מדוע חלוף הזמן לא הביא להגברת הציות בקרב שופטי בית המשפט העליון. אולם הממצאים מלמדים לא רק כי הציות לא גבר עם הזמן, אלא כי שיעור הציות גם הצטמצם במרוצת הזמן. ייתכן ששופטי בית המשפט העליון סברו שעליהם לקבוע מתחמים בכמה תיקים בתחילת הדרך כדי להבהיר לשופטי הערכאות הנמוכות יותר את חובתם לקיים את החוק, וכאשר החובה הזאת הוטמעה, הם לא מצאו עוד טעם להקפיד על קיום החוק. במילים אחרות, בהיעדר מנגנון ערעור, בית המשפט העליון ציית לחוק רק כל עוד נראה לו שהדבר דרוש להטמעת החוק בקרב שופטי הערכאות הנמוכות, אולם משהוטמע החוק, לא מצאו עוד שופטי בית המשפט העליון טעם להקפיד על קיום הוראותיו.

בין שהסבר זה נכון ובין לאו, הימנעות שופטי בית המשפט העליון מלציית לחוק מעניינת בעיקר לנוכח התפקיד המרכזי של בית המשפט העליון בהטמעת החובה לציית

104 ראו ע״פ 285/13 **מוסטפא נ׳ מדינת ישראל** (פורסם בנבו, 24.10.2013), וההחלטה המתקנת מיום 28.10.2013. על החלטה זו ראו קוגוט, חקאק וגלבפיש, לעיל ה״ש 102.

105 ראו לעיל ה״ש 73 והטקסט שלידה.

106 מנתוני מכון עוזמ״ת שנמסרו לכותב עולה כי 11 עוזרים משפטיים של שופטים בבית המשפט העליון היו רשומים להשתלמויות ההדרכה הנוגעות לתיקון 113 בשנים 2012 עד 2016. כיוון שלכל אחד מחמישה עשר שופטי בית המשפט העליון יש שניים–שלושה עוזרים משפטיים, ולנוכח התחלופה הגבוהה יחסית של העוזרים, ברי שמדובר במיעוט קטן יחסית של העוזרים המשפטיים של שופטי בית המשפט העליון. יצוין שכל השופטים בבית המשפט העליון עוסקים גם בגזירת דין בפלילים.

לדין בקרב רשויות השלטון בכלל,[107] ולנוכח הביקורת החריפה שהטיח בשופטי הערכאות האחרות שנמנעו מלציית לחוק בפרט.[108]

## ה. מסקנות

מחקרים המראים כי מידת הציות של פקידות זוטרית לחוק ולדין אינה מלאה, נפוצים זה יותר משלושה עשורים. עם זאת, מחקרנו זה חושף כמה תופעות חשובות שלא נחקרו עד כה בספרות.

ראשית, המחקר מראה כי גם שופטים, כמו בעלי משרה אחרים, עשויים להפר את הדינים המופנים אליהם, ככל שאלו נראים להם שגויים, מטילים עליהם עומס או פוגעים במעמדם הפרופסיונלי, כפי שהם רואים אותו. אמנם גם מחקרים קודמים הראו כי שופטים סוטים לעיתים מהדין באמצעות שימוש נרחב בחריגים שהדין מעניק או באמצעות יישום שנוי במחלוקת של העובדות של כל מקרה ומקרה על פי הדין הקיים. אולם לעומת מרבית המחקרים הקודמים בנושא, מחקר זה מראה כי גם כאשר החוק מפורש וברור ומופנה הישר אליהם, שופטים עשויים להפר אותו במידה נרחבת, אם הוא מכביד עליהם והם אינם שבעי רצון מתוכנו. נראה כי לפחות אצל מיעוט ניכר של השופטים, האתוס המקצועי של כפיפות לחוק חלש יותר מהתפיסה הפרופסיונלית של השופטים בדבר מעמדם ותפקידם בהליך גזירת הדין.

שנית, הממצאים אינם מאששים את מרבית ההשערות בדבר השפעת מרכיבי הזהות של השופט על מידת הציות לחוק. לא נמצא קשר מובהק בין המוצא האתני או המגדר ובין מידת הציות.

שלישית, נמצא קשר חזק בין הגיל והוותק השיפוטי למידת הציות. ממצא זה מעניין לנוכח ההתעלמות של מחקרים קודמים מהקשר האפשרי בין גיל השופטים למידת הציות לכללים. מהמחקר עולה ששופטים צעירים וחדשים יותר מקפידים יותר על יישום הוראות החוק מחבריהם המבוגרים והוותיקים. נראה כי השופטים הוותיקים והמבוגרים חשו חירות גדולה יותר להתעלם מהמחוקק ולהמשיך בגישה המוכרת להם והפשוטה יותר. נראה כי גם הביקורת שלהם על החוק, על הסרבול שהוא גורם ועל העומס שהוא מוסיף לתפקידם, עודדה אותם לוותר על יישומו. ייתכן שהשופטים הצעירים, לעומתם, רצו להוכיח את יכולתם לפתח את הדין ולצלוח את המבוך הסבוך שקבע המחוקק בתיקון החוק החדש.

רביעית, שלא במפתיע, היקף הציות ירד כאשר הצדדים ערכו הסדר טיעון לעונש. כאשר נערך הסדר טיעון לעונש, תוצאת הליך גזירת הדין ידועה פעמים רבות מראש, ולכן קיום הוראות החוק כלשונן עשוי להיראות מיותר גם לשופטים המקפידים במקרים אחרים לציית לחוק. נוסף על כך ייתכן שלהערכת השופטים הסיכוי שיוגש ערעור על גזר הדין קטן יותר

107 ראו למשל עניין **דה הס**, לעיל ה״ש 1, פס׳ 10 לפסק דינו של השופט אור (בית המשפט מבקר בחריפות את העירייה על אי־ציות לדין וקובע ש״אפילו יש ממש בטענות העירייה בדבר הקשיים באכיפתן של עבירות מינהליות של הוראות כאלה ואחרות שבחוק [...] אין צורך לומר שהעירייה אינה יכולה לעשות דין לעצמה ולפעול בניגוד לחוק״).

108 ראו לעיל ה״ש 85.

כאשר הצדדים מגיעים להסדר טיעון לעונש, וכי גם מטעם זה הם מקפידים פחות לציית לחוק לאחר הסדר טיעון לעונש. ייתכן גם ששופטים סבורים כי החובה לקבוע מתחמים אינה חלה כאשר הוצג על ידי הצדדים הסדר טיעון לעונש. עם זאת, חשוב לציין כי החוק לא קבע חריג לחובה לקבוע מתחמים במקרים של הסכמה על העונש, וכי עד כה גם בית המשפט העליון הבהיר שהחובה לקבוע מתחמים קיימת גם כאשר הצדדים ערכו הסדר טיעון, שכן השופט צריך לבחון אם לאמץ את העונש המוסכם לאור מתחם העונש ההולם שעליו לקבוע בהתעלם מההסכם.[109]

כאמור, בתיקים שבהם נערך הסדר לעונש, לא מצאנו הבדל במידת הציות לחוק בין שופטים צעירים למבוגרים, אולם ייתכן שבמקרה זה גודל המדגם הקשה מציאת ממצא, שכן רק ברבע מהתיקים במדגם נערך הסדר טיעון לעונש.

חמישית, שלא כפי ששיערנו, בקרב שופטי השלום חלוף הזמן דווקא הגדיל את היקף הציות לחוק. ייתכן שהטמעת החוק, ההשתלמויות שנערכו לשופטים ולעוזרים המשפטיים והנזיפות של בית המשפט העליון בשופטים שלא צייתו לחוק הביאו לידי כך שהיקף הציות הפך בחלוף הזמן לכמעט מוחלט.

מנגד, בקרב שופטי בית המשפט העליון שיעור הציות לחוק היה נמוך, והוא הלך וקטן ככל שחלף הזמן. כנראה, היעדר מנגנון ערעור על החלטות שופטי בית המשפט העליון וחוסר אהדתם להוראות החוק, הובילו לחוסר ציות נרחב לחוק. ייתכן ששיעורי הציות הגבוהים מעט יותר בתחילת הדרך נבעו מרצונו של בית המשפט העליון לפרש את החוק למען הערכאות הדיוניות, ואולי גם להטמיעו בקרב שופטי אותן ערכאות. בחלוף הזמן, משפורסמו ההלכות המרכזיות המפרשות את החוק, בית המשפט העליון מצא פחות צורך להשקיע את המשאבים ביישומו. לחלופין, ייתכן גם שעם כניסת התיקון לתוקף בקול תרועה רמה סברו שופטי בית המשפט העליון כי תשומת הלב הציבורית או האקדמית מחייבת אותם לציית לחוק, ואילו בחלוף הזמן, משככה הסערה, גם תשומת הלב של בית המשפט העליון לחוק ולחובה לציית לו פחתה. כך או כך, ניכר כי המחויבות הנמוכה מלכתחילה של שופטי בית המשפט העליון לחוק הלכה ופחתה ככל שחלף הזמן.

מחקרים נוספים דרושים כדי להבין את תופעת אי־הציות של שופטים לחוק. במחקר זה בחרנו להתמקד באחת מההוראות הפרוצדורליות של החוק, כיוון שקל יותר להגדיר אי־ציות להוראה זו, אולם אם השופטים נמנעים מלציית להוראות טכניות ברורות, הרי יש חשש שאין הם מצייתים גם להוראות מהותיות יותר. ואכן, מחקרים אחרים מראים כי השופטים מתקשים ליישם את הדרישות החדשות של החוק להימנע מהחמרה בענישה למטרות הרתעה אם לא הוכח סיכוי של ממש שההחמרה תקדם הרתעה, לאפשר חריגה מהמתחם למטרות הגנה על הציבור או לגזור עונשים לפי שיקולי שיקומו של נאשם אם הוכח סיכוי של ממש לשיקום והעבירה אינה בעלת חומרה יתרה.[110] עם זאת, יש להתחשב בכך שמחקרים אלו מבוצעים כיום, בחלוף כחמש שנים מכניסתו של התיקון לתוקף, וייתכן שחלוף הזמן ישפיע על היקף הציות להוראות הדיוניות והמהותיות של התיקון לחוק.

109 ראו לעיל ה״ש 64.

110 לאופן שבו השופטים עוקפים את ההוראות החדשות בדבר מעמדם של ההרתעה, השיקום וההגנה על הציבור בחוק החדש ראו גזל־אייל ״חריגה ממתחם העונש ההולם״, לעיל ה״ש 65.

# Proportionality in Action:

# A Comparative Empirical Analysis of the Judicial Practice

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

Proportionality is widely accepted as one of the most important constitutional principles of our time, but despite the immense normative literature on the doctrine, there has been nearly no comprehensive empirical analysis of its application. This study presents a first empirical exploration of the doctrine, and the preliminary findings demonstrate aspects in which the practice of proportionality deviates from assumptions in the theoretical literature and several previously unrecognized variations between jurisdictions.

The proportionality doctrine serves as the definitive reasoning framework in cases presenting conflicts between human rights and other public interests in a constantly growing number of countries around the globe. Its popularity is such that it has been said that "to speak of rights is to speak of proportionality".[1] Proportionality is often cited as a premiere example of the migration of constitutional ideas and one of the defining features of global constitutionalism, due to the "viral quality" with which it has spread across the globe: originating in German jurisprudence, it has been adopted as a central constitutional feature in Canada and South Africa, and continued to countries across Europe, and from Asia to South America, with yet more countries joining in every year.[2]

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[1] Grant Huscroft, Bradley W. Miller and Gregoire Webber (eds.),PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, JUSTIFICATION, REASONING (Cambridge University Press, 2014) 2

[2] Lorrain Weinrib, "*The Post-War Paradigm and American Exceptionalism*", in: THE MIGRATION OF CONSTITUTIONAL IDEAS 84 (Choudhry ed. 2007); Alec Stone Sweet and Jud Matthews, "*Proportionality, Balancing and Global Constitutionalism*", 47 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 72, 113 (2008). One of the most recent countries to have adopted the proportionality framework is Australia, see: Anne Carter, 'Proportionality in Australian Constitutional Law: Towards Transnationalism' ZaöRV 76 (2016), 951-966; As for the recent process of adoption proportionality in India, see elaboration below, footnote 28.

Proportionality is a judicially-developed doctrine, and although a single common formulation of the doctrine does not exist, it does share a basic structure across countries. Proportionality carries a sequential structure comprised of a series of subtests, typically including four elements: the worthy purpose requirement, according to which the right limitation must be for the sake of promoting a legitimate public interest; the suitability test establishing rationally connection between the means and the public goal pursued; the necessity test inquiring whether the goal can be attained using a less rights-restricting means; and the strict proportionality test, weighing the benefit of the public policy relative to the harm caused to the right.[3]

## Proportionality in Academic Literature – The Central Conventions about the Doctrine

Considering its prominent status in constitutional law around the globe, proportionality has triggered immense scholarly interest. To date, the vast majority of literature on proportionality is normative, and generally speaking fervently divided between supporters and objectors. The heated debate over proportionality relates primarily to the relationship between proportionality and theories of rights and whether it ensures sufficient protection for rights, and the institutional ramifications for judicial authority when adopting proportionality as the standard for judicial review.[4]

Surprisingly perhaps, the theoretical underpinnings of the doctrine are far from clear or agreed upon. A recent characterization has articulated two differing theoretical accounts of proportionality, roughly categorizing them as first and second generation justifications.[5] According to the first, proportionality at its core is an optimizing exercise between rights and the other values with which they come into conflict, which flows

[3] Klatt and Meister, THE CONSTITUTIONAL STRUCTURE OF PROPORTIONALITY (2012); Alec Stone Sweet and Jud Matthews, "*Proportionality, Balancing and Global Constitutionalism*", 47 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 72, 76 (2008).

[4] See, for example: DAVID BEATTY, THE ULTIMATE RULE OF LAW (Oxford University Press, 2004); GREGOIRE WEBBER, THE NEGOTIABLE CONSTITUTION: ON THE LIMITATION OF RIGHTS (Cambridge University Press, 2009); Stavros Tsakiyaris, "*Proportionality: An Assault on Human Rights?*" 7 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 468 (2009); Kai Moller, "*Proportionality: Challenging the Critics*", 10 ICON (2012) 709; Klatt and Meister, *Proportionality – a Benefit to Human Rights? Remarks on the ICON Controversy*, 10 ICON 687 (2012).

[5] FRANCISCO URBINA A CRITIQUE OF PROPORTIONALITY AND BALANCING (Cambridge University Press, 2017). Also see, similarly: Julian Rivers, "*Proportionality and Variable Intensity of Review*", 65 CAMBRIDGE LAW JOURNAL 174 (2006).

from the nature of rights themselves.[6] According to the second account, proportionality is essentially a practice of logical reasoning, strengthening a culture of justification in which the state is required to publicly justify rights-restricting policy so that the logic and force of the justification can be tested.[7] This distinction remains largely theoretical, and the practical ramifications of the different approaches for the actual practice of proportionality have not been significantly developed.

The intricate normative debate over proportionality is speckled with assumptions and assertions pertaining to how the doctrine functions in practice. However, these seemingly factual statements are nearly never empirically grounded, but rather overwhelmingly based on a small number of well-known decisions selectively chosen to support the normative claim being made. In the proportionality literature there is often not a clear distinction between the "is" and the "ought": there are those who do not seem to distinguish between the two, perhaps assuming that the theory and practice of proportionality are perfectly aligned. Some focus on critiquing the way the doctrine is applied in particular cases,[8] while others respond to such criticism with the claim that misapplications of the doctrine do not put the principle, as such, into question.[9]

In the following paragraphs we will present an assembly of some of the central assumptions that can be extracted from the normative literature about proportionality's function in practice. This will construct the basis upon which we will present our research questions and against which our findings can then be discussed.

One of the central features of proportionality is the doctrine's structured and sequential nature: the doctrine is comprised of a number of different stages, each posing a specific and defined question, and together they amount to all the required conditions for justifying a right limitation. A court conducting proportionality analysis proceeds, by order, from one question to the next, continuing only once the previous step has been successfully passed. As a consequence, the final stage of proportionality in the strict

[6] ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS (translated by Julian Rivers, Oxford University Press, 2002); Robert Alexy, "*Balancing, Constitutional Review and Representation*", 3 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW (2005) 572.

[7] Mattias Kumm, "*The Idea of Socratic Contestation and the Right to Justification: The Point of Rights Based Proportionality Review*", 4 LAW & ETHICS OF HUMAN RIGHTS (2010) 142; Moshe Cohen-Eliya and Iddo Porat, *Proportionality and the Culture of Justification* 59 AMERICAN JOURNAL OF COMPARATIVE LAW 463 (2011).

[8] Stravos Tsakyrakis, *Proportionality: an Assault on Human Rights?* 7 ICON 468 (2009).

[9] Kai Moller, "*Proportionality: Challenging the Critics*", 10 ICON (2012).

sense which is the apex of the analysis is reached only once a measure has successfully passed all previous stages; a measure that has failed any of the previous tests is by definition unconstitutional and therefore no further discussion is needed. [10]

This structured and sequential characteristic is viewed by several supporters of the doctrine as one of its central virtues: proportionality provides the judicial decision with structure, guiding judges through the decision process and ensuring that all relevant elements are considered in the appropriate order and context. Thus, proportionality allows "judges to be analytical, by breaking one complex question into several sub questions that can be analyzed separately". [11]

An additional fundamental element in the perception of the proportionality doctrine is the centrality of balancing to proportionality, subject to the fact that the concept of balancing is itself open to varying interpretations. The centrality of balancing is so significant that in some accounts proportionality and balancing are treated as one and the same.[12] Some of the most prominent theorists of proportionality see the balancing component, as reflected in the final stage of proportionality in the strict sense, as the essence, heart and core of the doctrine. Some point to the fact that balancing is an expression of the nature of rights themselves.[13] Others view balancing as the format through which courts can engage with the morally relevant considerations for the

[10] Alec Stone Sweet and Jud Matthews, "*Proportionality, Balancing and Global Constitutionalism*", 47 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 72, 76 (2008): "if the government's measure fails on suitability or necessity the act is *per se disproportionate*; it is outweighed by the pleaded right and therefore unconstitutional… If the measure under review passes the first three tests, the judge proceeds to balancing *stricto senso*."

[11] Kai Moller, "*Proportionality: Challenging the Critics*", 10 ICON (2012) 709, 727. See also: Mattias Kumm, '*Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice*' 2 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 574, 579 (2004); Denise Reaume, "*Limitation on Constitutional Rights: The Logic of Proportionality*" (2009) 26 OXFORD LEGAL RESEARCH PAPER SERIES 1; Charles-Maxime Panaccio, 'In Defence of the Two-Step Balancing and Proportionality in Rights Adjudication' (2011) I CANADIAN JOURNAL OF LAW & JURISPRUDENCE 109, 118, referring to proportionality as a "heuristic tool for practical-moral reasoning"; Aharon Barak, 'Proportionality', in: Michel Rosenfeld and Andras Sajo (eds.) THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW (2012); Aharon Barak, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS (Hebrew edition page numbers) 558-561 (Cambridge: Cambridge University Press, 2012); David Beatty, The Ultimate Rule of Law.

[12] Stavros Tsakiyaris, "*Proportionality: An Assault on Human Rights?*" 7 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 468 (2009); GREGOIRE WEBBER, THE NEGOTIABLE CONSTITUTION: ON THE LIMITATION OF RIGHTS 55-86 (Cambridge University Press, 2009).

[13] ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS (translated by Julian Rivers, Oxford University Press, 2002); Aharon Barak, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS (Cambridge: Cambridge University Press, 2012);

decision.[14] The general assumption is that cases are ultimately decided at this, final stage.[15]

Critics of proportionality also focus on the centrality of balancing, which they see as the most problematic aspect of the doctrine. The critique of balancing can stem from objection to its ramifications for the status of rights – since balancing leads to them being treated on the same plane as other considerations, thus robbing them of their preferential status and allowing them to be balanced away.[16] Alternatively, critique of balancing can be due to its unstructured and non-constraining nature, which undermines the concept of rule of law and provides courts with unlimited discretion.[17]

As a consequence of the general consensus shared by most critics and supporters that balancing is at the center of proportionality, the opening stages of the analysis - particularly the worthy purpose and suitability requirements – are overwhelmingly perceived as threshold tests targeted at weeding out extreme outlier cases that only rarely result in failure. Although legal scholars agree that limitation analysis should not be conducted in cases in which the goal of the limitation cannot even on its face justify limitation,[18] it seems to be almost taken for granted that such cases only rarely occur, perhaps based on the assumption that policy makers generally promote legitimate public interests, and therefore such cases are objectively rare. As for the suitability requirement, references to this stage in the literature consider the bar to be met at this stage as very low, requiring merely a theoretical demonstration that the measure is capable of

[14] Kai Moller, "*Proportionality: Challenging the Critics*", 10 ICON (2012) 709; Alec Stone Sweet and Jud Matthews, "*Proportionality, Balancing and Global Constitutionalism*", 47 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 72, 87-92 (2008).

[15] Jochen von Bernstorff, "*Proportionality without Balancing: why Judicial Ad Hoc Balancing in Unnecessary and Potentially Detrimental to the Realization of Individual and Collective Self Determination*", in: REASONING RIGHTS, 72-73, "Courts which make use of the third step (ad hoc balancing) extensively tend to decide cases at this balancing stage… for these courts justice is supposed to be done at the third stage".

[16] Gregoire Webber, *On the Loss of Rights*, IN: PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, JUSTIFICAITON, REASONING 123 (CAMBRIDGE, 2014); Stavros Tsakiyaris, "*Proportionality: An Assault on Human Rights?*" 7 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 468 (2009).

[17] FRANCISCO URBINA A CRITIQUE OF PROPORTIONALITY AND BALANCING (2017) 150-154; Fredrick Schauer, "*Balancing, Subsumption and the Constraining Role of the Legal Text*" in: Mattias Klatt (ed.), INSTITUTIONAL REASON: THE JURISPRUDENCE OF ROBERT ALEXY 307 (Oxford University Press, 2012); Grant Huscroft, "*Proportionality and Pretense*" 29 Constitutional Commentary 229 (2014).

[18] These are often termed "exclusionary reasons". Mattias Kumm, *"Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement"*, in: Paulsen et. al. (eds.) LAW, RIGHTS, DISCOURSE: THEMES OF THE WORK OF ROBERT ALEXY (Hart, 2007) 131; Klatt and Meister, *Proportionality – a Benefit to Human Rights? Remarks on the ICON Controversy*, 10 ICON 687 (2012); Iddo Porat, *The Dual Model of Balancing: A Model for the Proper scope of Balancing in Constitutional Law*, 27 CARDOZO LAW REVIEW 1393 (2006).

promoting the goal to some degree, and therefore it is assumed that measures would rarely fail such a basic requirement. All in all, the two threshold stages are viewed as primarily setting the stage for the next tests in which the "real" analysis takes place. [19]

Most disagreements over the proper application of the doctrine relate to the relationship between the last two components, the necessity test and proportionality in the strict sense. This is also one of the central points in which the literature acknowledges the existence of variation between jurisdictions, in terms of which of the two is the dominant element, carrying the main burden in justifying the outcome. It has been pointed out that in the UK proportionality is applied without a distinct balancing stage, instead culminating with the necessity test, and similarly in Canada the less-restricting means test is the dominant component, leaving the final stage almost meaningless. In contrast, in German jurisprudence the majority of the significant judicial deliberation is conducted at the final, balancing stage.[20]

In light of these differences, some discussion has addressed the possible underlying causes as well as the desirability of one approach over the other. One commonly cited claim is that the Canadian model reflects a hiding or masks of balancing considerations within the necessity stage, for legitimacy purposes, as opposed to an alternate, transparent approach to balancing, [21] while others have expressed support for an

[19] For example: Paul Yowell, "*Proportionality in US Constitutional Law*", in Liora Lazarus, Christopher McCrudden, Niels Bowels (eds.) REASONING RIGHTS: COMPARATIVE JUDICIAL ENGAGEMENT (Hart, 2014): *"the tests of legitimacy and suitability are – to the extent that they are separately addressed in a case – usually treated in a cursory fashion. It is very rare for a court to hold that the means are unsuitable for reaching that aim.";* Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights? A Rejoinder to Madhav Khosla', 8 ICON 307, 308 (2010): "*although judges… pay lip service to the first two subtests, they really don't attribute much significance to them*"; Alec Stone Sweet and Jud Matthews, "*Proportionality, Balancing and Global Constitutionalism*", 47 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 72, 76 (2008) (when surveying the structure of the doctrine present worthy purpose and suitability, and then when arriving upon the necessity test state that it is "has more bite", meaning that the previous two tests do not). Also see: Julian Rivers, "*Proportionality and Variable Intensity of Review*", 65 CAMBRIDGE LAW JOURNAL 174, 195-198 (2006); Aharon Barak, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS (Cambridge: Cambridge University Press, 2012); Denise Reaume, "*Limitation on Constitutional Rights: The Logic of Proportionality*" (2009) OXFORD LEGAL RESEARCH PAPER SERIES 1, 9-11.

[20] Julian Rivers, "*Proportionality and Variable Intensity of Review*", 65 CAMBRIDGE LAW JOURNAL 174, 177-179 (2006); Dieter Grimm, "*Proportionality in Canadian and German Constitutional Jurisprudence*" (2007) 57 UNIVERSITY OF TORONTO LAW JOURNAL 383; Stone Sweet and Mathews.

[21] Guy Davidov,"*Separating Minimal Impairment from Balancing: A Comment on R. v. Sharpe*", 5 REV. CONST. STUD. (2000) 195; Dieter Grimm, "*Proportionality in Canadian and German Constitutional Jurisprudence*" (2007) 57 UNIVERSITY OF TORONTO LAW JOURNAL 383, 395-397; Aharon Barak, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS (Cambridge: Cambridge University Press, 2012)

approach to proportionality that avoids the final stage when possible.[22] What is common to both sides in the debate is that they both conceive of the doctrine as having a single dominant component, and the application of the doctrine dichotomously follows one model or the other, resulting in either the necessity test swallowing the strict-proportionality test, leaving it with no added value, or the necessity test being effectively emptied, collapsing into the strict-proportionality test.[23]

Beyond this limited debate over which of the last two stages is the dominant element in the analysis, the academic literature on proportionality has not significantly engaged with the broader question of variance in the application between countries.[24] In the vast majority of the writing on proportionality the very existence of variance is most typically ignored or glossed over, and when it is anecdotally mentioned it is treated as "a mystery worth exploring".[25] At the other extreme, a very recent claim has been made that that the application of proportionality is so radically different in every jurisdiction and so dramatically altered by local factors that any talk of a common global standard is entirely meaningless.[26]

## Empirical Analysis of the Application of the Proportionality Doctrine: Research Questions, Methodology and Research Design

As demonstrated above, the extended normative debate over proportionality is infused with assumptions regarding the practical application of the doctrine but lacks sound empirical grounding. The current research is a first attempt to empirically and

[22] Jochen von Bernstorff, "*Proportionality without Balancing: why Judicial Ad Hoc Balancing in Unnecessary and Potentially Detrimental to the Realization of Individual and Collective Self Determination*", in: REASONING RIGHTS; Bernhard Schlink, "*Proportionality*" in: Michel Rosenfeld and Andras Sajo (eds.) THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW (Oxford, 2012) 718.

[23] See David Bilchitz "*Necessity and Proportionality: Towards a Balanced Approach*" in: REASONING RIGHTS, 41.

[24] For a very recent exception, see David Kenny, "*Proportionality and the Inevitability of the Local: A Comparative Localist Analysis of Canada and Ireland*" AJCL (Forthcoming, 2019), comparing proportionality in Canada and Ireland, and claiming that local implementation of the tests makes it dramatically different to the point where practically meaningless to talk about a global doctrine.

[25] Alec Stone Sweet and Jud Matthews, "*Proportionality, Balancing and Global Constitutionalism*", 47 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 72, 164 (2008)

[26] David Kenny, "*Proportionality and the Inevitability of the Local: A Comparative Localist Analysis of Canada and Ireland*" AJCL (Forthcoming, 2019).

comparatively analyze the application of the proportionality doctrine in practice across a considerable number of jurisdictions.[27]

The research engages with two levels of comparison: the first level is the comparison between proportionality in theory and proportionality in practice, focusing on the extent to which the application of the doctrine follows or deviates from theoretical accounts. This comparison can serve to evaluate the extent to which the normative debate over proportionality is aligned with or disconnected from the actual practice of proportionality.

The second level is the comparison of the practice of proportionality between jurisdictions. Locating and characterizing variance in the application of the doctrine can help expose some of the forces effecting the application of the doctrine which have not been accounted for in the literature. In addition, the comparative perspective can expand the theoretical imagination regarding the potential application of the doctrine and reveal what specific jurisdictions may have to offer in terms of effective engagement with the doctrine, as well as shine a light on common shortcomings.

The particular focus in this paper is on the function of the doctrine's internal mechanism, namely the relationship and division of labor between the subtests and the function of the multi-stage doctrine as a whole. At the quantitative level, this translates into the role each stage plays in justifying the result, particularly with regard to justifying the striking down of means. At the qualitative level, this includes the understanding of the content that has been introduced into the individual tests, the courts' engagement with each stage and its contribution to the final outcome.

The research was designed as a combination of quantitative and qualitative comparative analysis. This mixed methodological approach was chosen in order to accommodate both the need for meaningful engagement with the substance of the decisions in order to capture the rich context of the application of proportionality, and the benefits of

[27] For an empirical analyses of proportionality in a single jurisdiction (Canada), see L.E Trakman, W. Cole-Hamilton & S. Gatien "*R v. Oakes 1986-1998: Back to the Drawing Board*" (1998) 36 O.H.L.J. 83; For a comparison of three jurisdictions, Canada, Germany and South Africa, that does not strictly follow the proportionality doctrine but rather justifications for striking down measures more broadly, see NIELS PETERSEN, PROPORTIONALITY AND JUDICIAL ACTIVISM (Cambridge: Cambridge University Press 2017); For a qualitative comparison of the application of the doctrine in two jurisdictions, see David Kenny, "*Proportionality and the Inevitability of the Local: A Comparative Localist Analysis of Canada and Ireland*" AJCL (Forthcoming, 2019); Dieter Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57 U. Tor L.J. 383.

quantifiable and comparable measures as a basis for systemic comparative analysis. The result is a combination of quantitative measures, contextualized and nuanced with qualitative insights, producing a comparable and systemic description of the judicial practice.

The analysis draws on a database of proportionality cases from apex courts, some specialized constitutional courts and some supreme courts, in six jurisdictions: Canada, Germany, Israel, Poland, South Africa and India. The first five are countries in which proportionality is a dominant constitutional principle, but diverse in terms of political backgrounds, democratic histories and legal cultures, including both old democracies and new post-communist democracies, as well as western and non-western countries. We have also chosen to include India, a country that appears to be in the process of adopting the proportionality framework. Although the Indian Supreme Court has not yet officially embraced proportionality as the general doctrine for adjudicating cases of right limitation, its method of analysis mirrors that of proportionality analysis, and the court has recently adopted the proportionality framework in the specific context of the right to privacy.[28] The practice of limitation analysis in India provides an illuminating reference point for contrast and comparison.

In each country, a case law database was created by a local researcher.[29] In Germany, Israel and India the cases were selected in a two stage process: first a textual search was conducted on the relevant case law database within a limited timeframe. In the case of Israel and Germany the search was for the term proportionality and its conjugations, and in India the search was for specific constitutional rights articles. The resulting cases were then read and screened for those fulfilling the criteria of application of the proportionality framework, or limitation analysis more broadly in India.[30] In Canada,

[28] See *Justice Puttaswamy v. Union of India* (September 26th, 2018). Generally, see Aparna Chandra, Limitation Analysis in Indian Case Law (August, 2018, on file with author); Abhinav Chandrachud, '*Wednesbury* Reformulated: Proportionality and the Supreme Court of India' (2013) 13(1) OUCLJ 191; Ashish Chugh, 'Is the Supreme Court Disproportionately Applying the Proportionality Principle?' (2004) 8 SCC (J) 33.

[29] In Canada, by Lorian Hardcastle; In Germany by Andrej Lang; In India by Aparna Chandra; In Israel by Talya Steiner; In Poland by Anna Slezdinska-Simon; and in South Africa by Richard Stacey.

[30] The **German** sample began with a search of FCC First or the Second Senate decisions (eight judges as opposed to Chamber decisions with only three judges) that contain a variation of the term "proportionality" in German, as well as the German terms "Übermaß" and "Untermaß", which are sometimes used synonymously with proportionality, in the 2000-2012 timeframe. The 368 results of the search were then read to locate those which applied the proportionality doctrine. FCC chamber decisions were excluded, due to the combination of their vast quantity and their limited decision-making authority.

Poland and South Africa the cases were selected based on a case-by-case evaluation of all cases handed down in the relevant timeframe to locate those that qualify for the criteria of applying the proportionality framework.[31] The specific timeframe was tailored per-country, primarily based on the overall volume of decisions given by the court. Thus, for courts with a low annual volume, such as Canada and South Africa, the timeframe chosen was quite long, encompassing all cases of application of proportionality since the adoption of the framework in 1986 and 1995 respectfully. However, in courts with a high annual volume, including Israel, India, Germany and Poland, the selected timespan was shorter (between 4 and 18 years), focusing on the more recent period.

The cases included in the database were then coded for the subject matter and rights invoked, as well as the outcome of each of the stages of the proportionality analysis and the final outcome.[32] The cases were also qualitatively analyzed based on a common questionnaire, covering the formulation of the tests and the way in which each stage of

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The **Israeli** sample began with a search of the "Nevo" database for the term "proportional" (מידתי), including morphological conjugations in the 2006-2015 timeframe. The 2,698 results were reviewed individually to locate those in which the outcome was based upon multi-stage proportionality analysis.

Since the Indian case law has not officially adopted the proportionality doctrine, the **Indian** sample is comprised of all cases where the Supreme Court analyzed whether there has been a limitation of one of the three most important fundamental rights: the right to equality (Article 14), fundamental freedoms (Article 19) and life and personal liberty (Article 21), and if found to be limited, whether the limitation was valid. The cases were selected using a combination of two complementary selection methods, meant to create an overall representative portrait of Indian Supreme Court limitation analysis. The database includes all Constitution Bench (5 or more judges) decisions regarding these rights from the years 2004-2013 (21 decisions out of 89 constitutional bench decisions in this time period), and all decisions regarding these rights regardless of bench size from the years 2014-2016 (77 decisions out of the 506 cases tagged as relating to these rights in the case reporter Supreme Court Cases). This twin method was employed because while Constitution Bench decisions hold the highest precedential value as to the constitutional requirements of a rights analysis, the smaller bench decisions represent the more "run of the mill" fundamental rights cases, and therefore showcase how the Court conducts rights analysis more generally.

[31] The **Canadian** sample includes all Supreme Court cases conducted a proportionality analysis since the *R v Oakes* in 1986 until the end of 2017, not including cases in which the courts borrows from the *Oakes* test but do not apply the test in the same manner (i.e. in the adjudication of aboriginal rights or claims under human rights laws). The dataset was arrived at by reading the headnote of all Supreme Court of Canada cases (2,688) from the Court's official website during this 31-year period to determine which involved the adjudication of a charter right and the application of the *Oakes* test.

The **Polish** sample includes all judgments rendered in the time period of 2010-2015 in which the Constitutional Tribunal applied the proportionality test as part of its decision, either using the word "proportionality" (or its modalities) or explicitly referred to the general limitation clause (Article 31(3) of the Constitution). The selection of the cases was based on a case-by-case study of all judgments in the defined timeframe (329 cases).

The **South African** sample includes all Supreme Court cases in which the court both found that some government conduct limited constitutional rights and went on to consider whether the limitation was justifiable in terms of section 33 of the interim Constitution or section 36 of the 1996 Constitution, beginning with the *S v Makwanyane* decision of 1995. The sample was reached based on an initial reading of all decisions (703) handed down by the Constitutional Court in the relevant time period.

[32] The coding was based on the majority of justices on the panel. Aggregating for majority of justices, as well as stage in which there were multiple decisions.

the analysis was applied, as well as general themes such as burden of proof and introduction of evidence.

Overall, the database includes 745 decisions, ranging from 98 to 172 cases per jurisdiction. Table 1 below presents the number of cases and their timeframe per jurisdiction.

**Table 1: Aspects of the Case Sample in the Database per Jurisdiction**

| **Court** | **Number of cases** | **Number of Failure Cases (Measure Struck Down)** | **Years** |
|---|---|---|---|
| Supreme court of Canada | 172 | 80 (46.5%) | 1986-2017 (31 years) |
| Constitutional Court of South Africa | 100 | 82 (82%) | 1995-2017 (22 years) |
| Supreme Court of Israel | 161 | 43 (27%) | 2006-2015 (10 years) |
| Federal Constitutional Court of Germany | 114 | 58 (51%) | 2000-2017 (18 years) |
| Constitutional Tribunal of Poland | 100 | 59 (59%) | 2010-2015 (4.5 years) |
| Supreme Court of India | 98 | 55 (56%) | 2004-2016 (13 years) |
| Total | **745** | | |

## Findings

This paper will focus on two central findings: the significance of the threshold stages of worthy purpose and suitability, and the relationship between the last two tests of necessity and strict proportionality.

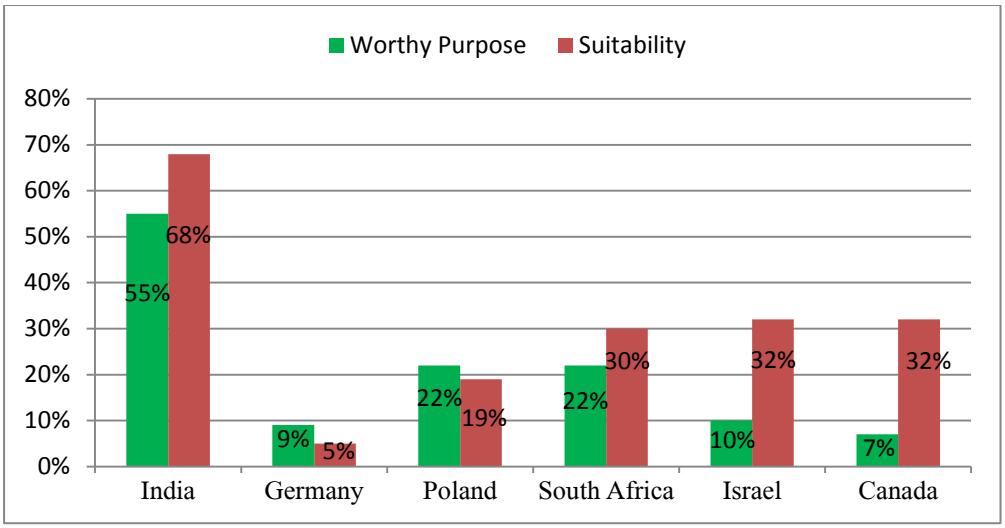
### The Significance of the Threshold Stages: Worthy Purpose and Suitability

As mentioned above, the first two stages of the doctrine are considered threshold stages that only rarely result in failure, and therefore primarily function as defining the relevant elements at play and setting the stage for the subsequent analysis. Given the overall

consensus on the marginality of these stages our expectation would be that these two stages exhibit very low failure rates across all jurisdictions.

We use the failure rate at each stage out of the overall number of failure cases in which the analysis resulted in the court striking down a measure as a quantitative indicator for the centrality of a particular test in the doctrine. Figure 1 below presents the frequency of failure of measures at the two opening stages per country analyzed.

**Figure 1: Comparative Failure Rates at the Worthy Purpose and Suitability Stages**




## Worthy Purpose

The data affirms that in several of the jurisdictions the failure rates at the worthy purpose stage are low. In Canada and Israel this is the stage with the lowest failure rate (7 and 10 percent respectively), and in Germany the rate is similarly low (9 percent). However, in South Africa and Poland the failure rate at the worthy purpose stage is surprisingly significant, amounting in both countries to 22 percent, over a fifth of all failure cases. India stands out as a distinct outlier, emphasizing a clear difference between analysis that is strongly rooted in a tradition of reasonableness review, and analysis that has transitioned to the proportionality standard.

The qualitative analysis sheds some light on the unexpected finding of significant failure rates at the worthy purpose stage in South Africa and Poland. Despite the similar quantitative failure rates, we find qualitatively that the two courts demonstrate very different approaches to this stage: while in South Africa this stage is often explicitly value oriented and serves to denounce illegitimate goals at the very opening of the

analysis, in Poland a combination of more formalistic requirements have been introduced into this stage, which emphasize its function as an outlet for striking down measures on a preliminary basis, so as to avoid the explicit evaluation of the policy content itself.

A unique factor found to contribute to the significant failure rates in South Africa is the review of apartheid-era legislation. The majority of cases (12 out of the 18.5) in which a South African measure failed at the worthy purpose stage were cases that reviewed pre-1994 legislation. In such cases, the judicial review is explicitly targeted towards delegitimizing the premises underlying legislation from the previous regime, and the Court emphasizes in its decision that legislation pursuing apartheid-era commitments to social segregation and differentiation can never provide justification for right limitations.[33] In this unique situation, part of the court's core mandate is to critique legislative goals, and it enjoys the ultimate level of legitimacy in doing so. The South African case exhibits the rare quality of actually having an external and consensual measure against which to evaluate the legitimacy of policy goals, and therefor the court is fully empowered to send an unequivocal message the kind of which is sent by failure at the worthy purpose test.

Despite being much rarer, such situations can be found in other jurisdictions as well. In reviewing antique legislation, or in cases in which there has been a significant change in society or reality, the Court seems to enjoy a high level of legitimacy, allowing it to hold that the goals and values reflected by the law are no longer considered legitimate.[34]

Although the Polish Constitutional Tribunal could be viewed as being positioned similarly to the South African Constitutional Court in the sense of practicing constitutional review following a regime change, and although it regularly reviews Communist-era policy, its approach to this category differs from that of the South African Court. A significant legacy of the communist-era were limitations of individual

[33] See, for example: *Bhe and Others v Khayelitsha Magistrate and Others* 2005 (1) SA 580 (CC); M*oseneke & Others v The Master & Another* 2001 (2) SA 18 (CC); *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC).

[34] In **Canada** this can be found in the review of very old criminal offences, as well as in the context of sexual orientation in which social change positioned the court as capable of affirming the lack of all worthy purpose. *R v Zundel* [1992] 2 SCR 713; *R v Daviault* [1994]; *Vriend v Alberta*, [1998] 1 SCR 493; *Canada v Hislop* [2007] SCC 10. In **Germany** such cases can be found in the areas of family law and professional conduct, with regard to legislation seeking to protect antiquated moral standards or outdated professional rules. See: BVerfGE 7, 377 at 410ff; BVerfGE 25, 1 at 12; BVerfGE 39, 210 at 225; BVerfGE 36, 146. In **India** this can be found with regard to colonial-era legislation or other very old legislation. See: *John Vallamattom v Union of India*, (2003) 6 SCC 611; *Malpe Vishwanath Acharya v State of Maharashtra* (1998) 2 SCC 1.

rights in executive acts, internal circulars or instructions, often issued without statutory authorization and without official publication. One of the central tools with which the Tribunal deals with this communist legacy is through the principle of "rule of law", requiring that limitations of fundamental rights be explicitly enshrined in statue.[35] Such cases most often do not even reach the worthy purpose stage, since they fail to meet this preliminary, formal requirement.[36]

Several other factors, if so, contribute to the significant failure rate at the worthy purpose stage in Poland. One such factor is the text of the limitation clause in the Polish constitution. Article 31(3) of the Polish Constitution contains a closed list of constitutional values that can be considered as legitimate grounds for limitations of constitutional rights or freedoms. The catalogue includes: security of the state; public order; natural environment; health; public morals; and constitutional rights and freedoms of other persons. While in other jurisdictions the question of whether the particular goal promoted by the policy is worthy is an open-ended question to be filled with content by the Court in light of constitutional values, the Polish Constitutional Tribunal has a more formal process of reviewing at the worthy purpose stage whether the goal pursued by the legislature fits one of the enumerated goals of Article 31(3), regardless of whether the goal might be a legitimate goal in and of itself. Although in most cases the Tribunal interprets the listed goals quite broadly and thereby manages to include most public interests under one of them, this structure of the limitation clause does lead the Tribunal at times to fail a measure at the worthy purpose test since it fails to meet one of the enumerated goals, without making a confrontational statement that the legislature's goals

[35] Case no. P 2/87 (admission to medical schools); Case no. K 25/97; Case no. U 1/86.

[36] Such cases were not included in the Polish Database, since its focus was on the courts engagement with proportionality. However, in the process of establishing the database data was collected on this point, pointing to the existence of 9 cases in the year 2013 alone (13 percent of all judgements handed down that year) in which the Tribunal reviewed normative acts issued by the executive without required statutory authorization, 7 of which concerned limitations of constitutional rights. See Case no. K 38/12 (lack of statutory regulation determining conditions for admission to public kindergartens and schools); Case no. U 2/11 (ministerial regulation determining conditions of medical examination of persons accused or suspected of crime); Case no. K 11/12 (lack of statutory regulation determining conditions of use of force by prison guards and functionaries of the Government Protection Office); Case no. P 53/11 (statutory authorization to determine payment for annual leave and cash equivalent for the period of unused leave); Case no. U 5/12 (ministerial regulation determining conditions of exercising the profession of medical physicist); Case no. K 35/12 (statutory authorization to determine conditions and method of evaluation, classification and promotion of school children and conditions of school examinations); Case no. U 7/12 (ministerial regulation determining conditions for detention of migrants).

are *per se* illegitimate. This type of outcome is more formalistically anchored in the constitutional text, and therefore its rhetoric is much less explicitly value-based.[37]

This practice of finding the goal pursued not fit the goals enumerated in the constitution, even though it is not necessarily an illegitimate goal, can be found in India as well. Article 19 of the Indian constitution includes six fundamental freedoms, including the rights to free speech and expression, peaceful assembly, association, movement, residence, and professional occupation. Each of these rights has its own specific limitation provision, stating that the State can impose "reasonable restrictions" on the right in order to meet specifically listed goals, which differ from right to right.[38] When analyzing rights limitation under Article 19, the Court begins by investigating whether the state action furthers a specified goal in the relevant limitation clause associated with that right. In several cases the Court held that the grounds for a right limitation, while not necessarily an illegitimate goal *per se*, did not match any of the expressly stated grounds for limiting the particular right.[39]

Additional failures at the worthy purpose stage in Poland concerned situations in which rights-restricting-legislation completely failed to provide any legal outlet or remedy for the individuals to whom the law applied, and the court held that such complete denial of rights without any procedural opening could not be justified by any worthy purpose.[40] Finally, the Polish tribunal has at times introduced the principle of specificity in legislative language as a requirement at the worthy purpose stage. Thus, the tribunal has held that vagueness in the wording of the law does not allow it to precisely ascertain the

[37] See, for example: Case no. K 9/11 (electoral code); Case no. K 26/96 and Case no. K 14/12 (abortion cases).

[38] Constitution of India, art. 19(2)- 19(6).

[39] See for example: *Ramesh Thapar v State of Madras* AIR 1950 SC 124, a law regulating the circulation, sale and distribution of documents, which was sought to be justified on the ground of securing 'public safety' or maintaining 'public order.' Since neither were expressly stated grounds for limiting the freedom of speech, the Court found the impugned measure invalid. Another example is *State of Karnataka v Associated Management of (Government Recognised-Unaided-English Medium) Primary and Secondary Schools* (2014) 9 SCC 485, involving the State mandating educating a child only in her mother tongue in primary and early secondary schooling, for the sake of protecting local languages and cultures, "in the larger interest of the nation." The Court held that the measure, however necessary or important, did not relate to any of the specified grounds for limiting freedom of speech, and was therefore invalid. Also see *Shreya Singhal v. Union of India* (2015) 5 SCC 1.

[40] Case no. SK 48/13 (dismissal from service; right to payment in lieu of holiday days); Case no. P 33/12 (possibility of denial of fatherhood after death of child); Case no. SK 22/11 (rejection of the cassation without the letter of formal notice); Case no. K 25/11 (communication between a person in a temporary arrest and the defense lawyer); Case no. K 21/11 (access to a court in disciplinary matters); Case no. SK 20/11 (appeal against a decision of a court of second instance on the reimbursement of costs of legal aid).

legislative goal, thus preventing the ability to evaluate whether it meets one of the enumerated goals.[41] These two additional practices of the Polish Tribunal similarly reflect a relatively formalistic, or rule-like approach to the worthy purpose test, pointing to flaws in the legislative design that deem the legislation unworthy on a preliminary basis.

The low failure rates at the worthy purpose stage in Israel, Germany and Canada generally correspond to the expectation in the literature. The qualitative analysis reveals that in a large portion of cases in these countries the scrutinized policy unquestionably promotes a legitimate purpose and the judicial analysis at this stage is therefore justifiably brief. In a subset of cases, however, the legitimacy of the policy goal is far from obvious. In such cases, the constitutional and supreme courts overwhelmingly chose to avoid failing the measure at the worthy purpose test, by using different avoidance tactics.

In Germany, for example, the Federal Constitutional Court will at times use this stage to weed out particular purposes as unworthy, while still passing the measure at this stage because it can still be based on a different, worthy, purpose. Thus, although failing in only 5 percent, the Court has pointed out an unworthy purpose in 21 percent, a practice which almost always leads to striking down the measure later on.[42] In Israel, difficulties with the policy goal will at times be pointed out at the worthy purpose stage, but instead of coming to a determination on the matter the stage will be passed despite the problems that have arose, or be left undecided considering the failure at a later stage. Thus, although only 10 percent of failure cases failed the worthy purpose stage in Israel, in an additional 12 percent of cases such "negative signaling" appeared at the worthy purpose stage, subsequently ending in failure.[43] Interestingly, this phenomena of avoidance of

[41] See, for example: Case no. K 26/96 and Case no. K 14/12 (abortion cases).

[42] BVerfGE 102, 197 at 215; BVerfGE 103, 1 at 12-14; BVerfGE 104, 357 at 365-67; BVerfGE 115, 276 at 307-08; BVerfGE 128, 226 at 259; BVerfGE 135, 90 at 119. In 84% of the cases in Germany (16 of 19) in which a single goal was struck down and upheld on another goal, the policy was ultimately struck down.

[43] See, for example: HCJ 7146/12 *Neget Adam v. Knesset* (September 16, 2013, unpublished); HCJ 7385/13 *Eitan Israel Migration Policy v. Government of Israel* (September 22, 2014, unpublished);. HCJ 616/11 *Students Association of Israel v. Government of Israel* (May 25, 2014, unpublished).

sensitive questions topics at the worthy purpose stage exists in South Africa and Poland as well, despite the significant failure rates there.[44]

Meaning, the extremely low failure rates at the worthy purpose stage are not conclusive evidence that rights-restrictions caused by the pursuing of problematic goals is exceptionally rare. At least partially, the low failure rates reflect choices made by courts not to engage with the question of legitimate purpose directly. In some of such cases the discussion at this stage is used to build up towards a failure at a later stage, while in others cases the court ultimately upholds the reviewed measure, without engaging with the question of the legitimacy of the goal, ignoring issues that arguably are worthy of debate.[45]

**Suitability**

The significant failure rates at the suitability stage are highly surprising. In all countries except for Germany this stage plays a significant role in justifying the failure of measures: 19 percent of the failure cases in Poland include a failure at the suitability stage, 30 percent in South Africa, and 32 percent in both Canada and Israel. Again India stands out as an outlier, with the rational nexus inquiry playing the most dominant role in justifying failures, with 68 percent of all failure cases failing this stage.

Qualitatively, we find that the unexpected levels of failure at the suitability stage are a result of a combination of causes. First, there are indeed cases in which the reviewed policy fails the test of rationality at the most basic level – using a common sense approach the court concludes that the means do not promote the goal, and perhaps even

[44] In South Africa this can be found with regard to legislation introduced by the current government, rather than the previous regime whose motives are easier to critique, see: *United Democratic Movement v President of the Republic of South Africa and Others* (No 2) 2003 (1) SA 495 (CC), 2002 (11) BCLR 1179 (CC); *Glenister v President of the Republic of South Africa & Others* 2009 (1) SA 287 (CC); 2009 (2) BCLR 136 (CC). In Poland avoidance at the worthy purpose test can be found in cases raising sensitive political issues, such as ban on communist symbols and the treatment of those involved in the communist regime, and the differentiation between political revenge and necessary protection of the new constitutional order. Case no. K 11/10 (totalitarian symbols ban); Case no. K 6/09 (old-age pension benefits for former security officers); Case no. K. 24/98 (lustration).

[45] In Germany see BVerfGE 135, 126; In Israel see HCJ 7052/03 *Adalah Legal Centre for Arab Minority Rights v. Minister of Interior* [2006] IsrSC 61(2) 202; HCJ 1213/10 *Eyal Nir v. Knesset Chairman* [2012] ; HCJ 2311/11 *Sabach v. Knesset* (September 17, 2014, unpublished); HCJ 3166/14 *Guttman v. Attorney General* (March 12, 2015, unpublished). In Poland see K 11/10 (totalitarian symbols ban). the measure was struck down at the balancing stage, focusing on lack of legal certainty regarding how specific elements would be interpreted, without dealing with what the actual goal was and whether it was a worthy limitation of speech; the insult of the president case, again not discussing whether there was a goal that could limit speech.

achieve the opposite.[46] In addition, several of the failures at the suitability stage can be categorized as "spillovers" from the worthy purpose stage, reflecting the unwillingness of the court to tackle an unworthy purpose head on. Instead, the court may use a claim of lack of suitability as a method for indirectly exposing the insincerity of the presented goal or proving its illegitimate nature.[47] Finally, in practice the suitability stage has often been interpreted to include the idea of extreme overbreadth. This increases the scope of cases failing under this stage to include policies so broad that they cannot be found to meet the basic standard of being rationally connected to the policy goal as pronounced, although this could be considered to fall under the necessity test.[48]

These qualitative insights into the nature of failures at the suitability test help clarify the function this stage fills in practice, and establish the suitability stage as an intermediate stage between worthy purpose and necessity, catching cases that "fell through" the worthy purpose test on the one hand, and cases that are so grossly overbroad they fail even before reaching the more refined less-restrictive means test on the other hand.

The implicit meaning of this finding, however, seems to be that the function that this stage is meant to fill by definition – investigating whether the rights-restricting means can indeed significantly promote the goal and therefore at least potentially justify a

[46] In Israel see: HCJ 2355/98 *Stamka v. Minister of Interior* [1999] IsrSC 53(2) 728; AAA 4614/05 *State of Israel v. Oren* [2006] 61(1) 211. In Poland see Case no. K 12/14 (conscience clause); Case no. SK 14/13 (costs of legal representation in cassation proceedings); Case no. P 15/12 (real estate and mortgage division). In South Africa see *Lawyers for Human Rights & Another v Minister of Home Affairs* 2004 (4) SA 125 (CC);.

[47] In **Israel** see for example: HCJ 4264/02 *Ibillin Breeders Partnership v. Ibillin Local Council* (December 12, 2006, unpublished)*;* HCJ 1030/99 *MK Haim Oron v. Knesset Chairman* [2002] IsrSC 56(3) 640; HCJ 616/11 *Students Association of Israel v. Government of Israel* (May 25, 2014, unpublished). In **Germany** see BVerfGE 17, 306. In **Poland** see Cases no. K 14/13 (access to documentation produced by internal auditors in the course of audit), and SK 7/11 (family benefits). In **South Africa** see Te*Larbi-Odam and Others v MEC for Education (North-West Province) and Others* 1998 (1) SA 745; *Minister of Home Affairs & Another v Fourie & Another* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC). In India see: *Harsora v Harsora* (2016) 10 SCC 165.
More broadly, on rationality as a technique for smoking out illegitimate motives, see Elana Kagen, "*Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine"*, 63 THE UNIVERSITY OF CHICAGO LAW REVIEW 413 (1996) ; Wojciech Sadurski, *"Searching for Illicit Motives"*, SYDNEY LAW SCHOOL LEGAL STUDIES RESEARCH PAPER 14/61 (2014) ; Richard Fallon, "*Constitutionally Forbidden Legislative Intent"*, 130 HARVARD LAW REVIEW 523 (2016); David Kenny, "*Proportionality and the Inevitability of the Local: A Comparative Localist Analysis of Canada and Ireland*" AJCL (Forthcoming, 2019).

[48] In **South Africa** see for example: *Case v Minister of Safety and Security*; *Twee Jonge Gezellen (Pty) Ltd & Another v Land and Agricultural Development Bank of South Africa t/a The Land Bank & Another* 2011 (3) SA 1 (CC). In **Poland** see the Supreme Chamber of Control case; in **Germany** see BVerfGE 17, 306; BVerfGE 55, 159; BVerfGE 100, 59; BVerfGE 79, 256. In **India** see *Shree Bhagwati Steel Rolling Mills v Commission of Central Excise* (2016) 3 SCC 643; *Ashoka Kumar Thakur v Union of India* (2008) 6 SCC 1.

limitation of rights – isn't meaningfully engaged with. Despite the relatively high failure rates at this stage, courts seem to generally refrain from enquiring after evidence to support the claim regarding the policy's capability to effectively promote the goal, instead accepting statements made by policy makers as is, even when it seems that their reasoning could perhaps be challenged. In Poland and India there is a presumption of constitutionality at this stage, thus explicitly imposing the burden on the plaintiff to prove the means unsuitable.[49] In addition, in Poland and Germany, by definition, the perspective of this test is *ex ante* – testing whether at the time of the creation the policy a reasonable legislature could have found a rational connection, and therefore the question of the actual effects of the law in practice are considered beyond the scope of this test.[50]

The South African case law seems to present a partial exception, in its relatively heightened tendency to require actual evidence of effectivity, particularly in review of policy in place for a significant amount of time, where evidence on its effectivity may be expected.[51] A number of similar examples can be found in the Israeli jurisprudence as well, in which evidence on effectivity was engaged with at the suitability stage,[52] although this is not necessarily the standard in all cases.[53]

[49] A classic example of the impact of the presumption of constitutionality in India is the case concerning the constitutionality of the death penalty. In *Bachan Singh v State of Punjab* AIR 1980 SC 898, the majority opinion held that given the presumption of constitutionality, it was on those challenging the death penalty to show that it serves no valid penal purpose and is therefore unreasonable. Since empirical evidence as well as theoretical opinion is divided on the question of whether the death penalty serves the function of deterrence, the Court held that the burden had not been discharged by the petitioners and therefore, the death penalty was constitutional.

[50] BVerfGE 30, 250 at 263; BVerfGE 39, 210 at 230; BVerfGE 30, 250 at 263; BVerfGE 118, 1 at 24; BVerfGE 67, 157 at 175; BVerfGE 25, 1 at 13; BVerfGE 30, 250 at 263. See also BVerfGE 50, 290 at 331-32; BVerfGE 113, 167 at 234; BVerfGE 123, 186 at 242.

[51] See for example: *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development & Another* 2014 (2) SA 168 (CC)*; Sandu - South African National Defence Union* 1999 (4) SA 469 (CC)*; De Lange v Smuts NO* 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC)*; S v Makwanyane & Another* 1995 (3) SA 391 (CC).

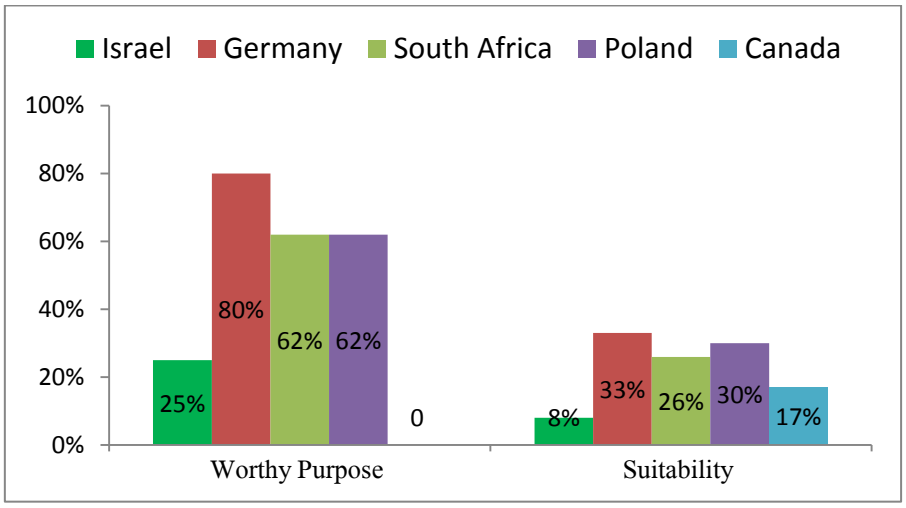
[52] See for example: HCJ 6298/07 *Ressler v. Knesset* (February 21, 2012, unpublished); HCJ 1877/14 *The Movement for Quality Government v. Knesset* (September 12, 2017, unpublished); HCJ 4542/02 *Kav Laoved v. Government of Israel* [2006] IsrSC 61(1) 346; HCJ 7146/12 *Neget Adam v. Knesset* (September 16, 2013, unpublished).

[53] In Israel, see HCJ 2605/05 *Academic Center of Law and Business v. Minister of Finance* [2009] IsrSC 63(2) 545*;* HCJ 2150/07 *Abu Safiyeh v. Minister of Defense* [2009] IsrSC 63(3) 331; HCJ 3969/06 *Dir Samet Village Council v. Commander of IDF in the West Bank* (October 22, 2009, unpublished). In addition, ongoing reluctance to require evidence on the effectivity of house demolitions for deterrence of terrorism, CJ 2006/97 *Ghanimat v. IDF Central Command* [1997] IsrSC 51(2) 651. See also HCJ 7040/15 *Hamad v. Commander of IDF in the West Bank* (November 12, 2015, unpublished), Justice Solberg, at para. 1. Although recent statement that evidence will be required in the future: HCJ 8091/14 *Centre for the Defence of the Individual v. Minister of Defence* (December 31, 2014, unpublished).

### Threshold Stages and Termination Rates

A complementary quantitative measure is the rate of termination of the analysis after a failure at each stage. While the failure rates in Figure 1 measure the extent to which the two threshold tests take part in justifying the failing of the measure, the termination rates in Figure 2 show whether failure at these stages are in themselves sufficient to justify the final outcome, or whether the measure needs to fail an additional subtest to support this finding. This measure sheds further light on the role played by the worthy purpose and suitability tests in the overall structure of limitation analysis.

**Figure 2: Comparative Termination Rates at Worthy Purpose and Suitability**[54]




At the theoretical level, the different stages are all requirements of proportionality, and therefore a failure at one of the stages by definition should bring the analysis to an end. Figure 2 shows that the termination rates at the worthy purpose test are relatively high in South Africa, Poland and Germany. Meaning, finding the reviewed policy to fail the worthy purpose requirement is considered a blow significant enough for the analysis to come to an end. Moreover, the failure at the preliminary worthy purpose stage may be shaped deliberately for the sake of avoiding substantial limitation analysis, as has been demonstrated in some cases in Poland. Although the termination rate is not 100 percent, these finding supports the conclusion that this stages is viewed as a significant component in South African and Polish jurisprudence. In Israel and Canada in contrast, the termination rate at the worthy purpose test is surprisingly low, demonstrating that this

[54] Considering that limitation analysis in India does not currently follow the structured proportionality framework, the analysis in India is not expected a specific order and terminate after a failure, and therefore India is not included in the termination rate measure.

stage does not carry independent standing in these countries and requires a combination with at least one additional failure. Germany is unique, in the sense that failures at the worthy purpose are extremely rare, but to the extent that they occur they are considered sufficient.

As for the suitability test, Figure 2 shows that in all jurisdictions the courts overwhelmingly tend to continue their analysis after failure. The numbers are especially telling with regard to Israel and Canada: While roughly one third of the cases that fail the proportionality test include a failure at the suitability stage, the Israeli and the Canadian Supreme Court virtually never rely exclusively on the suitability test to strike down a law. Hence, the quantitative analysis shows that failures at the suitability stage are not considered to suffice to justify a judgment of disproportionality, and is hardly ever dispositive of a case on its own.

The low termination rates at the suitability stage strengthen the observations made above, regarding the nature of failures as the suitability stage. For one, they support the existence of some blurring between the suitability and necessity stages, both being based on a finding of overbreadth, will often lead to continuation of the analysis past the suitability stage, to make the point of overbreadth at the necessity stage as well, thus concluding that the overbreadth not only undermines the connection of the means to the goal, but also does not constitute a less-restricting means. An addition possibility is that courts may tend to continue the analysis after failure at the suitability stage since the necessity stage allows the court to frame its conclusion in a positive manner: although the measure as currently designed is being struck down, but an alternative, less-restricting formulation would be considering proportional. Continuing to the necessity stage can give the court some power over framing what the reaction should be and how the policy should be redesigned.

In evaluating the role played by both the worthy purpose and suitability stages within the proportionality framework, the contrast to India is illuminating. India, as detailed above, has not yet comprehensively adopted the proportionality framework, although it has stated that its analysis mirrors the elements of proportionality analysis.[55] The quantitative

[55] See eg, *Om Kumar v Union of India* (2001) 2 SCC 386; *Indian Airlines Ltd v Prabha D. Kanan* (2006) 11 SCC 67; *Teri Oat Estates (P) Ltd v UT, Chandigarh* (2004) 2 SCC 130; *Sahara India Real Estate Corporation Ltd v SEBI* (2012) 10 SCC 603; *MP Housing and Infrastructure Development*

data demonstrates that the justification of failures in India is dominated by the elements of worthy purpose and rational nexus, with failure rates of 55 and 68 percent respectively, while narrow tailoring and balancing considerations serve strictly as additional justifications rather than independent bases for failure. One possible explanation that may account for part of this significant difference is that the Indian Supreme Court may be dealing with objectively a higher proportion of cases lacking a worthy purpose or basic rationality in comparison to the other countries analyzed in this study. An alternative or complementary explanation may be that the Indian Supreme Court, coming from a UK based tradition of *Wednesbury* reasonableness standard of review in which scrutiny of purpose and rationality of the means are the core of the analysis, has a higher comfort level critically engaging with these tests and framing failures in these terms. An expectation may be that with the adoption of a more formalized structure of proportionality analysis, decisions which previously might have been framed in terms of failure at worthy purpose and rational nexus might begin to shift towards necessity and balancing type of reasoning.

**The Division of Labor between Necessity and Strict Proportionality**

As described above, the majority of the literature on proportionality focuses on the final, balancing stage, and treats this stage of the analysis as the core element of the doctrine. However, an alternate model of proportionality has been pointed out to exist, in which the core element is the necessity test, and different justifications have been brought for the advantages of one relative to the other model.[56] Overall, though, the approaches all seem to present a binary choice between one test and the other.

Our findings regarding Canada and Germany support the identification of two distinct models discussed in the literature. However, they also expose the existence of a third, previously unrecognized model which includes significant use of both the necessity test and the strict proportionality test, jointly. Figure 3 below presents the failure rates at the necessity and strict proportionality stages for each of the six countries analyzed.

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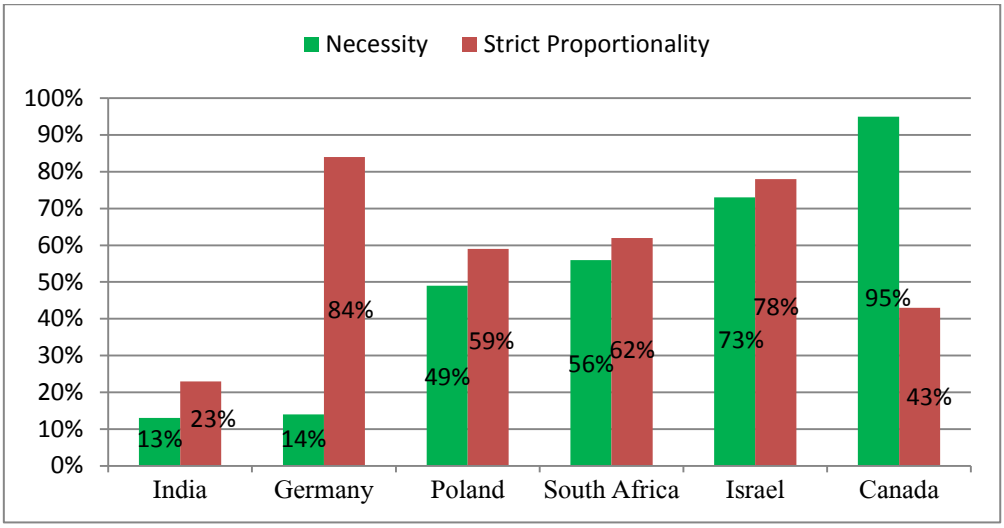
*Board v B S S Parihar* (2015) 14 SCC 130; *Modern Dental College and Research Centre v State of Madhya Pradesh* (2016) 7 SCC 353.

[56] Julian Rivers, "*Proportionality and Variable Intensity of Review*", 65 CAMBRIDGE LAW JOURNAL 174 (2006); Alison Young, *Proportionality is Dead: Long Live Proportionality!*, in: Grant Huscroft, Bradley W. Miller and Gregoire Webber (eds.),PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, JUSTIFICATION, REASONING 43 (Cambridge University Press, 2014).

The German data indeed demonstrates that as expected, the majority of failure decisions (86 percent) include failure at the stage of proportionality in the strict sense, and in 65.5 percent of failure cases this is the sole basis for failure. The necessity stage does not play a significant role in these decisions, with only 14 percent of the failure cases including a failure at that stage. In contrast, in Canada the vast majority (95 percent) of failure decisions include a failure at the less impairing means test, whereas the proportionality in the strict sense stage played a significantly lesser role, with only 40 percent of the failure cases including a failure at this stage. It seems fair to say that the Supreme Court of Canada has effectively relegated the strict proportionality test to a residual stage that is never determinative of the outcome of the proportionality analysis.

**Figure 3: Comparative Necessity and strict Proportionality Failure Rates**

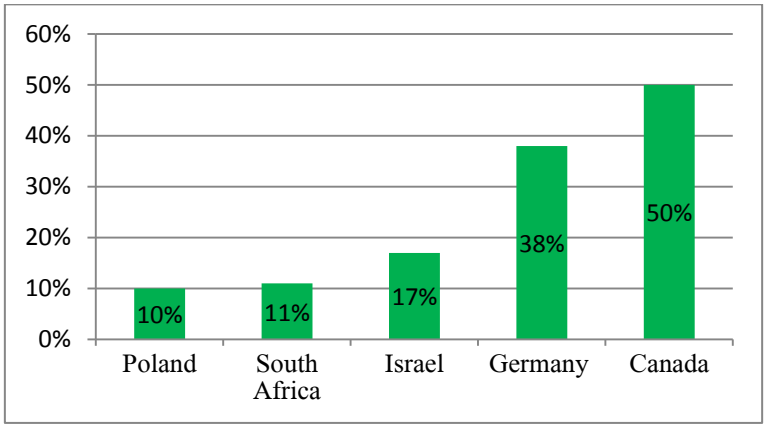



In the cases of Germany and Canada the dominance of one of the elements – necessity or strict proportionality – comes at the expense of the other element. Thus, in Canada, the centrality of the less impairing means test leads the discussion at the stage of proportionality in the strict sense to be either non-existent (this stage is not discussed in 60 percent of the failure cases), or extremely brief and repetitive, serving primarily as a conclusion of the Court's argument. On the other hand, in the German case law the necessity stage is skipped entirely in 20 percent or merely glanced over in 25 percent of all cases, and even when it is significantly analyzed it is narrowly interpreted thus essentially deflecting the discussion to the final stage of strict proportionality.

However, an unexpected finding is the existence of an integrated or interim model, which does not correspond with the two traditionally recognized models. In this third model both the necessity stage and the stage of proportionality in the strict sense play significant roles in supporting failure decisions. In the countries that can be seen as part of this model the failure rate at the necessity stage is significant, ranging from 49 percent in Poland, to 56 percent in South Africa and 73 percent in Israel. However, this significance does not translate, as it does in Canada, into a marginalization of the stage of proportionality in the strict sense, but rather the opposite – the necessity stage, with all its significance, still plays a supporting role vis-a-vis the strict proportionality test. This stage remains the final accord in the majority of failure decisions, with 60 percent failure rate in Poland, 62 percent in South Africa and 78 percent failure rate in Israel.

The termination rates further clarify the relationship between the two elements of the analysis. Figure 2 below measures whether the constitutional and supreme courts in the countries analyzed terminate their proportionality analysis after a failure at the necessity stage. It indicates the relative strength of the necessity test by showing to what extent courts are willing to exclusively base their overall judgment of disproportionality on a failure at the necessity test without continuing their analysis to the strict proportionality stage. The data in Figure 2 shows that the Israeli Supreme Court, the South African Constitutional Court, and the Polish Constitutional Tribunal rarely terminate their proportionality analysis after they deemed a measure to fail the necessity test (Poland: 10%, South Africa: 11%, Israel: 17%). Instead, they typically continue their analysis on to the strict proportionality test. This practice is contrasted by the approach of the Canadian Supreme Court in which the necessity test is generally dispositive of the overall proportionality judgment and in which the proportionality analysis ends in every other case after a failure at the necessity test.

**Figure 4: Termination of Analysis after Failure at the Necessity Stage**[57]




At first glance, the data in Figures 3 and 4 might seem paradoxical: On the one hand, the necessity test forms an important component of the proportionality practice of the courts in Israel, Poland, and South Africa. If a measure is deemed disproportionate, this finding will, amongst others, be based on the necessity test at least in every other case (South Africa: 56%, Poland: 49%), or in almost three out of four cases (Israel: 73%). On the other hand, a failure at the necessity stage is rarely dispositive of the overall judgment of disproportionality (Poland: 10%, South Africa: 11%, Israel: 17%). In other words, the conclusion that a measure is disproportionate will typically be based jointly on the necessity test *and* on the strict proportionality test (and to some extent on the suitability test).

This finding is significant considering that in the literature, significant failure at the necessity stage has been viewed as an attempt by the court to avoid explicit value-based balancing, for legitimacy reasons.[58] We find that in Israel, South Africa and Poland significant use is made of the necessity stage, and it cannot be explained as attempting to avoid balancing, since these courts choose to engage with balancing voluntarily, even though doctrinally-speaking they aren't required to.

The qualitative analysis of the dynamic between the stages in these countries demonstrates that the meaning of this finding may differ in Israel and South Africa as opposed to Poland. In South Africa and Israel the cases of dual use of both necessity and

[57] Considering that limitation analysis in India does not currently follow the structured proportionality framework, the analysis in India is not expected a specific order and terminate after a failure, and therefore India is not included in the termination rate measure.

[58] Dieter Grimm, "*Proportionality in Canadian and German Constitutional Jurisprudence*" (2007) 57 UNIVERSITY OF TORONTO LAW JOURNAL 383.

strict proportionality in justifying failures is generally based on a meaningful engagement with both stages, thus creating a basis of two separate rationales for these failures. The necessity stage demonstrates that the chosen policy is excessive and can be narrow tailored, that alternate measures exist in reference to other areas of law or in comparative law, or even that the existing policy can be left in place, with no need for the amendment. Nonetheless, the additional engagement with the balancing stage allows the court to go beyond a relatively factual evaluation of policy design and policy alternatives, sharing the value-based underpinnings of its decision.[59]

The finding of such an interim model is less surprising in the case of South Africa. It has been pointed out that the South African Court is known to have adopted what has been termed a "global" or "holistic" approach to proportionality analysis, according to which all elements must be taken into consideration in reaching the outcome. [60] The significance of both the necessity and strict proportionality in justifying a failure outcome could be seen as coherent with this declared approach, that the analysis should not be based on a failure at a single element. However, this South African model of application of proportionality is generally treated as a unique and outlier approach. It has even been explicitly rejected by Aharon Barak in his treatise,[61] and therefore the findings regarding Israel are unexpected, and particularly intriguing.

In contrast, in Poland, the practice of failure at both the necessity and strict proportionality stages seems to be a reflection of a different dynamic: a significant level of blurring between these two tests. In a significant number of cases the two stages seem to be interpreted by the court very similarly. The overall emphasis in Polish proportionality analysis is on the prohibition of excessiveness. Following this general idea, the most common type of reasoning pattern includes the court briefly stating at the necessity stage that the law under review goes beyond necessary to secure the policy goal, and then goes on to justify this conclusion using language of the strict

[59] In Israel see, for example: HCJ 8276/05 *Adalah Legal Centre for Arab Minority Rights v. Minister of Defence* [2006] IsrSC 62(1) 1; HCJ 4124/00 *Yekutieli v. Minister of Religious Affairs* [2010] IsrSC 64(1) 142; HCJ 2887/04 *Abu Madigam v. Israel Land Administration* [2007] IsrSC 62(2) 57; HCJ 7146/12 *Neget Adam v. Knesset* (September 16, 2013, unpublished); HCJ 2577/04 *El Khawaja v. Prime Minister* (July 19, 2007, unpublished). Need SA examples.

[60] Section 36(1) to the constitution; *S v Manamela & Another* 2000 (3) SA 1 (CC), para 32; *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC) para 18; Stu Woolman and Henk Botha, 'Limitations' in Woolman and Bishop (eds) CONSTITUTIONAL LAW OF SOUTH AFRICA (Juta, 2005, 2nd edn.) 94.

[61] Aharon Barak, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS (Hebrew edition page numbers) 172 (Cambridge: Cambridge University Press, 2012)

proportionality stage, namely that the burden imposed on individual is excessive in relation to the benefit of the law. Such cases tend to primarily deal with lack of procedural guarantees or lack of safeguards against administrative abuse. The result seems to be that the court does not significantly engage with analysis of alternatives at the necessity stage, and limits its focus on excessiveness at the strict proportionality stage as well.

Overall, the findings display a significant level of variance between countries with regard to the application of the last two stages of the doctrine, from models relying primarily on one or on the other to justify failures (such as Germany and Canada), to using both in a way that is essentially identical and therefore limits the full potential of each (Poland), as well as an additive model of using two types of reasoning to ultimately justify the result (Israel and South Africa). However, the countries do converge in the sense that it is rare that a policy is struck down solely on the basis of a failure at the strict proportionality stage, with Germany emerging as an outlier rather than the rule it is often perceived to be.

## Discussion

In the following section we will offer three reflections on the findings presented above, and the ways in which they challenge some of the basic tenets regarding proportionality analysis.

The first reflection relates to the interaction between two main characteristics of proportionality analysis: its sequential nature on the one hand, and the centrality of the balancing component to proportionality on the other. Although these two elements are presented in the literature side by side, there is some tension between the two: emphasizing the sequential nature means viewing every stage as filling a distinct and meaningful role, while considering the final strict proportionality stage to reflect the doctrine's essence diminishes the significance of the earlier stages. Since the theoretical literature on proportionality overwhelmingly emphasizes the importance of the final stage, this then comes at the expense of the previous stages, which are generally viewed as merely organizing the analysis for the sake of the final resolution.[62] Our findings

[62] Aharon Barak, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS (Hebrew edition page numbers) 425 (Cambridge: Cambridge University Press, 2012); Denise Reaume, "*Limitation on Constitutional Rights: The Logic of Proportionality*" (2009) 26 OXFORD LEGAL

provide a more nuanced account of each of these characteristics separately, as well as the relationship between them.

The German practice clearly leans towards the centrality of the final strict proportionality stage, at the expense of significant engagement with the earlier stages of the analysis. This practice indeed raises doubts regarding the real significance of the doctrine being made up of four different subtests. In many cases the FCC tends to pass the reviewed measure through the different stages with little analysis, particularly at the suitability and necessity stages, which are skipped entirely in approximately one quarter of cases.

Surprisingly however, in the jurisdictions other than Germany the majority of failures are not based solely on a failure at the strict proportionality stage. This does not mean, however, that the strict proportionality stage is not central to proportionality in these jurisdictions: its significance is reflected in the strong tendency to continue the analysis to the final stage, which is exhibited in all countries with the exception of Canada. This finding generates the possibility of a new understanding of balancing's centrality to proportionality, not as the sole basis of justification, but rather as the ultimate "finishing accord" for the analysis, without which the outcome is not fully justified. This refined definition of balancing's centrality does not diminish the role of the previous stages, and does not erode the significance of the sequential structure. The nature of balancing itself is then also subsequently altered: rather than balancing standing independently after all preliminary questions have been cleared away,[63] balancing is actually often a concluding exercise, drawing heavily upon the flaws that have been previously located throughout the stages of the analysis.[64]

The doctrine's sequential structure also gains a new and refined meaning in light of the findings. Contrary to the theoretical conceptualization, in reality the stages often do not function separately: interactions take place between the stages and some blurring between them occurs. Thus, the suitability stage plays a supporting role to the question of worthy purpose; the investigation of overbreadth overlaps between suitability and necessity; necessity and strict proportionality can both involve evaluation of alternatives

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RESEARCH PAPER SERIES 1; Stavros Tsakyrakis, "*Proportionality: An Assault on Human Rights? A Rejoinder to Madhav Khosla*" 8 ICON 307, 308-309 (2010).

[63] Alec Stone Sweet and Jud Matthews, "*Proportionality, Balancing and Global Constitutionalism*", 47 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 72, 76 (2008); Reaume, ibid.

[64] And see Mattias Kumm, "*The Idea of Socratic Contestation and the Right to Justification: The Point of Rights Based Proportionality Review*", 4 LAW & ETHICS OF HUMAN RIGHTS (2010) 142;

and the idea of excessiveness; and the analysis does not tend to come to a stop mid-way after a single failure, but rather subsequent stages are still engaged with to further support the outcome. These practices point to a more holistic application of the doctrine: rather than analyzing each stage independently, bringing it to resolution and then moving it aside, each stage adds a perspective that feeds into the remaining analysis, so that analytical work done in one stage can be carried over and be resolved at a subsequent stage.

This interpretation of the sequential structure could express a more integrative understanding of the doctrine, which perhaps better captures its full potential. For example, allowing the suitability stage to serve as a supporting test for worthy purpose can significantly bolster the court's ability to "smoke out" illegitimate motives. However, this approach can also have the effect of curtailing the clarity of the judicial message, since it may be less clear what the precise nature of the flaw that led the measure to be struck down is, and therefore what type of amendment would remedy the flaw. Application of proportionality in this manner may somewhat undermine the power of the doctrine to guide future policy, which is an important function of judicial reasoning.

A final insight into the status of the balancing component arises from the findings regarding the dynamic between the last two stages, necessity and strict proportionality. While the main claim in the literature is that courts that significant base failure outcomes on the necessity stage do so as an attempt to mask balancing considerations,[65] our findings show that this cannot be the sole explanation, considering that Israel, South Africa and Poland engage significantly with the necessity test, and then go on to engage explicitly with balancing as well. The dual-failure pattern at both the necessity and strict proportionality elements may reflect the recognition of the added value of each of the stages, the flip side of which is the realization of the weaknesses of each. A decision based solely on necessity analysis risks criticism that the court lacks the institutional capacity to evaluate comparative effectiveness of policy alternatives, whereas a decision based solely on strict proportionality risks critique of the validity of the scale for determined the comparative weight of benefit and harm. Although in principle the court could end its analysis after failure at the necessity stage, the logic of the balancing stage

[65] Dieter Grimm, "*Proportionality in Canadian and German Constitutional Jurisprudence*" (2007) 57 UNIVERSITY OF TORONTO LAW JOURNAL 383; David Kenny, "*Proportionality and the Inevitability of the Local: A Comparative Localist Analysis of Canada and Ireland*" AJCL (Forthcoming, 2019).

is generally viewed as contributing to the analysis and strengthening the justification and is therefore included despite not being doctrinally required. However, notwithstanding the added power the balancing reasoning carries, the fact that the majority of the analyzed courts do not tend to base their justification solely on the balancing stage can reflect that its persuasiveness is still understood to be greater when combined with additional failures.

The insights gained from the empirical analysis regarding the actual nature of the sequential structure and the relationship of the final stage of the analysis to the previous stages can enrich the ongoing debate over the function proportionality fills. In our view, the findings demonstrate that in several jurisdictions proportionality is not practiced primarily as an optimization exercise between conflicting values, but rather as a method for evaluating the sincerity and persuasiveness of the state's justification for the right limitation.[66]

A second reflection on the findings relates to the shortcomings exposed in the operation of the threshold stages, demonstrating that courts are not always utilizing the full potential of these stages. The literature has placed significant theoretical responsibility on the worthy purpose stage as a gate keeper, preventing different types of purposes from even entering justification analysis.[67] However, the willingness to point out the unworthiness of antiquated policy or policy of a previous regime in the case of South Africa only draws attention to the avoidance techniques applied when faced with problematic or controversial contemporary policy motivations. In practice, in a significant number of cases across jurisdictions this stage is brushed over rather than being significantly engaged with. At times this reluctance can be attributed to heightened political sensitivity. In others this may be a side effect of the sequential structure: since there are three more stages to the analysis, there may not be a particular sense of

[66] Mattias Kumm, "*The Idea of Socratic Contestation and the Right to Justification: The Point of Rights Based Proportionality Review*", 4 LAW & ETHICS OF HUMAN RIGHTS (2010) 142; Moshe Cohen-Eliya and Iddo Porat, *Proportionality and the Culture of Justification* 59 AMERICAN JOURNAL OF COMPARATIVE LAW 463 (2011); NIELS PETERSEN, PROPORTIONALITY AND JUDICIAL ACTIVISM (Cambridge: Cambridge University Press 2017); Julian Rivers, "*Proportionality and Variable Intensity of Review*", 65 CAMBRIDGE LAW JOURNAL 174 (2006).

[67] Mattias Kumm, *"Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement"*, in: Paulsen et. al. (eds.) LAW, RIGHTS, DISCOURSE: THEMES OF THE WORK OF ROBERT ALEXY (Hart, 2007) 131; Klatt and Meister, *Proportionality – a Benefit to Human Rights? Remarks on the ICON Controversy*, 10 ICON 687, 690 (2012); Iddo Porat, *The Dual Model of Balancing: A Model for the Proper scope of Balancing in Constitutional Law*, 27 CARDOZO LAW REVIEW 1393 (2006).

"urgency" to conduct a rigorous analysis at the very first stage. Instead, the purpose is defined at a high level of abstraction and passed, marginalizing the contribution of this stage.

Shortcomings have also been located in the function of the suitability stage. Despite the fact that the failure rates at this stage are higher than expected, the analysis demonstrates that the suitability stage functions as an intermediate stage between worthy purpose and necessity, sharing themes from both of these stages. This can explain why despite the failure rates being significant, the termination rates are exceptionally low: this stage does not truly function as an independent test. Courts generally accept government's factual assertions regarding the function of the policy on their face, even in cases of policy that has already been deployed and for which an expectation to present actual data on its achievements could be expected. In our view, an integrative conception of proportionality in which each and every stage of the analysis is taken seriously and meaningfully engaged with while maintaining connections and feedback between the stages can improve the quality of the judicial practice and fully exploit the analytical potential inherent in proportionality analysis.

The third and final reflection relates to the nature of the interaction of the local practice with the global framework. Proportionality has been adopted by courts that are very differently situated in terms of their history and legal culture, role definition, legitimacy and power, and yet the concrete question of how these factors interact with the framework and come to play in the application has not previously received any significant attention. Different views have been voiced on the universalism versus localism divide in the legal scholarship: On the one hand, proportionality analysis is viewed as the ultimate example of global constitutional law, a commonly applied framework based on a similar structure and language.[68] On the other hand it has been recently argued that there is no global meaning of proportionality, but rather it is a

[68] Alec Stone Sweet and Jud Matthews, "*Proportionality, Balancing and Global Constitutionalism*", 47 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 72, 74-77 (2008); Nevertheless, it has been recognized that the doctrine is exceptionally flexible, thus allowing individual courts to input their local interpretations and values. See Julian Rivers, "*Proportionality and Variable Intensity of Review*", 65 CAMBRIDGE LAW JOURNAL 174, 203 (2006), Proportionality as a "flexi-principle"; Aharon Barak, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS (Hebrew edition page numbers) 210-211 (Cambridge: Cambridge University Press, 2012).

rhetoric that "links very different and divergent practices, masking the pervasive influence of local values in the guise of an international framework".[69]

Our comparative analysis provides some initial insight into the ways in which the local factors come to bear, including specific tools that individual courts gravitate towards and tools they shy away from, the type of rhetoric they are most comfortable with and justification patterns they adopt.

A most illustrative example are the different approaches exhibited at the worthy purpose stage. Three of the analyzed jurisdictions meaningfully engage with this stage, but each differs in their precise interpretation and application. While the South African court engages openly with value based evaluations of purposes, the Polish Tribunal has interpreted this stage rather formalistically focusing on matching the constitutional text or on concepts of specificity or lack of all legal safeguards, and the Indian court makes significant use of this stage in various ways. Each of these patterns of engagement can be tied to characteristics unique to the particular court, be it the special position of the South African Constitutional Court in reviewing apartheid-era legislation, the role played by the Polish tribunal in the regime transition by introducing the formal concept of rule of law which emphasized formal requirements of rulemaking over substantive requirements, or be it the UK tradition of reasonableness review in the Indian jurisprudence.[70] On the other hand, our analysis also reveals a significant level of convergence between jurisdictions: even the deviations from theory and shortcomings in application are often surprisingly similar.

These preliminary findings can open the way for a more detailed study of the nature of local interactions with the global framework, which often reveal themselves clearly only when contrasted comparatively. Such findings could allow chipping away at the currently monolithic normative debate over proportionality, without necessarily ending up at the other extreme of declaring the commonality of the framework to be meaningless. Through contextualization of the discussion, new nuance can be introduced into questions regarding the doctrine's strengths and weaknesses. By singling out factors

[69] David Kenny, "*Proportionality and the Inevitability of the Local: A Comparative Localist Analysis of Canada and Ireland*" AJCL (Forthcoming, 2019)

[70] And see Bomhoff, on differing cultural notions of balancing, in Germany and the US. Jacco Bomhoff "*Balancing the Global and the Local: Judicial Balancing as a Problematic Topic in Comparative Constitutional Law*", 31 HASTINGS INTERNATIONAL AND COMPARATIVE LAW REVIEW 555 (2008).

that increase the chances of the doctrine being applied in a certain way, the benefits versus the dangers of adopting proportionality in one court rather than another can be better ascertained.

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# Introducing the Israeli Supreme Court Database

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ANDY WORMS

*Advancing knowledge and driving discovery often require data infrastructure. To that end, we built the Israeli Supreme Court Database (ISCD), which encodes information from all final decisions of Israeli Supreme Court in cases opened between 2010 and 2018 (16,109 cases and 48,634 opinions). Guiding our work were the five defining characteristics of high-quality infrastructure, such that the Database is accessible, reliable and reproducible, sustainable, foundational, and capable of addressing real-world problems. In what follows we elaborate on these criteria, offer examples, and, more generally, introduce the ISCD to the research, policy, and legal communities.*

Word Count: 1093

The past few years have witnessed dramatic growth in the empirical analysis of apex courts—the Israeli Supreme Court (ISC) not excepted. Since the early 2000s, hundreds of quantitative studies of the ISC have appeared in scholarly journals and newspapers.[1]. Although the studies focus on different aspects of the Court's work, they share a reliance on one-off (or otherwise limited) hand-coded datasets designed to assess particular hypotheses. The"one-off"

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**Introduction prepared for the Comparative Supreme Court Decision Making Workshop**

[1]For literature reviews, see Esienberg et al. (2011); Teichman and Zamir (2014); Weinshall-Margel (2016)

approach has its benefits of course. But that it also has substantial costs, including massive duplication of effort, inefficiencies, dated information and measures, and conflicting results. These costs, we believe, ultimately impede the drive to discovery.

For these reasons, we built the Israeli Supreme Court Dataset (ISCD): data infrastructure designed to advance knowledge and accelerate innovation by encoding information from all final decisions of the ISC in primary cases opened between 2010 and 2018 (16,109 cases and 48,634 opinions). More specifically, the ISCD consists of 61 variables (columns) for each case and 74 variables for each justice's opinion in the population of cases decided by panels of three to nine justices. The variables capture information on the parties, litigants and legal representation, the origin and history of appealed cases, proceedings and hearings in the ISC, case outcomes, and the opinions and background characteristics of the individual justices.

In building the dataset, we were guided by the five defining characteristics of high-quality infrastructure.[2] First, members of the community should be able access it with no barriers to entry or use. To this end, not only is the ISCD one of the very few non-U.S. based databases that is freely and publicly available; its website also houses an analysis tool that allows users to access particular variables without having to download the dataset.

Second, high-quality infrastructure should be reproducible and the encoded data, reliable. Reproducibility means that the developers and the users must understand how to reproduce the data housed in the infrastructure. Reliability is related: It is the extent to which it is possible to replicate encoded data, producing the same value using the same standard for the same subject at the same time regardless of who or what is doing the replicating. Through a combination of automated and hand coding (with reliability assessed) we sought to meet both criteria.[3]

Standing the test of time is the third characteristic of high-quality infrastructure; and we have developed several strategies to meet it. Chiefly, to the extent possible we eliminated humans from the

[2]Adapted from Epstein (2019); Epstein et al. (2019); Epstein and Martin (2014).

[3]Because we provide more details in the body of the paper, suffice it to note here: (1) the Database's documentation provides the precise definition and coding method for each variable; and (second, that (2) various computerized and human reliability tests show over 90% accuracy/agreement.

data-generation process, as we just suggested. We also sought to repel (irrational) data exuberance on the theory that intricate and detailed coding schemes are the surest way to create a product that will die a slow death, not to mention unreliable data.[4]

Which brings us to the fourth and related characteristic: Data infrastructure should serve as foundation on which researchers can build by adding content, backdating, updating, or otherwise adapting it to their own needs; the infrastructure need not—and more to the point, should not—be the be-all, end-all. To this end we sought to build a product that, yes, will be useful in its own right or even for purposes of comparison with other apex courts[5] but that also can be adapted to future or even present needs.

Last but not least, by definition data infrastructure should promote innovation, inventions, and insights.[6] Although no product can guarantee these ends, infrastructure aimed at solving or developing implications for real-world problems increases the odds of success. By providing information of interest to policymakers, journalists, and citizens seeking to make evidence-based assessments of the ISC and its work, we believe the Dataset meets this criterion; and, in what follows, offer supporting examples—some of which shore up surprising trends in ISC decisions since 2010.

We now turn to elaborating on these criteria, providing illustrations, and, more generally, introducing the ISCD to the research, policy, and legal communities.

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[4]See Benoit et al. (2016).

[5]In creating case-based datasets of high courts, many scholars have adapted the U.S. Supreme Court Database's (`http://supremecourtdatabase.org`) protocols and coding scheme (see Epstein et al. 2019). The ISCD follows suit, as we describe later in the text.

[6]See, e.g., Epstein and King (2002); Epstein and Martin (2014).

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# Are Taiwan Constitutional Court Justices Political?

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## Abstract

*In the decision-making on the Taiwan Constitutional Court (TCC), is there really no place for Justices' political ideology? Or, is it rather the case that court watchers could not find the smoking gun of ideologically motivated judicial behavior because the sensor they use is just not good enough? If the TCC is indeed an apolitical court that renders its constitutional judgments solely on the basis of legal reasoning, what explains the marked and increasing disagreement among the TCC Justices in the recent years? We seek to answer these questions by analyzing and comparing the opinion positions of those TCC Justices who served during 2003 and 2015 voted in two sets of merit cases—the political and the less-political cases. Contrary to the existing empirical literature, we find some circumstantial evidences that political ideology does play some role in the merit decision-making in the TCC, albeit most of the TCC Justices can be considered ideological moderates.*

Keywords: Taiwan Constitutional Court, ideal point estimation, judicial ideology, the attitudinal model, judicial philosophy, judicial activism

## 1. Introduction

"All judges are political—except when they are not." (Bybee, 2010). This statement appears to hold no less true for the Taiwan Constitutional Court (TCC) Justices than for the Justices sit on other supreme courts or constitutional courts around the world. On the one hand, judges are humans, and their decisions are bound to be affected by their political ideologies or worldviews just like other human beings. As the final arbiters of constitutional law, politically appointed constitutional judges that sit on the top courts are even far less constrained by existing law and prior judicial precedents than are the career judges of the ordinary courts. For social scientific students of judicial behavior, therefore, apolitical judging on a constitutional court is simply a myth, and the only meaningful question is how, and how big a role, political ideology plays in constitutional adjudication. This logic certainly applies to the TCC, which is among the strongest and most activist constitutional courts around the world. On the other hand, most constitutional judges are jurists by training, and the legal model of judicial decision making remains the dominant thinking in the legal profession and legal academia. Much of the authority and legitimacy of a constitutional court, in addition, is premised on the idea that judges can and do set aside their personal ideologies and act as faithful servants of law when adjudicating a case. As typical constitutional judges, the TCC Justices certainly take seriously their judicial duty to the rule of law, and the last thing they want to do is to entertain the idea that they are merely "politicians in robes."

The contradiction between the political and the legalist aspects of constitutional judging appears to be less obvious in Taiwan, though, as two previous empirical studies of the TCC decision making found no smoking gun for the influence of political ideology on the merit decisions of the TCC (Garoupa, Grembi and Lin, 2011; Pellegrina, Garoupa, and Lin, 2012). But instead of viewing them as vindicating the legalist claim that the TCC Justices are apolitical in the sense that their personal political ideologies do not significantly affect their judgment calls in constitutional adjudication, we think these findings have more to do with the difficulties and limitations of measuring and testing attitudinal decision making in Taiwan. In view of Taiwan's political developments in general, and the composition of the TCC in particular, we do not expect to find that the way a TCC Justice voted in a given constitutional case is primarily determined by his or her ideological stance. But we surmise that political ideology still plays some roles in the TCC decision making. There are some anecdotal evidences—including, among others, the separate opinions written by individual Justices—showing that some TCC Justices are more liberal/conservative than others. But this insider knowledge remains a well-kept secret. To forcefully argue that, as a matter in general, the TCC Justices are as political as one can expect of a constitutional judge, we need to demonstrate with empirical evidence that the

Justices' political ideology does play a role in their adjudication of constitutional cases.

Are the TCC Justices political in the sense that (i) they can be identified as liberals, moderates or conservatives in the same way as any other political actors, and (ii) their political ideologies have certain influences on the decisions they make in adjudicating constitutional cases? We suspect that they are, but we cannot rule out the possibility that the TCC can be perceived less as a political court and more as a court of law if the Justices are ideologically indistinguishable, and the disagreement among them has little to do with the political disagreement found between liberals and conservatives. To find out which is the case, we first review the existing literature and discuss the challenges confronting the study of judicial behavior on the TCC (Section 2). We then propose a new empirical strategy for tracing the influence of political ideology on the TCC merit decision making and apply it to study the opinion alignments (as partially revealed judicial votes) of the TCC Justices served during 2003 and 2016 (Sections 3 and 4). By analyzing and comparing the TCC Justices' disclosed positions in political and less-political cases, we find that, although most of the TCC Justices are moderate jurists, they do have different ideological predispositions, and, along with some less-ideological factors such as personality, jurisprudence and judicial philosophy, their ideologies do play some role in their decision making. We discuss our findings and their implications in Section 5.

## 2. All Top Courts Are Political—Except the TCC?

With the fast advancement of judicial behavior as a field of social scientific study in the recent years (Epstein, 2016), there is a growing uneasiness about the adequacy of the attitudinal model, which posits that ideological considerations alone can explain and predict much of the decisions judges make on the top courts (Segal and Spaeth, 2002). We now know that "ideological motivations are just one of several kinds of motivations that should be incorporated into a realistic and comprehensive conception of judicial decision making." (Epstein and Knight, 2013: 24) Still, judges' political ideology matters, and more and more evidences of ideological voting have been found in many supreme courts and constitutional courts around the world (Hönnige, 2009; Garoupa, 2009; Amaral-Garcia, Garoupa, and Grembi, 2009; Garoupa, Gomez-Pomar, and Grembi, 2011; Hanretty, 2012; Iaryczower and Katz, 2015; Tiede, 2016; Rachlinski and Wistrich, 2017). Not all top courts are conducive to empirical study. But when it is possible to identify or infer from the opinions how an individual Justice voted in a given case, students of judicial behavior usually can unearth evidence of judging under the influence of political ideology by using none other than the appointing regime as a crude proxy for the ideology of a given Justice in regression analysis. The resulting empirical findings usually are strong enough to dispel

as a myth the notion of apolitical judging under the legal model (Fischman and Law, 2009: 172).

However, two previous studies of the TCC decision making suggested otherwise. Using the party affiliation of the President by whom a TCC Justice was appointed as the proxy for that Justice's political stance, Garoupa, Grembi, and Lin (2011) tested whether the TCC Justices ruled in favor of their appointers' interests in 97 cases of political significance the Court decided during the period of 1988-2008. The results do not confirm their political allegiance hypothesis, which predicts an appointing-party alignment to be found in the Justices' voting patterns as a result of ideological congruence and/or partisan loyalty between the Justices and their appointers. This pioneering study thereby concluded that the TCC was "fairly insulated from main party interests" during the observed period. Subsequently, Pellegrina, Garoupa and Lin (2012) used the published collective and separate opinions as substitutes for the undisclosed judicial votes and estimated the TCC Justices' ideal points in the 101 decisions of political significance the Court made during the period of 1988-2009. They found that the TCC was "largely non-polarized" and seemed to "follow the pattern of civil law jurisdictions by pursuing a certain apolitical façade." Taken as a whole, these findings are in line with two prevailing perceptions held among students of the TCC: (i) The TCC has been able to exert its independence since as late as Taiwan began her democratic transition in the late 1980s (Ginsburg, 2003; Yeh, 2016). (ii) Even with its rising opinion dissensus in the recent years (Su and Ho, 2016; Lin, Ho, and Lee, 2018), the TCC has not been known for being an ideologically polarized court. That being said, can we take these findings as proof that the TCC Justices are rather apolitical? We have some doubts.

Consider first the lack of ideological polarization and what it means for the Court. Notwithstanding the escalation of partisan polarization in Taiwan for the past two decades, the major cleavage in Taiwan politics has long been between the Chinese and the Taiwanese identities as opposed to the left-right or liberal-conservative division commonly found in western democracies (Achen and Wang, 2017; Sheng and Liao, 2017; Hsiao, Cheng, and Achen, 2017). While the two major political parties in Taiwan—the Democratic Progressive Party (DPP) and the Kuomintang (KMT)—may be positioned respectively as center-left party and center-right party, the ideological sorting of the parties has been rather weak at the level of elite politics. Most of the political elites in Taiwan can be said to be ideological moderates, and there is little reason to expect that the TCC Justices would be otherwise. The TCC is composed of 15 Justices. Most of them came from the career judiciary and the legal academia. Few of them have known affiliation with political parties. Still fewer have public profiles as staunch liberals or conservatives. Under these circumstances, there is little wonder that ideological polarization is not found in the TCC.

Ideologically moderate Justices, however, are not necessarily apolitical Justices. The absence of ideological polarization in the composition of the Court might just mean that it takes extra efforts to flesh out the vague liberal-conservative division on the Court.

The fact that liberal-conservative political ideology generally takes a backseat in Taiwan politics also suggests that ideology might not be a central concern in the selection of the TCC Justices. The Justices are nominated and appointed by the President with the consent of the Legislative Yuan. In picking nominees for the TCC, the President's discretion is limited, however, as Article 4 of the Judicial Yuan Organization Act stipulates rather stringent qualifications for the Justices and requires that the overall composition of the Court maintain diversity in terms of the Justices' professional backgrounds. In practice, the President picks his or her TCC nominees from a short list of hopefuls recommended by a nomination committee, which is usually chaired by the Vice President. Composed mainly of former Justices and reputable elders from the civil society, the committee is responsible for making merits-based recommendations to the President. As senior career judges or law professors, most of the TCC nominees have CVs and paper trails that provide scant information about their political ideologies. Although the confirmation of the TCC Justices is not above the fray of partisan warfare (especially during the period of divided government), most of the nominees can get through the process, which only has cursory hearings and ends with a confirmation vote in anonymity.

In view of the nature of the TCC appointment, it is certainly questionable whether the appointing regime can serve as a good proxy for judicial ideology in Taiwan. But Garoupa, Grembi, and Lin's 2011 study suffers from yet another limitation that is even more severe: Each and every case in their dataset was decided by Justices that were appointed by the same President and confirmed by the KMT-controlled parliament. The appointing-party measure simply cannot tell the differences in judicial ideology when all of the Justices sitting on a given case have to be coded as the same, regardless of whether they voted unanimously or not. It was not until 2008 that we were able to observe whether Justices appointed by different Presidents reached different conclusions in a given case, and we suspect that the appointing-party measure may have more bite as a crude proxy for judicial ideology thereafter.

Once appointed, a TCC Justice serves an 8-year term, and cannot be consecutively re-appointed for the following term. Their decision making on the Court is further complicated by the way the TCC works. The TCC hears all cases *en banc*. It uses majority rule to decide whether to dismiss a case on procedural grounds, and to dispose cases concerning unified statutory interpretation or review of regulation. A 2/3 supermajority is required, however, for the Court to rule on cases involving the constitutionality of

statutes or constitutional controversies over separation of powers.[1] During the review sessions held in secrecy, the Justices are known to deliberate rather scrupulously on the exact wordings of its merit decision, which is referred to as Judicial Yuan (J. Y.) Interpretation. Though first drafted by one of the Justices who are assigned to report the case, a J.Y. Interpretation is a collective work contributed and signed by all of the attending Justices, even including those who voted in the minority.

Luckily for students of judicial politics, such deliberative process of decision-making and opinion-writing does not guarantee consensus, and individual Justices are allowed to write (or join) concurring or dissenting opinions to be signed and published along with the authoritative J.Y. Interpretation. The TCC Justices, moreover, appear to be much more opinionated than Justices on the other constitutional courts. At our request, two former and one sitting TCC Justices (who were appointed to the Court in 2003, 2007, and 2015 respectively) shared with us their thoughts about the norms and practices of dissenting opinion writing on the TCC. According to them, there is a clear understanding among the Justices that one cannot write or join a dissent unless she/he voted against the majority when the outcome of the case was put to a vote. However, it is entirely up to individual Justice to decide whether to write or join a dissenting opinion to express and explain her/his disagreement with the Court's decision to the public. Our sources told us that it is not unusual for the dissenting Justices to forego the opportunity to file dissenting opinions. It appears that some Justices had done so more often than others, while the trend had been increasingly for public dissent in the recent years. In this regard, we think the opinion alignment—i.e., the information about which Justices were in the majority/minority as provided by the published opinions of a given case—can be used as a close but imperfect substitute for the undisclosed judicial votes.

Even though the actual judicial votes remain a secret, the use of opinion alignment as stand-in for the judicial votes enables students of the Court to apply the method of ideal point estimation developed by Martin and Quinn (2002). Pellegrina, Garoupa and Lin's 2012 study presented the first Martin-Quinn scores for the TCC Justices. We also use our data to estimate the static ideal points for the TCC Justices served during 2003 and 2016, and our estimation is reported in Appendix 1. To interpret the meaning of such ideal point estimations, we first have to ascertain what the uncovered latent dimension stands for (Ho and Quinn, 2010). In the context of the U. S. Supreme Court, the Martin-Quinn scores match closely to the general perception of where the Justices stand on the conservative-liberal spectrum (Epstein, et al., 2012: 713). The uncovered latent dimension,

[1] Although the TCC has broad discretion over the scope of judicial review, it cannot review the rulings of ordinary courts. In addition to judicial review, the Court possesses such ancillary powers as the power to dissolve unconstitutional parties and the power to adjudicate presidential impeachment.

therefore, can be said to have strong ideological connotations in the U.S. Supreme Court. It is not necessarily the case in the context of the TCC, however. While we suspect that the latent dimension has something to do with political ideology, we cannot rule out the possibility that it has more to do with the less-ideological factors, such as the Justices' professional and educational backgrounds and their judicial philosophies. So while we may infer from the overlapping Martin-Quinn scores that the differences between the TCC Justices are not polarized, we still need to know what drives them to disagreement.

In short, we do not think that the existing empirical evidences lend support to the legal model of constitutional adjudication in Taiwan. It has yet to be proven with systemic evidence, though, that the TCC Justices are just as political as their peers on the other top courts in the sense that their decision making is more or less affected by political ideology they personally hold. Notwithstanding the relative irrelevance of the liberal-conservative divide in Taiwan politics, we think it still makes sense to characterize a TCC decision in terms of its ideological valence, and to identify a TCC Justice as a liberal, a moderate, or a conservative in a one-dimensional ideological spectrum. Even if the Justices detest such labels for harming their public images as constitutional judges, students of the TCC can readily sense that some Justices are just more liberal or more conservative than their colleagues in view of the positions they took. The judicial ideology thusly defined arguably captures much of the Justices' political or policy motivations than their national identities, which are likely to influence only a handful of TCC cases concerning or implicating the Taiwan-China relations.

## 3. Research Design and Data

To assess the effect of ideology on the Justices' merit decisions, we first need to measure the Justices' ideology. One of the biggest challenges to our study, though, is to find ways to ensure that the measures of ideology we use are not too blunt to detect signs of attitudinal decision making. The only exogenous measure we can use is the appointing-party measure, which cannot differentiate Justices appointed by the same President/party, and tends to produce results that systematically understate the impact of ideology (Fischman and Law, 2009: 170-71). Due to the paucity of public discussion about the TCC appointment, it is not possible to develop the equivalent of the Segal-Cover scores (Segal and Cover, 1989) in Taiwan. And to the extent that the TCC Justices' Martin-Quinn scores can be used as an endogenous measure of judicial ideology, we cannot explain votes with measures derived from those very same votes (Epstein, et al., 2012: 708). What else can we do?

We think retooling the old strategy of divide and conquer provides a key to solving

this problem. Many studies of ideology and judicial decision making proceed from the intuition that judges' "political attitudes are apt to be most salient in cases with direct political implications" (Rachlinski and Wistrich, 2017: 206). It is therefore understandable that the aforementioned two studies on the TCC decision making opted to limit the scope of their inquiries to a set of "political cases." We also divide the cases in our dataset into two categories labeled as "political cases" and "less-political cases," with the set of political cases including all cases that are either (i) politically salient or (ii) have clear ideological implications in Taiwan according to our assessment. While speculating that the effect of ideology on judging might be easier to detect in political cases than in less-political cases, we do not discard the less-political cases—i.e., cases that are of less political salience and the ideological implications of which are indeterminate—in our dataset, however. Rather than focusing solely on the Justices' decision making in the political cases, we analyze and compare the Justices' opinion positions in these two types of cases in order to find out whether ideology (i) affects judging only when ideological/political issue is at stake, (ii) affects judging in less-political cases as well, or (iii) has no discernible effect in either type of cases. Evidences of ideological voting, we think, are much stronger if they are found not just in political cases, but in less-political cases as well.

Given that significant differences do exist in the vote/opinion patterns in these two types of cases[2], we further take cues from Lindquist and Cross (2009) and speculate that, when a Justice opts to invalidate the norm under review, the judicial activism she/he exercises may have different connotations in these two types of cases. Lindquist and Cross (2009) differentiate the multi-dimensional judicial activism into two strands: Whereas *institutional activism* "reflects justices' willingness to substitute their own judgments for those of other governmental actors, to expand judicial adjudicatory power, and to revise prevailing legal doctrines," *ideological activism* "reflects the justices' readiness to engage in these activities in furtherance of their own ideological preferences (Lindquist and Cross, 2009: 134)." Since we assume that ideology is less salient in less-political cases, we further take an activist decision in a less-political case as driven mainly by institutional activism rather than by ideological activism. Under this assumption, we first develop an *institutional conservatism score* (ICS) as a measure of a Justice's institutional activism based on the decisions she/he made in the less-political cases during the observed period. For Justices within a natural court (i.e., a court composed by the same Justices), the ICS for a Justice *J* on a less-political case *i* is defined as the standardization of the proportion in which *J* had upheld the norm under review, with the case *i* omitted to avoid circularity in subsequent

[2] We estimate Justices' ideal points in political and less-political cases in our dataset separately. The correlation between the median ideals points in these two types of cases is -0.1585, which indicates that there is no linear relationship between the Justices' voting behavior in political and less-political cases.

regression analyses.[3] Thus computed, the ICS can serve as a rough indicator of a Justice's willingness to exercise judicial self-restraint on account mainly of his or her judicial philosophy. A Justice with above-average ICS, for instance, is likely to be a judicial conservative who is more deferential to other political actors than his or her colleagues. But because of the staggered terms of the TCC, we have different numbers of observations for different Justices. For Justices with fewer observations, their ICSs may be a less robust predictor of their institutional activism.

We assume that, in political cases, Justices are more likely than not to vote in line with their own ideologies, and, as a result, an activist decision in a political case bears the marks of both institutional and ideological activism. But instead of looking into a Justice's decisions to uphold or invalidate the norms under review in political cases, we take the advantage of being able to tell whether the outcome of a political case is a "liberal" or a "conservative" decision as defined in ideological terms to observe and study a Justice's *post hoc* ideological leaning. Since the TCC has yet to invalidate any liberal law as unconstitutional for conservative reasons, all political decisions that invalidated the norm under review are coded as liberal decisions. Political cases involving judicial validation, in turn, are coded in accordance to the ideological valence of the norm at issue and on a case-by-case basis. With this information, we propose a *political conservatism score* (PCS) that reports the standardized leave-one-out proportion of ideologically conservative decisions a Justice *J* made in political cases within a natural court. The PCS can serve as a crude *post hoc* measure for a Justice's political ideology, though it is less reliable a measure for Justices with fewer observations. And since the correlation between the averaged PCS and the appointing-party measure is statistically insignificant ($r$ = -0.019), we suspect that the use of PCS may help us detect more signs of ideological voting on the TCC.

With these new tools in hand, we study the 167 constitutional decisions the TCC made during the period of October 2003 to October 2016. This period began when the first 15 Justices appointed by DPP President Chen Shui-bian (陳水扁) took office, and ended when 7 of the 15 Justices appointed by KMT President Ma Ying-jeou (馬英九) left the Court. Choosing this time frame thereby enables us to observe a Chen Shui-bian Court (i.e., a TCC composed all by Chen's appointees) (2003-2008), a Ma Ying-jeou Court (a TCC composed all by Ma's appointees) (2015-2016), and a Court of divided appointment (2008-2015). Of the 167 constitutional cases, we characterize 51 as political cases and 116 as less-political cases. A case would be characterized as a political case if it is politically salient (because it concerns a major policy issue or because its petitioner is a prominent public figures, for instances), or has indisputable ideological valence (such as a case concerning

[3] We compute a Justice J's ICS for political cases in a similar way except that the proportions to be rescaled are based on all less-political cases, resulting in a static z-score for a Justice within a natural court.

freedom of expression or equality). Considering that a given case (J.Y. Interpretation) may implicate more than one object/issue of constitutional review, and the Court may reach different conclusions for different issues in a given case, we choose "issue" as opposed to "case" as the unit of our analysis. For instance, if a J. Y. Interpretation upheld 3 distinct provisions of a statute but invalidated 2 other distinct provisions of the same statute, it would be counted as containing 5 issues. We count a total of 174 political issues and 230 less-political issues (including 10 less-political issues from 4 political cases). A list of the cases and the corresponding number of issues is reported in Appendix 2.

Like Pellegrina, Garoupa, and Lin (2012), we study the Justices' opinion alignment in a given case as a substitute for the undisclosed judicial votes, and the dependent variable in our study is whether a Justice publicly "voted" for or against the constitutionality of the law at issue. We obtain the data about the opinion alignment of a given case from the Taiwan Constitutional Court Interpretations Database (TCCID) constructed by the Institutum Iurisprudentiae, Academia Sinica (IIAS), and we recode the case-based opinion data into the issue-specific vote data. Since a TCC Justice can file a partial dissent on some but not all of the issues decided in a given case, and since a dissent in the TCC does not necessarily mean that the dissenting Justice disagrees with the majority over the very judgment of constitutionality,[4] we read and double-check all of the dissenting opinions on our dataset to ensure the accuracy of our coding.

To test whether political ideology is a significant factor in the TCC decision making in constitutional cases, we use independent variables *appointing President* and *political conservatism score (PCS)* as two crude proxies for Justices' political ideologies. We assume that Justices appointed by KMT President Ma Ying-jeou are more conservative than Justices appointed by DPP President Chen Shui-bian, and the higher the PCS a Justice has, the more conservative he or she is. We test three hypotheses:

> *Hypothesis 3.1. A Justice's opinion positions (stated votes) are affected by his/her political ideology as measured by the appointing President variable and/or by the PCS variable.*
>
> *Hypothesis 3.2. A Justice's opinion positions on political issues are affected by his/her political ideology as measured by the appointing President variable and/or by the PCS variable.*
>
> *Hypothesis 3.3. A Justice's opinion positions on less-political issues are affected by his/her political ideology as measured by the appointing President variable and/or by the PCS variable.*

[4] Some Justices, for instance, would dissent from a decision holding unconstitutionality not because they would uphold the law under review, but because they thought the transition period granted to the Legislature was too long.

Aside from Justices' political ideology, we consider and control the following four Justice-based, less-ideological factors that are likely to influence the merit decision making on the TCC:

(a) *Judicial philosophy (Institutional Activism)*: As suggested above, different Justices may hold different views on the role of the Court in constitutional democracy, and, as a result, some Justices tend to be more/less deferential to other political actors than their colleagues. We use the *institutional conservatism score (*ICS*)* variable to control a Justice's institutional activism.

(b) *Judicial Personality* (*Outspokenness*): Since the actual judicial votes are kept in secret, and disagreement within the Court surfaces only when individual Justices write separately, there is a possibility that the pattern of a given Justice's opinion positions is a function of his/her "judicial personality" as defined in terms of whether the Justice prefers to speak out or keep quiet when he/she disagrees with the majority of the Court. Some Justices are not shy away from expressing in public what they really thought, whereas other Justices may care more about teamwork than their individual reputations. Using the data provided by the TCCID, we calculate a Justice's career *separate opinion average (SOA)* as a measure of his/her judicial personality (or outspokenness, to be more specific). For an observed Justice *J*, his/her SOA = the number of separate opinions (including concurrences and dissents) J ever issued / the number of J.Y. Interpretations J ever voted on. The higher the SOA a Justice has, the more outspoken or opinionated the Justice appears to be. We test whether this independent variable is significantly correlated with his/her stated votes.

(c) *The Scholars-Judges Divide*: A mutual dislike appears to exist between the legal academia and the career judiciary in Taiwan. On the one hand, many law professors look down on career judges (and prosecutors) as mediocre bureaucrats who often get the law wrong. Many practitioners in the judiciary, on the other hand, criticize academic lawyers for being too idealistic and not knowing enough about legal practice on the ground. Since the TCC, roughly speaking, is composed of half former law professors and half former career judges, it is worth exploring whether the disagreement among the Justices has anything to do with this social divide found in Taiwan's legal profession. To examine the effect of this scholars-Judges divide on judging, we create a dummy variable *prior judicial experience* that indicates whether a Justice is a former career Judge/prosecutor. This variable is coded based on the Justices' background information we obtain from the Taiwan Constitutional Court Justices Database (TCCJD) developed by the IIAS.

(d) *The German Approach vs. the American Way*: Taiwan is a civil law country heavily influenced by the European continental legal thought. Academic jurists trained in Germany, Japan, or other civil law countries have long dominated most of the major law

faculties in Taiwan. But thanks to the close political, economic and cultural ties Taiwan has with the United States, American-trained academic lawyers have constituted a growing minority in Taiwan's legal academia. It is often asserted in Taiwan that German-trained and American-trained lawyers see things differently and adopt different approaches to law and legal theory. Whereas German-trained lawyers usually pursue doctrinal scholarship aimed at disciplining legal reasoning and separating law from politics, American-trained lawyers tend to embrace legal pragmatism and emphasize interdisciplinary studies of law. Given that there are German-trained and American-trained Justices serving on the TCC, one may speculate that the disagreement within the Court can be linked to this sectarian division in Taiwan legal thought. To assess this possibility, we include a dichotomous variable *American exposure* that codes whether a Justice received a doctoral degree in law from the United States or from other common law jurisdictions. The coding of this variable is also based on the information provided by the TCCJD.

Summary statistics of the independent variables considered in our study are reported in the following Table 1.

Table 1: Descriptive Statistics of Independent Variables (*N*=34)

Panel A: Continuous Variables

| | Mean | Std. Dev. | Min. | Max. |
|---|---|---|---|---|
| PCS | 0.45 | 0.1658 | 0 | 0.6364 |
| ICS | 0.4952 | 0.1368 | 0.1967 | 0.7105 |
| SOA | 0.3803 | 0.3124 | 0 | 1 |

Panel B: Categorical Variables

| | % |
|---|---|
| Appointing Presidents | |
| Chen Shui-bian (陳水扁) | 55.88 |
| Ma Ying-jeou (馬英九) | 44.12 |
| Past Judicial Experience | 44.12 |
| American Exposure | 17.65 |

In short, we think the TCC Justices can be said to be political—in the ideological

sense of the term—if empirical evidence can be found that political ideology significantly correlates with their opinion positions in cases with and even without political salience. The TCC Justices are as apolitical as they can be, however, if their disagreement has more to do with such less-ideological factors as judicial philosophy, judicial personality, and the divisions in the Justices' professional and educational backgrounds, than with their political ideology.

## 4. Analysis and Results

We can think of a Justice's opinion position in a given case as some kind of (stated or public) vote; it's a vote for or against the constitutionality of the norm under review. To account for the within-subject correlation, and also the possible personal heterogeneities, we incorporate random effects into fixed effects structure (thus mixed) modeling. Since the response variable is binary, we deploy the mixed effects logistic regression, or logistic GLMM (generalized linear mixed (-effects) model) to characterize the repeatedly-measured vote distribution. Although analyzing the entire population rather than a sample of stated votes, we think of the votes observed as a realization of a stochastic process of deliberation. That is, there still are some uncertainties in the underlying generating process responsible for the collected data. Therefore, (large-sample) inferences can be made in the usual way (Gelman et al, 2013).

We first investigate three models for the stated votes in all issues. Model (a) tests whether *appointing President*, *past judicial experience*, *American exposure*, and SOA affect a Justice's stated votes in all issues decided during the whole observed period (Oct. 2003-Oct. 2016). Model (b) tests the same set of independent variables, but its scope of inquiry is limited to all issues decided after November 2008, when the effect of divided appointment began to kick in. Model (c) adds PCS and ICS to the list of independent variables, and it investigates all issues the Court decided during the whole observed period. Tables 2 reports the maximum likelihood estimates from fitting GLMMs.

The results in Models (a), (b), and (c) lend support to our Hypothesis 3.1. The variable *appointing President* is statistically significant at the 10% level in Model (a), and is significant at 5% level in Model (b). Consistent with our expectations, *appointing President* is positively correlated with the likelihood that a Justice would vote to uphold the norm under review. As shown in Model (b), for instance, Justices appointed by President Ma Ying-jeou have a 51% (=exp(0.414)-1) increase in the estimated odds of voting for the law versus voting against the law as compared to Justices appointed by President Chen Shui-bian. *Appointing President* is not a significant factor in Model (c), but the effect of ideology is arguably picked

up by PCS, which has a significance level at 0.1.

Table 2: Fixed-Effect Parameter Estimates Fitting GLMMs

| Variables\ Models | (a) | (b) | (c) |
|---|---|---|---|
| Intercept | 0.235* | 0.108 | 0.260*** |
| | (0.106) | (0.203) | (0.065) |
| Appointing President | 0.286+ | 0.414* | 0.082 |
| | (0.157) | (0.207) | (0.107) |
| Political Conservatism Score | | | 0.072+ |
| | | | (0.041) |
| Institutional Conservatism Score | | | 0.182*** |
| | | | (0.036) |
| Past Judicial Experience | 0.150 | 0.366* | -0.013 |
| | (0.109) | (0.183) | (0.073) |
| American Exposure | -0.070 | -0.128 | -0.138+ |
| | (0.138) | (0.224) | (0.082) |
| Separate Opinion Average | -0.721** | -0.880* | -0.425** |
| | (0.235) | (0.345) | (0.158) |
| Natural Courts (baseline: Weng, Oct. 2003-Sep. 2007 for (a)(c); Lai 2, Nov. 2008-Sep. 2010 for (b)) | | | |
| Lai 1, Oct. 2007-Oct. 2008 | -0.117 | | -0.083 |
| | (0.124) | | (0.115) |
| Lai 2, Nov. 2008-Sep. 2010 | -0.080 | | -0.066 |
| | (0.109) | | (0.094) |
| Rai 1, Oct. 2010-Sep. 2011 | 0.024 | 0.106 | 0.069 |
| | (0.172) | (0.171) | (0.160) |
| Rai 2, Oct. 2011-Sep. 2015 | -0.383** | -0.366** | -0.308** |
| | (0.129) | (0.114) | (0.099) |
| Rai 3, Oct. 2015-Oct. 2016 | -0.596** | -0.566** | -0.532** |
| | (0.188) | (0.178) | (0.168) |
| Observations | 5440 | 2509 | 5440 |

*** p<0.001, ** p<0.01, * p<0.05, + p<0.1

In Model (c), the coefficients for PCS and ICS are 0.072 and 0.182. Both coefficients

are significantly different from 0 using significance level 0.1 and 0.001, respectively. This indicates that, for every one-unit increase in PCS, we expect a 7.47% (=exp(0.072)-1) increase in the odds of upholding the norm under review, and the odds of upholding the norm under review increase by 19.96% (=exp(0.182)-1) with each additional point on ICS. In Model (c), the estimate -0.138 for the variable *American exposure* is significantly less than 0 if we chose significance level to be 0.05, implying the odds of voting for the law under review for Justices with American doctoral degrees decreases by 12.89% (=exp(-0.138)-1) compared with the rest of the Justices. Of the other control variables, SOA is statistically significant in all three models. *Past judicial experience* has significant effect in Model (b). The estimated odds of voting for the law increase by 44% (=exp(0.366)-1) for Justices with prior judicial experience compared to Justices from the academia at a 0.05 significance level.

To test our Hypotheses 3.2 and 3.3, we fit two models for political issues, and two for less-political issues. The four models reported in Table 3 differ only in their scopes of inquiry. Model (d) and Model (f) consider respectively all political issues and all less-political issues the TCC decided during the whole observed period. Model (e) and Model (g), by contrast, investigate the political and the less-political issues the Court decided during the period of Nov. 2008 – Oct. 2016.

The results in Model (d) support our Hypothesis 3.2, as PCS is statistically significant at the 0.05 level. However, none of the variables reaches significance in Model (e). PCS is statistically significant in Model (g), but neither PCS nor *appointing President* is statistically significant in Model (f). Hypothesis 3.3 is partially supported in this regard. Among the control variables, ICS is statistically significant in Model (f) with a .05 significance level. The variable SOA is significant in both Model (d) and Model (f) at the .05 level and 0.1 level, respectively.

Table 3: Fixed-Effect Parameter Estimates Fitting GLMMs for Political/Less-Political Issues.

| | Political Issues | | Less-Political Issues | |
|---|---|---|---|---|
| Variables\ Models | (d) | (e) | (f) | (g) |
| Intercept | -0.188$^{+}$ | 0.903$^{***}$ | 0.663$^{***}$ | 0.084 |
| | (0.103) | (0.220) | (0.092) | (0.257) |
| Appointing President | 0.238 | 0.203 | 0.010 | -0.057 |
| | (0.174) | (0.191) | (0.174) | (0.315) |
| Political Conservatism Score | 0.102$^{*}$ | 0.109 | 0.095 | 0.508$^{*}$ |
| | (0.052) | (0.104) | (0.076) | (0.240) |
| Institutional Conservatism Score | 0.010 | 0.214 | 0.214$^{*}$ | -0.033 |
| | (0.073) | (0.132) | (0.089) | (0.154) |
| Past Judicial Experience | 0.024 | 0.040 | 0.008 | 0.036 |
| | (0.116) | (0.186) | (0.117) | (0.273) |
| American Exposure | -0.075 | 0.027 | -0.110 | -0.339 |
| | (0.131) | (0.242) | (0.116) | (0.278) |
| Separate Opinion Average | -0.638$^{*}$ | -0.349 | -0.399$^{+}$ | -0.504 |
| | (0.265) | (0.336) | (0.242) | (0.488) |
| Natural Courts (baseline: Weng, Oct. 2003-Sep. 2007 for (d)(f); Lai 2, Nov. 2008-Sep. 2010 for (e)(g)) | | | | |
| Lai 1, Oct. 2007-Oct. 2008 | 0.076 | | -0.187 | |
| | (0.168) | | (0.166) | |
| Lai 2, Nov. 2008-Sep. 2010 | 1.202$^{***}$ | | -0.729$^{***}$ | |
| | (0.187) | | (0.119) | |
| Rai 1, Oct. 2010-Sep. 2011 | 0.196 | -1.026$^{**}$ | -0.215 | 0.500 |
| | (0.319) | (0.346) | (0.198) | (0.201) |
| Rai 2, Oct. 2011-Sep. 2015 | 0.482$^{**}$ | -0.764$^{***}$ | -1.014$^{***}$ | -0.423$^{*}$ |
| | (0.160) | (0.199) | (0.151) | (0.148) |
| Rai 3, Oct. 2015-Oct. 2016 | -2.316$^{***}$ | -3.569$^{***}$ | -0.492$^{*}$ | 0.204$^{**}$ |
| | (0.547) | (0.557) | (0.209) | (0.209) |
| Observations | 2338 | 917 | 3102 | 1592 |

*** p<0.001, ** p<0.01, * p<0.05, + p<0.1

## 5. Discussion

Our empirical study simply confirms a truism of legal realism that ideology matters in judicial decision making. All judges are political in the sense that they make decisions under the influence of their political ideologies, and the TCC Justices are no exceptions. Most of the TCC Justices are ideological moderates, and the lack of polarization makes it much harder to discern the influence of ideology on the TCC decision making. Still, our findings suggest that the TCC Justices' ideologies affect their opinion positions not only in political cases, but in some of the less-political cases as well. That we are able to unearth some circumstantial evidences of ideological voting on the TCC is thanks in large part to the temporal span of our dataset and to the censors we use. We would not be able to find significant correlations between a Justice's appointing President and his/her stated votes had our dataset not included many cases decided by a TCC of mixed appointment. Our finding that the influence of ideology is more pronounced in Model (b) than in Model (a) further suggests that the efficacy of the appointing-party measure is much contingent on the extent to which we can observe how Justices appointed by different Presidents interacted with each other. In addition, we propose and deploy a new measure of judicial ideology—the political conservatism score (PCS). Although it is less reliable a measure for Justices with fewer observations, the PCS appears to have outperformed the appointing-party measure in capturing a Justice's ideology. It should be noted, however, that the Justices' opinion positions also track their differences in judicial personality (as measured by SOA), judicial philosophy (institutional activism), professional background (the academia-judiciary divide), and legal philosophy (the German or American influences). Our findings are in line with the emerging consensus among students of judicial behavior that ideology is but one among many factors influencing judicial decision making.

That the appointing party measure still has its use as a crude proxy for the Justices' political ideology also suggests that the appointment of the TCC Justices is not entirely merit-based, but has some sort of ideological vetting at play behind the scene. In other words, we do not think it is a coincidence that in general the Justices appointed by KMT President Ma Ying-jeou tend to vote more conservative than the Justices appointed by DPP President Chen Shui-bian. The appointing-party measure can also be used as a measure of judicial partisanship. However, we don't think we can infer from our findings that partisanship or partisan loyalty in and of itself plays a role in the TCC decision making. We would caution against making such an inference because even in most of the political cases in our dataset, the two major political parties simply did not care to take a stand on the issues before the Court, and the fact that the liberal-conservative divide is not that important in Taiwan politics also suggests that ideology does not necessarily coincide with

partisanship in TCC decision making. Saying that the TCC Justices are political in the ideological terms, therefore, does not imply that they are biased in partisan terms.

By proving that political ideology works behind the scene of the TCC merit decision making, our study is hoped to serve as a stepping stone for developing a more realistic understanding of judicial behavior on the TCC. We still need to know, for instance, how ideology works on the TCC, and whether the realist account of judging has any impact on how the public and other political actors think of the Court.

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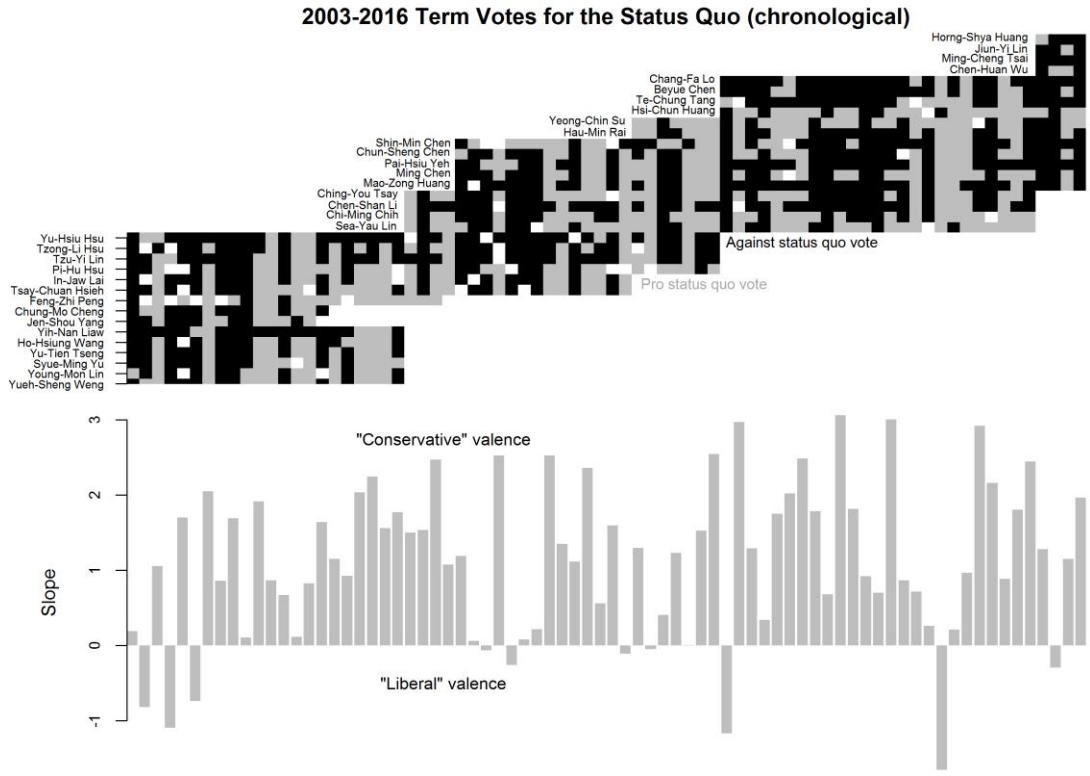
# Appendix 1: Static Ideal Point Estimation for the TCC, 2003-2016

The TCC issued a total of 174 J. Y. Interpretations during 2003-2016. We first exclude the 7 unified statutory interpretation cases the Court issued during the same period from our dataset because the ideological valence of these decisions is too difficult to tell. For the purpose of estimating issue-based as opposed to case-based ideal points of the TCC Justices, we count a total of 404 issues decided in the 167 cases. Figure I displays our overall data.

Figure I: Votes cast in non-unanimous cases for staggered terms of TCC (the top panel), with slopes in each case model serving as weights and direction given to each case (the bottom panel).

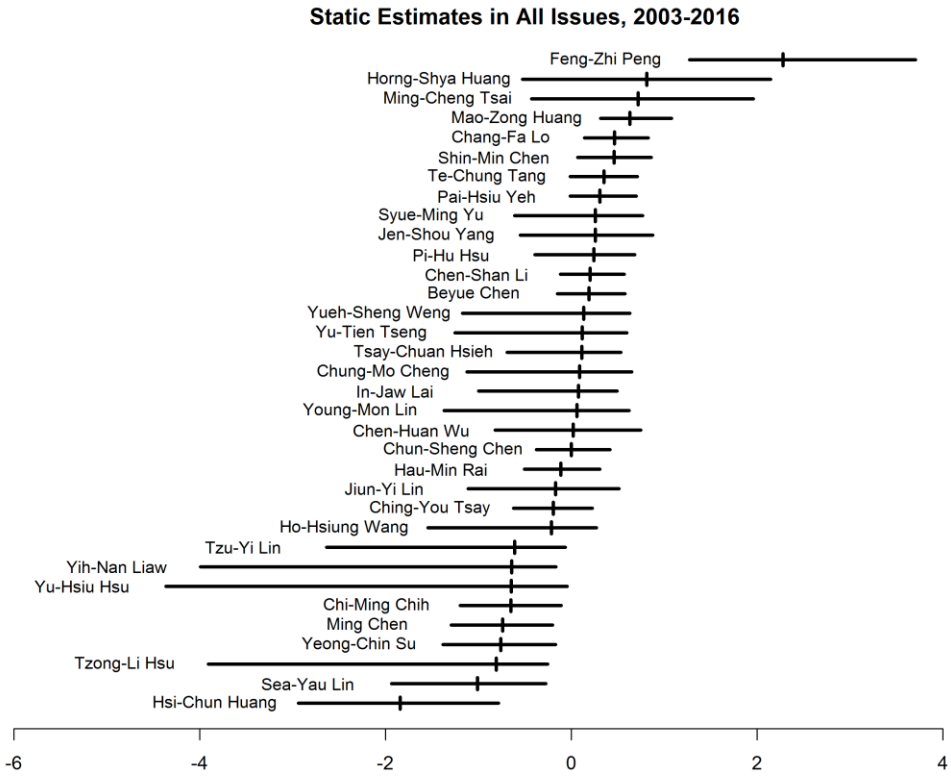



Source: authors

We choose Justice Yu-Hsiu Hsu (left) and Justice Feng-Zhi Peng (right) as the two anchor Justices, and Figure II reports the static ideal point estimates for all cases in our dataset. Having taken into account the inferred voting data, our updated belief on each Justice's ideal points can be summarized by the median of the posterior distribution, a robust measure of central tendency in skewed distributions, and by the 95% equal-tailed Bayesian credibility interval (CI), which includes the Justices' true ideal points with 95%

probability. For any two Justices (such as J. Feng-Zhi Peng and any other Justice except J. Horng-Shya Huang and J. Ming-Cheng Tsai), the fact that their CIs do not overlap suggests that their ideal points are evidently and significantly different. Although some of the CIs overlap partially or wholly in Figure II, sorting all 34 posterior distributions based on individual median values provides us with the Justices' relative locations in the uncovered latent dimension.

Figure II: Static median ideal point estimates (the short vertical bars) with 95% credible intervals for staggered terms of TCC. Justices are sorted from left to right by median ideal point.




Source: authors

# Appendix 2: The List of Political and Less-Political Cases of the TCC, Oct. 2003-Oct. 2016

**The Political Cases**

**J.Y.I. No. (year) (number of issue)**

| | | |
|---|---|---|
| 1. 567 (2003) (3) | 18. 627 (2007) (4) | 35. 690 (2011) (1) |
| 2. 573 (2004) (3) | 19. 631 (2007) (1) | 36. 699 (2012) (3) |
| 3. 577 (2004) (3) | 20. 632 (2007) (1) | 37. 708 (2013) (2) |
| 4. 578 (2004) (6) | 21. 633 (2007) (15) | 38. 709 (2013) (5) |
| 5. 582 (2004) (5) | 22. 636 (2008) (11) | 39. 710 (2013) (7) |
| 6. 584 (2004) (1) | 23. 639 (2008) (4) | 40. 712 (2013) (1) |
| 7. 585 (2004) (23) | 24. 644 (2008) (1) | 41. 717 (2014) (10) |
| 8. 588 (2005) (15) | 25. 645 (2008) (2) | 42. 718 (2014) (3) |
| 9. 599 (2005) (2) | 26. 646 (2008) (1) | 43. 719 (2014) (3) |
| 10. 601 (2005) (1) | 27. 649 (2008) (1) | 44. 721 (2014) (3) |
| 11. 603 (2005) (2) | 28. 656 (2009) (1) | 45. 724 (2014) (1) |
| 12. 613 (2006) (8) | 29. 664 (2009) (3) | 46. 728 (2015) (1) |
| 13. 617 (2006) (3) | 30. 665 (2009) (4) | 47. 729 (2015) (1) |
| 14. 618 (2006) (1) | 31. 666 (2009) (1) | 48. 732 (2015) (3) |
| 15. 623 (2007) (1) | 32. 678 (2010) (3) | 49. 733 (2015) (1) |
| 16. 624 (2007) (2) | 33. 684 (2011) (1) | 50. 735 (2016) (1) |
| 17. 626 (2007) (2) | 34. 689 (2011) (1) | 51. 737 (2016) (2) |

**The Less-Political Cases:**

**J.Y.I. No. (year) (number of issue)**

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| 1. | 568 (2003) (1) | 30. | 608 (2006) (1) | 59. | 654 (2009) (3) | 88. | 693 (2011) (3) |
| 2. | 569 (2003) (5) | 31. | 609 (2006) (2) | 60. | 655 (2009) (1) | 89. | 694 (2011) (1) |
| 3. | 570 (2003) (2) | 32. | 610 (2006) (2) | 61. | 657 (2009) (2) | 90. | 696 (2012) (2) |
| 4. | 571 (2004) (3) | 33. | 611 (2006) (1) | 62. | 658 (2009) (1) | 91. | 697 (2012) (5) |
| 5. | 572 (2004) (1) | 34. | 612 (2006) (1) | 63. | 659 (2009) (1) | 92. | 698 (2012) (2) |
| 6. | 574 (2004) (4) | 35. | 614 (2006) (1) | 64. | 660 (2009) (1) | 93. | 700 (2012) (1) |
| 7. | 575 (2004) (2) | 36. | 615 (2006) (3) | 65. | 661 (2009) (1) | 94. | 701 (2012) (1) |
| 8. | 576 (2004) (2) | 37. | 616 (2006) (2) | 66. | 662 (2009) (1) | 95. | 702 (2012) (3) |
| 9. | 579 (2004) (2) | 38. | 619 (2006) (1) | 67. | 663 (2009) (1) | 96. | 703 (2012) (2) |
| 10. | 580 (2004) (11) | 39. | 620 (2006) (1) | 68. | 667 (2009) (1) | 97. | 704 (2012) (2) |
| 11. | 581 (2004) (2) | 40. | 622 (2006) (1) | 69. | 669 (2009) (1) | 98. | 705 (2012) (6) |
| 12. | 583 (2004) (2) | 41. | 625 (2007) (1) | 70. | 670 (2010) (1) | 99. | 706 (2012) (2) |
| 13. | 586 (2004) (1) | 42. | 628 (2007) (1) | 71. | 671 (2010) (1) | 100. | 707 (2012) (1) |
| 14. | 587 (2004) (4) | 43. | 629 (2007) (1) | 72. | 672 (2010) (3) | 101. | 711 (2013) (2) |
| 15. | 589 (2005) (1) | 44. | 630 (2007) (1) | 73. | 673 (2010) (4) | 102. | 713 (2013) (1) |
| 16. | 590 (2005) (2) | 45. | 634 (2007) (2) | 74. | 674 (2010) (2) | 103. | 714 (2013) (1) |
| 17. | 591 (2005) (2) | 46. | 635 (2007) (2) | 75. | 675 (2010) (1) | 104. | 715 (2013) (1) |
| 18. | 592 (2005) (1) | 47. | 637 (2008) (1) | 76. | 676 (2010) (2) | 105. | 716 (2013) (2) |
| 19. | 593 (2005) (4) | 48. | 638 (2008) (2) | 77. | 677 (2010) (1) | 106. | 720 (2014) (1) |
| 20. | 594 (2005) (1) | 49. | 640 (2008) (2) | 78. | 679 (2010) (2) | 107. | 722 (2014) (1) |
| 21. | 596 (2005) (1) | 50. | 641 (2008) (1) | 79. | 680 (2010) (2) | 108. | 723 (2014) (1) |
| 22. | 597 (2005) (1) | 51. | 642 (2008) (2) | 80. | 681 (2010) (2) | 109. | 725 (2014) (4) |
| 23. | 598 (2005) (4) | 52. | 643 (2008) (1) | 81. | 682 (2010) (3) | 110. | 727 (2015) (2) |
| 24. | 600 (2005) (2) | 53. | 647 (2008) (1) | 82. | 683 (2010) (1) | 111. | 730 (2015) (1) |
| 25. | 602 (2005) (3) | 54. | 648 (2008) (1) | 83. | 685 (2011) (3) | 112. | 731 (2015) (1) |
| 26. | 604 (2005) (2) | 55. | 650 (2008) (1) | 84. | 686 (2011) (1) | 113. | 734 (2015) (2) |
| 27. | 605 (2005) (1) | 56. | 651 (2008) (1) | 85. | 687 (2011) (1) | 114. | 736 (2015) (1) |
| 28. | 606 (2005) (1) | 57. | 652 (2008) (1) | 86. | 688 (2011) (1) | 115. | 738 (2016) (4) |
| 29. | 607 (2005) (3) | 58. | 653 (2008) (2) | 87. | 692 (2011) (1) | 116. | 739 (2016) (6) |

5.9.2018

# ENFORCED PERFORMANCE IN COMMON-LAW VERSUS CIVIL-LAW SYSTEMS: AN EMPIRICAL STUDY OF A LEGAL TRANSFORMATION

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D. Length of Legal Proceedings
E. Summary
Discussion and Conclusion

## INTRODUCTION

A standard claim made by comparative-law experts is that even legal systems with markedly different concepts and doctrines often reach quite similar practical outcomes. Specifically, in the sphere of remedies for breach of contract, it has been repeatedly argued that, despite the contrasting positions of common-law and civil-law systems—the former denying specific performance in all but exceptional cases, and the latter awarding enforcement remedies subject to certain exceptions—the actual decisions made by litigants and courts need not be too different.[1] Whether this is actually the case is, however, a matter of ongoing debate, as some scholars insist that the doctrinal and cultural differences produce considerable differences in judicial practice.[2]

On the theoretical level, few ideas, if any, within economic analysis of law and beyond, have captured the imagination of legal scholars as much as the notion of *efficient breach* and the related distinction between *property rules* and *liability rules*. Almost fifty years after the introduction of this idea[3] and the related distinction,[4] the debate over the pros and cons of specific performance—as opposed to monetary damages—shows no

[1] *See* RENÉ DAVID, ENGLISH LAW AND FRENCH LAW 126–27 (1980); FREDERICK H. LAWSON, REMEDIES OF ENGLISH LAW 213 (2d ed. 1980); Louis J. Romero, *Specific Performance of Contracts in Comparative Law: Some Preliminary Observations,* 27 LES CAHIERS DE DROIT 785 (1986); GUENTHER H. TREITEL, REMEDIES FOR BREACH OF CONTRACT: A COMPARATIVE ACCOUNT 71 (1988); KONARD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPAR TIVE LAW 484 (Tony Weir trans., 3rd ed. 1998); Henrik Lando & Caspar Rose, *The Myth of Specific Performance in Civil Law Countries,* 24 INT'L REV. L. & ECON. 473 (2004); Ronald J. Scalise, Jr., *Why No Efficient Breach in the Civil Law: A Comparative Assessment of the Doctrine of Efficient Breach of Contract,* 55 AM. J. COMP. L. 721, 730–34 (2007).
[2] *See* Anthony Ogus, *Remedies, English Report, in* CONTRACT LAW TODAY—ANGLO-FRENCH COMPARISONS 243 (Donald Harris & Dennis Tallon eds., 1989); Lucinda Miller, *Specific Performance in the Common Law and Civil Law, Some Lessons for Harmonisation, in* RE-EXAMINING CONTRACT AND UNJUST ENRICHMENT: ANGLO-CANADIAN PERSPECTIVES 281 (Paula Giliker ed., 2007); SOLÈNE ROWAN, REMEDIES FOR BREACH OF CONTRACT: A COMPARATIVE ANALYSIS OF THE PROTECTION OF PERFORMANCE 18–69 (2012).
[3] Robert L. Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency,* 24 RUTGERS L. REV. 273 (1970); John H. Barton, *The Economic Basis of Damages for Breach of Contract,* 1 J. LEGAL STUD. 277 (1972).
[4] Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral,* 85 HARV. L. REV. 1089 (1972).

signs of abating.[5] In a nutshell, the claim is that contracts should be performed if, and only if, the promisee's expected utility from performance exceeds the expected cost of performance to the promisor. When this is not the case, both the parties and society at large would be better off if the contract is not performed. Presumably, entitling the promisee to expectation damages creates adequate incentives for the promisor, because the duty to compensate the promisee forces the promisor to internalize the former's disutility in the event of a breach, thereby aligning the promisor's incentives with the social good. Dozens of articles have added much nuance to the basic argument.[6]

Only a few studies have gone beyond the doctrinal, theoretical, or comparative analyses, and examined the issue empirically. These studies used qualitative methods,[7] vignette surveys,[8] or incentivized lab experiments.[9] None, however, have quantitatively analyzed actual court judgments. This Article revisits the comparative and theoretical debates, and describes the surprising findings of a quantitative analysis of judgments concerning remedies for breach of contract in Israel.

The Israeli experience is particularly interesting in this regard because Israeli law is a mixed legal system that experienced a "legislative shock" in 1970. Prior to the enactment of the Contracts (Remedies for Breach of Contract) Law 1970, Israeli law closely followed the common-law rule, whereby damages were the ordinary remedy for breach of contract, while specific performance was an equitable relief that was awarded only in exceptional cases—primarily in contracts for the sale of real property and unique goods.[10] The Remedies Law revolutionized Israeli law by abandoning the common-law rule and adopting the civil-law rule instead, whereby the injured party is ordinarily entitled to enforced performance of the contract, subject to certain exceptions (e.g., when the

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[5] According to the Law Journal Library of HeinOnLine (containing more than 2400 law and law-related periodicals), the number of articles mentioning "efficient breach" has constantly risen in every five-year period between 1971–75 and 2011–15 (1, 28, 107, 205, 241, 276, 324, 401 and 471, respectively)—for a total of 2,162 articles.

[6] *See infra* notes 57–68 and accompanying text.

[7] Yonathan A. Arbel, *Contract Remedies in Action: Specific Performance,* 118 W. VA. L. REV. 369 (2015).

[8] Daphna Lewinsohn-Zamir*, Can't Buy Me Love: Monetary versus In-Kind Remedies,* 2013 U. ILL. L. REV. 151 (2013).

[9] Ben Depoorter & Stephan Tontrup, *How Law Frames Moral Intuitions: The Expressive Effect of Specific Performance,* 54 ARIZ. L. REV. 673 (2012); Christoph Engel & Lars Freund, *Behaviorally Efficient Remedies – An Experiment* (MPI Collective Goods Preprint, No. 2017/17), *available at:* https://ssrn.com/abstract=2988653.

[10] 3 ZEEV ZELTNER, CONTRACT LAW: GENERAL PART 264–93 (1970, in Hebrew).

obligation is to perform a personal service, or when enforcement would require unreasonably costly supervision by the court). There is virtually a consensus among Israeli judges and scholars that this reform radically transformed Israeli law.[11] Thus, one should expect that following the enactment of the Remedies Law, parties' inclination to seek enforcement remedies and courts willingness to award them have dramatically increased.

This consensus notwithstanding, there are several reasons to doubt that such revolution has actually occurred in practice. Since Western common-law and civil-law countries resemble each other in their basic economic and social conditions, and do not fundamentally differ with regard to their basic normative convictions; and since the huge theoretical literature highlights complex considerations for and against the availability of enforced performance—it would be surprising if legal systems actually diverged markedly in this regard. In fact, as noted above, while some comparativists insist that there are fundamental differences between common-law and civil-law systems in this regard, others argue that the differences are more apparent than real. If this is true when comparing different legal systems, it may be true when comparing pre- and post-1970 Israeli law, as well. In this context, one must pay heed to terminological differences between the pre- and post-1970 Israeli law—in particular, the difference between *specific performance* under the old law and *enforced performance* under the new—and to the existence of exceptions to the basic rules under each legal regime. These differences—which echo similar differences in the international arena—call for caution when comparing the two regimes. Finally, important pragmatic considerations affect parties' preferences and courts' rulings in ways that might create discrepancies between law on the books and the law in action.

With all this in mind, we present the findings of a quantitative analysis of the judgments of the Israeli Supreme Court on remedies for breach of contract over 69 years—from the establishment of the State of Israel in 1948 through the end of 2016—and a complementary analysis of district court judgments in recent years. To that end, we constructed two new datasets, comprising a total of 767 judgments (and since in 85 of the

[11] *See, e.g.,* GABRIELA SHALEV & YEHUDA ADAR, THE LAW OF CONTRACT – REMEDIES FOR BREACH: TOWARDS CODIFICATION OF ISRAELI CIVIL LAW 191–94 (2009, in Hebrew); 4 DANIEL FRIEDMANN & NILI COHEN, CONTRACTS 104–05 (2011, in Hebrew). *See also infra* notes 17–42 and accompanying text.

judgments the court discussed claims for remedies by both parties, the total number of *observations* in the two datasets is 852). Our initial goal was to examine whether the legislative reform of 1970 has indeed transformed the use of enforcement remedies, as is commonly thought. Our hypothesis was that, notwithstanding the legislative reform and the prevailing judicial and scholarly rhetoric, the actual resort to these remedies by plaintiffs and courts has not dramatically changed in the wake of the 1970 legislation. We were surprised to discover that not only there was no increase in the use of enforcement remedies after 1970, but the tendency of plaintiffs to sue for these remedies has actually *decreased* markedly since then. As for the courts' willingness to award enforcement remedies in cases in which they were claimed, not only it has not increased, inasmuch as there was any change, it was in the opposite direction.

Since it is highly unlikely that the elevation of the status of enforcement remedies caused a decline in using them, we looked for other explanation for this phenomenon. Thus, we examined—and rejected—the possibility that the decrease in the use of enforcement remedies resulted from the availability of supra-compensatory remedies for breach of contract. We also tested whether judges' legal education (civil law or common law) was associated with their inclination to award enforcement remedies—and found that it was not. Finally, we examined whether the initial claim for enforcement remedies and their award were associated with the length of the legal proceedings between the initial filing of the lawsuit to the final judgment by the Supreme Court. We found a highly statistically significant association between the length of legal proceedings and the inclinations to sue for, and to award, enforcement remedies. This association persisted even when we controlled for other variables—such as the legal regime (pre- or post-1970), the year of the judgment, and the type of contract. This finding was corroborated by an analysis of the complementary dataset of district court judgments.

Like other observational studies, the present study has considerable limitations stemming from both the scope of the data (especially with regard to lower-courts judgments and judgments from earlier periods) and the inherent difficulty of deducing causation from statistical association. That said, the study also has considerable advantages, including the fact that it compares two legal regimes in the same society (rather than comparing between different countries).

Given these limitations, one must be cautious in drawing theoretical, normative, analytical, or comparative conclusions from the empirical findings. We nevertheless believe that our study—and the theoretical and comparative analyses that motivated it—carry several positive and normative implications. First, they support the claim that the actual differences between the opposing legal regimes might be rather small, if they exist at all. Second, while our findings do not purport to resolve the normative debate over contract remedies, they arguably point to the limited practical significance of the theoretical arguments raised in that debate, and the possibly greater significance of mundane considerations—such as the length of legal proceedings. Third, our findings imply that if one truly strives to expand the use of enforcement remedies, shortening the expected lapse of time between the filing of a lawsuit and execution of the final judgment may be as important as formulating the appropriate substantive rules. Fourth, the discrepancy between the Courts' rhetoric and practice regarding enforcement remedies may shed light on the complex roles that the law and the courts play in society.

The remainder of this article is divided into seven Parts. For readers unfamiliar with the Israeli legal system, the next Part briefly describes Israeli contract law and remedies. Part II describes the broad consensus among Israeli legislatures, judges, and scholars regarding the transformation of the status of enforcement remedies brought about by the 1970 Law. Part III then analyzes various reasons why this consensus should be questioned, and suggests that there may be considerable difference in this regard between courts' rhetoric and practice. These reasons give rise to the hypothesis that, contrary to appearances, the Remedies Law of 1970 has not resulted in a major change in the choice of remedies for breach of contracts. Part IV introduces previous empirical studies, the motivation for our study, its methodology, strengths, and limitations. Part V presents the surprising results of the declined resort to enforcement remedies, and Part VI probes for explanations for these results. The concluding Part offers a brief discussion of the broader implications of our findings.

## I. BACKGROUND: CONTRACT LAW AND REMEDIES IN ISRAEL

Israel has a mixed legal system. When the State was established in 1948, its legal system was an amalgam of pre-1917 Ottoman legislation, British legislation and case law that

had been introduced during the British Mandate Period (1917–1948), and religious laws applying to each religious community in matters of marriage and divorce. With the exception of tort law, there was almost no British legislation in the field of private law, yet contract law was distinctively common-law oriented due to a process of Anglicization brought about by the courts. During the Mandate period, local judges—who were either British or British-oriented—tended to read, interpret, and fill (actual or purported) gaps in the local legislation using common-law principles, concepts, and rules.

After the establishment of the State of Israel, Israeli judges became less dependent on English sources, but the legal system in general, and contract law in particular, remained common-law oriented.[12] A fundamental, gradual transformation was brought about through legislation, primarily from the 1960s to the early 1980s. Unlike most countries that became independent in the mid-twentieth century, Israel did not meet the challenge of modernizing its private law by adopting and adapting an established European code, or by sticking to English common law. Instead, it embarked on a project of creating its own modern private law. In the controversy between those who believed that it would be more prudent to maintain the linkage of Israeli law to the English common law, those who argued that modern Israeli law should be based on Jewish law, and those who advocated for an entirely new system of Israeli law (inspired by both civil-law and common-law systems, but with greater emphasis on the former)—the third attitude prevailed.[13] The outdated Ottoman legislation and patchwork of common-law doctrines were replaced with a systematic, comprehensive, code-like legislation. Although these Laws were enacted one by one, and prepared by different expert committees over an extended period, they were all intended eventually to form parts of a European-style civil code. These Laws were not designed to amend or complement extant law, but rather to replace it altogether.[14] In the field of contract law, the two centerpieces were the Contracts

[12] Norman Bentwich, *The Legal System of Israel,* 13 INT'L & COMP. L.Q. 236 (1964).
[13] Guido Tedeschi & Yaacov S. Zemach, *Codification and Case Law in Israel, in* THE ROLE OF JUDICIAL DECISIONS AND DOCTRINE IN CIVIL LAW AND MIXED JURISDICTIONS 272 (Joseph Dainow ed., 1974).
[14] *See id.*; Daniel Friedmann, *Independent Development of Israeli Law,* 10 ISR. L. REV. 515 (1975); Aharon Barak, *Towards Codification of the Civil Law,* 1 TEL AVIV U. STUD. L. 9 (1975); Gabriela Shalev & Shael Herman, *A Source Study of Israel's Contract Codification,* 35 LA. L. REV. 1091 (1975); Alfredo Mordechai Rabello & Pablo Lerner, *The Project of the Israeli Civil Code: The Dilemma of Enacting A Code in a Mixed Jurisdiction, in* LIBER AMICORUM GUIDO ALPA: PRIVATE LAW BEYOND THE NATIONAL SYSTEMS 773 (Mads Andenas et al. eds., 2007); Eyal Zamir, *Private Law Codification in a Mixed Legal System –*

(Remedies for Breach of Contract) Law 1970, and the Contracts (General Part) Law 1973. The new legislation in the field of contract law did not mimic any existing foreign law, but is generally civil-law oriented, with a key role played by the principle of good faith, no requirement of consideration for contract formation, and so forth.

The Remedies Law 1970 was inspired by the remedial provisions of the Uniform Law on International Sale of Goods of 1964 (ULIS)—the predecessor of the United Nations Convention on Contracts for the International Sale of Goods of 1980 (CISG).[15] The three primary remedies under the Law are enforced performance (*enforcement*—in Hebrew *akhifa*),[16] rescission (in Hebrew *bitul*) of contract, and damages (*compensation*—in Hebrew *pitzuyim*). According to Section 2 of the Law, when a contract is breached, "the injured party is entitled to claim its enforcement or to rescind the contract, and in addition to or in lieu of the said remedies he is entitled to compensation…" As further detailed in the next Part, the primary remedy under the law is enforced performance, to which the injured party is entitled as a matter of course.

## II. THE CONSENSUS

Under Section 3 of the Israeli Remedies Law, the injured party is entitled to enforced performance unless one of four exceptions applies.[17] Courts and scholars agree that the

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*The Israeli Successful Experience, in* THE SCOPE AND STRUCTURE OF CIVIL CODES – A COMPARATIVE ANALYSIS 233 (Julio Cesar Rivera ed., 2014). In the mid-1980s, following the enactment of the separate Laws, a committee of experts chaired by Chief Justice, Prof. Aharon Barak (aka *the Codification Committee*)—was established to integrate the separate Laws into a unified civil code. The committee completed its work in the mid-2000s (Aharon Barak, *Introduction to the Israeli Draft Civil Code, in* THE DRAFT CIVIL CODE FOR ISRAEL IN COMPARATIVE PERSPECTIVE 1 (Kurt Siehr & Reinhard Zimmermann eds., 2008); Pablo Lerner & Alfredo Mordechai Rabello, *The (Re) Codification of Israeli Private Law: Support for, and Criticism of, the Israeli Draft Civil Law Code,* 59 AM. J. COMP. L. 763 (2011)). The legislative process in Parliament began in 2011, but it is unclear when it will be completed, if at all.

[15] *See* Eyal Zamir, *European Traditions, the Conventions on International Sales and Israeli Contract Law, in* EUROPEAN LEGAL TRADITIONS AND ISRAEL 499 (Alfredo Mordechai Rabello ed., 1994).

[16] Section 1(a) clarifies that *enforcement* means "enforcement by an order for the discharge of a monetary obligation or some other mandatory order or by a restraining order, and includes enforcement by an order for the repair or removal of the consequences of the breach." To avoid the ambiguity surrounding the term *enforcement* (which sometimes means "giving legal effect" or "providing legal sanction for infringement") and the technical meaning of *specific performance*, we generally use the term *enforced performance* to describe the remedy under Israeli law.

[17] Section 3 provides as follows:

> The injured party is entitled to enforcement of the contract unless one of the following obtains:
>
> (1) the contract is impossible of performance;

transformation of the status of enforced performance is the greatest change brought about by the 1970 Law. Already at its Bill stage, where the entitlement to enforced performance was more limited than in the final Law,[18] it was explained that the primary right of the injured party is for the enforced performance of the breached contract, and that—contrary to the existing law at the time—this remedy would no longer be an equitable remedy only.[19] In contrast, the rules concerning damages have not significantly changed: Section 10 of the Remedies Law follows the common law's famous *Hadley v. Baxendale* rule.[20]

Shortly after the Law's enactment, the Supreme Court (Zussman J.) emphasized that in the wake of the new Law, "enforced performance, which is akin to specific performance, had been promoted from its inferior status under English law." Enforced performance, the court noted, "is now on a par with damages, if not superior to it, whereas until now it was only used as a secondary relief, when the payment of damages does not compensate the injured party."[21] Ever since, the Supreme Court has repeatedly stressed that enforced performance is "the primary and principal relief to which the injured party is entitled";[22] the "first and foremost" relief;[23] the relief with priority position under contract law;[24] and "*primus inter pares* and even superior to other reliefs".[25] Hence, "in any case—but for those mentioned in the concluding part of Section 3—*any* contract will be enforced by the injured party's claim as a matter of course".[26]

While under English law, specific performance is considered an equitable relief, subject to the court's discretion, under the Remedies Law "enforcement is the injured

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(2) enforcement of the contract consists in compelling the doing or acceptance of personal work or a personal service;
(3) implementation of the enforcement order requires an unreasonable amount of supervision on behalf of a court or an execution office;
(4) enforcement of the contract in the circumstances of the case is unjust.

[18] As cited in *supra* note 17 and further explained below, under the 1970 Law, enforced performance is denied if it is "unjust"—however, the fact that damages would provide a just (or even more just) remedy does not militate against enforcement. In contrast, according to the Bill, enforced performance was to be denied whenever it was established that damages were a more just remedy in the circumstances.
[19] HH 5729, p. 392.
[20] 9 Exch. 341 (1854).
[21] Zori Pharmaceutical & Chemical Co. Ltd. v. National Labor Court, 28(1) PD 372, 384 (1974).
[22] See, e.g., Peretz v. Bitton, 30(1) PD 367, 373 (1975); Rabinai v. Man Shaked Co. Ltd., 33(2) PD 281, 291 (1979); Elhaded v. Shamir, para. 34 (Nevo, March 29, 2011).
[23] Pomerantz v. K.D.S. Const. & Invest., 38(2) PD 813, 817 (1984).
[24] Azimov v. Binyamini, paras. 14, 18, 20, 23, 24 (Nevo, March 7, 2013).
[25] Yanai v. Yichya, 47(4) PD 773, 778 (1993).
[26] Onison Const. Co. v. Deutch, 30(2) PD 398, 405 (1976).

party's right, and the relief is not dependent on the court's discretion."[27] Specifically, while under the previous law, enforcement was denied whenever damages adequately protected the injured party's interests,[28] nowadays the fact that damages would provide an adequate protection does not negate the entitlement to enforced performance—which is denied only under the exceptions set out in Section 3.[29] Moreover, since enforced performance is the rule, or "the high road" (*derech hamelech*),[30] and the limitations on its award are the exception—the burden of proof for the existence of an exception is borne by the breaching party.[31] The court has ruled that Section 3's exceptions must be strictly construed: "Only in exceptional and extraordinary cases will the court refrain from ordering the performance of the contract."[32] This approach applies to all four exceptions, including the fourth (enforcement being "unjust").[33]

More than twenty years ago, one of us expressed some reservations about this rhetoric.[34] But for this exception,[35] the courts' decisive position regarding the transformation of Israeli law of contract remedies and the primary status of enforced performance is overwhelmingly shared by legal academia, including English-oriented scholars.[36]

Moreover, the transformation of the status of enforced performance is generally perceived to have altered the very nature of contracts: "The contract is not only a source

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[27] Rabinai, 33(2) PD at 291.
[28] Parchodnik v. Ackerman, 10 PD 72, 74 (1956).
[29] Rabinai, 33(2) PD at 292.
[30] Kassem v. Kassem, 37(3) PD 60, 90 (1983).
[31] Novitz v. Leibovitz, 36(1) PD 537, 543 (1982); Kassem, 37(3) PD at 90.
[32] Meir v. Mizrachi, 37(3) PD 579, 583 (1983).
[33] Azimov, at paras. 16–18 (Hayut J.).
[34] EYAL ZAMIR, CONTRACT FOR SERVICES LAW, 1974 676–79 (COMMENTARY ON LAWS RELATING TO CONTRACTS, Guido Tedeschi ed., 1994, in Hebrew).
[35] As further described in *infra* Section IV.A, Arbel's recent study (*supra* note 7) lends support to Zamir's reservations.
[36] *See* ZELTNER, *supra* note 10, at 365 (describing the rule concerning enforced performance in the Bill of the 1970 Law as "the reverse" of the common-law rule); URI YADIN, CONTRACTS (REMEDIES FOR BREACH OF CONTRACT) LAW, 5731-1970 54 (COMMENTARY ON LAWS RELATING TO CONTRACTS, Guido Tedeschi ed., 1979, in Hebrew); René Sanilevici, *Can the Enforcement of a Monetary Obligation be Rejected for Being Unjust?, in* ESSAYS IN MEMORY OF PROFESSOR GUIDO TEDESCHI 563 (Aharon Barak et al. eds., 1995, in Hebrew); 1 MIGUEL DEUTCH, INTERPRETATION OF THE CIVIL CODE 301–07 (2005, in Hebrew); ELI BUKSPAN, THE TRANSFORMATION OF BUSINESS LAW 367–73 (2007, in Hebrew); SHALEV & ADAR, *supra* note 11, at 191–94; Nili Cohen, *Justice Exception in Contract Enforcement – Morality and Efficiency as Considerations of Distributive Justice*, 33 TEL AVIV U.L. REV. 241 (2010, in Hebrew); FRIEDMANN & COHEN, *supra* note 11, at 104–05.

for the duty to pay damages for its non-performance, it is, first and foremost, a source for the performance of the obligations it lays down".[37] Put differently, "when a contract is made for the sale of a horse, the buyer acquires a right to receive a horse, not a right to damages for not receiving a horse".[38] This principled approach has guided the courts in developing the rules of enforced performance, for example, with regard to the appointment of a Receiver to complete a construction project,[39] and the indexation of prices by the court to facilitate the enforced performance of transactions in periods of hyperinflation.[40] It has similarly guided the courts beyond the scope of the law of enforced performance—for example in recognizing a broad entitlement to disgorgement remedies, based on the law of unjust enrichment.[41] Finally, some judges view the broad availability of the remedy of enforced performance under Israeli law as incompatible with the doctrine of efficient breach, hence as an argument against economic analysis of law:[42]

> The economic approach does not give sufficient weight to considerations that cannot be given an economic weight. Contract law is not only designed to enhance economic efficiency. It is also designed to facilitate proper social life. A contract should be performed—and not only pay damages for its breach—because by adopting this position we encourage people to keep their promises. Keeping promises is a cornerstone of our life as a society and as a nation.

According to the legislation, the case law, and the scholarly writing it should therefore be expected that following the Remedies Law, the inclination of courts to award enforcement remedies—and correspondingly, plaintiffs' tendency to claim these remedies—have risen substantially.

## III. REASONS FOR SKEPTICISM

Notwithstanding the broad consensus among Israeli legislators, judges, and scholars, there are reasons to doubt that the Remedies Law 1970 has actually brought about the

[37] Novitz, 36(1) PD 542 (Barak J.).
[38] Adras Building Materials Ltd. V. Harlow & Jones GMBH, 42(1) PD 221, 277 (1988) (Barak J.).
[39] Onison, 30(2) PD 398.
[40] Rabinai, 33(2) PD 291–95.
[41] Adras, 42(1) PD 275–79.
[42] Adras, 42(1) PD 278 (Barak J.).

revolution that is commonly attributed to it. This Part discusses four types of reasons for this skepticism: the familiar insight of comparative law that even legal systems that diverge in their doctrinal points of departure often converge in their actual rulings; the weight and complexity of policy arguments for and against enforced performance—given which it is unlikely that legal systems that share the same core values would take opposite stances on such a fundamental issue in practice; conceptual and terminological differences between the pre- and post-1970 law and exceptions to the basic rule under each regime; and pragmatic considerations that might narrow the actual differences between the two legal regimes.

### *A. Comparative Law*

One reason to question the prevailing consensus that the legal practice concerning contract remedies changed dramatically in the wake of the Remedies Law 1970 comes from comparative law. A basic theme in comparative law is "that the legal system of every society faces essentially the same problems, and solves these problems by quite different means though very often with similar results."[43] In the present context, the argument is that, despite the contrasting positions of common-law and civil-law systems—the former denying specific performance in all but exceptional cases, and the latter awarding enforcement remedies subject to certain exceptions—the actual decisions made by litigants and courts need not be too different.

Whether this is actually the case is a matter of ongoing debate, which we could not resolve, or even describe in any detail, here. Some scholars, such as Anthony Ogus, Lucinda Miller, Shael Herman, Jan Smits, Alan Farnsworth, and Solène Rowan claim that there are fundamental differences in this regard between the common-law and civil-law systems.[44] As Rowan concludes, "the view amongst commentators that there are few differences between the English and French approaches to specific remedies is

[43] ZWEIGERT & KÖTZ, *supra* note 1, at 34.
[44] *See* Ogus, *supra* note 2; Miller, *supra* note 2; ROWAN, *supra* note 2, at 17–69; Shael Herman, *Specific Performance: a Comparative Analysis,* 7 EDINBURGH L. REV. 5 (2003) (comparing U.S. and Spanish law); JAN M. SMITS, CONTRACT LAW: A COMPARATIVE INTRODUCTION 11 (2014); E. Allan Farnsworth, *Comparative Contract Law, in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 899, 932 (Mathias Reiman & Reinhard Zimmerman eds., 2006) (arguing that although the difference between the systems "may not be as great as at first appears," the systems' attitudes "remain fundamentally different").

fundamentally misguided" since the description of those two systems "demonstrates beyond doubt that the regime of specific relief in English law gives inferior protection to the performance interest compared to the law in France."[45] Other scholars, including René David, Frederick Lawson, Louis Romero, Guenther Treitel, Konard Zweigert and Hein Kötz, Henrik Lando and Caspar Rose, Stephen Smith, and Ronald Scalise, argue that there is considerable practical convergence between the systems.[46] For example, Reinhard Zimmerman states that "it is widely recognised among modern comparative lawyers that in the actual practice of German law the claim to specific performance does not have anything like the significance attached to it in theory. At the same time, the traditional common law view seems to be losing some of its force in both the United States and in England."[47]

Whatever the differences that may have existed between these two systems at any point in time, it is clear that these have gradually diminished over the years, thanks to legislative and judicial developments. Thus, for example, Section 1211 of the French Civil code was amended in 2016 so that enforced performance is denied not only when performance-in-kind is impossible, but also when its cost to the promisor would be manifestly disproportionate to the benefit to the promise. This amendment might not close the gap between French law and English law, and it is still early to foresee how the courts will interpret and implement it, but it certainly narrows the gap between the systems.[48] On the other side of the English Channel/*la Manche*, courts' willingness to

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[45] ROWAN, *supra* note 2, at 52.
[46] *See* DAVID, *supra* note 1, at 126–27; LAWSON, *supra* note 1, at 213; Romero, *supra* note 1; TREITEL, *supra* note 1, at 71; ZWEIGERT & KÖTZ, *supra* note 1, at 484; Lando & Rose, *supra* note 1; STEPHEN SMITH, ATIYAH'S INTRODUCTION TO THE LAW OF CONTRACT 386 (2006); Scalise, *supra* note 1, at 730–34.
[47] Reinhard Zimmerman, *Savigny's Legacy: Legal History, Comparative Law, and the Emergence of a European Legal Science,* 112 L.Q.R. 576, 591 (1996). For additional comparative analyses, see SPECIFIC PERFORMANCE IN CONTRACT LAW: NATIONAL AND OTHER PERSPECTIVE (Jan Smits, Daniel Hass & Geerte Hesen eds., 2008).
[48] *See* Jan M. Smits & Caroline Calomme, *The Reform of the French Law of Obligations: Les Jeux Sont Faits,* 23 MAASTRICHT J. EUR. & COMP. L. 1040 (2016); Solène Rowan, *The New French Law of Contract,* 66 INT'L & COMP. L.Q. 805 (2017); Yves-Marie Laithier, *Exécution Forcée en Nature, in* THE CODE NAPOLÉON REWRITTEN: FRENCH CONTRACT LAW AFTER THE 2016 REFORMS 257 (John Cartwright & Simon Whittaker eds., 2017).

reinstate wrongfully discharged employees has increased in the past decades, at least in principle.[49]

It appears that terminological differences between the systems (as discussed below); the existence of significant exceptions to the basic rules (with substantial correspondence between the situations governed by the common-law rule and those governed by the civil-law exceptions—and vice versa); possible discrepancies between judicial rhetoric and practice; and the interrelationships between substantive rules and the rules of civil procedure—all result in a narrower gap between the various legal systems than first meets the eye (even if some gap still remains). To use but one example, under Section 887 of the German Code of Civil Procedure, when a court orders the breaching party to perform a certain act, and the breacher fails to do so—and the said act can be performed by someone else—the court is authorized to order the performance of the act by a third party, at the breacher's expense. In such cases, although enforced performance was awarded, the final result is a substitutionary monetary relief.[50] Inasmuch as legal systems that start from opposite doctrinal points of departure tend to converge in their practical solutions, this may also be true within Israeli law, in relation to its pre- and post-1970 legal regimes.

### *B. Complex Policy Considerations*

This Section briefly reviews some of the arguments for and against the availability of enforced performance as a remedy for breach of contract. The main purpose of this review is to argue that the weight and complexity of the moral, social, economic, and institutional arguments—which make it one of the most controversial issues in contract law—cast doubt on the plausibility of any legal system *actually* moving from one extreme to another in this regard. In the face of a wealth of conflicting arguments, one would expect that, regardless of the doctrinal point of departure, the actual

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[49] *See* Martha S. West, *The Case against Reinstatement in Wrongful Discharge,* 1988 U. Ill. L. Rev. 1, 32–37; GARETH JONES & WILLIAM GOODHART, SPECIFIC PERFORMANCE 171–72 (2d ed. 1996).

[50] *See also* BASIL S. MARKESINIS, HANNES UNBERATH & ANGUS JOHNSTON, THE GERMAN LAW OF CONTRACT: A COMPARATIVE TREATISE 403–06 (2d ed. 2006); Lando & Rose, *supra* note 1 (describing German and Danish law).

implementation of the law would be moderate, balanced, and nuanced.

One reason for awarding enforced performance as a matter of course is the moral duty to keep one's promises. According to a liberal theory, promises, including contracts, enable people to enjoy the efforts and resources of others, while respecting their autonomy.[51] By legally enforcing contracts, the law treats promisors as autonomous and rational beings. Charles Fried has argued that expectation damages fully realize the moral duty to keep promises, because they place the injured party in the same position she would have been in had the contract been performed.[52] However, as Fried's critics have compellingly argued, if the goal of contract law is to let the promisee get what she was promised, then the primary remedy should in fact be specific performance.[53] In retrospect, Fried conceded that the connection that he made between the promise principle and expectation damages was "insufficiently nuanced."[54]

One might doubt that there is a moral duty to perform a contract when its breach does not entail losses to the promisee (or even when it does—if the breach results in better outcomes overall). However, even if one concedes that there is a moral duty to perform contracts, a liberal argument against generally awarding enforced performance is that this remedy often significantly curtails the promisor's freedom. Especially when the contractual obligation is to do, rather than to give; active, rather than an obligation to refrain from action; and personal in nature—the liberal consideration weighs against enforced performance, and in favor of substitutionary monetary remedies.[55] Furthermore, fairness requires taking both parties' interests into account. In situations where enforced performance is expected to inflict substantial hardship on the promisor, and damages would adequately protect the injured party's interests, both freedom and fairness considerations militate against enforced performance.

Extending one's perspective to society as a whole, the convention of promise- and

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[51] *See, e.g.,* CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (1981).
[52] *Id.* at 17–19. *Cf.* Daniel Markovits, *Making and Keeping Contract,* 92 VA. L. REV. 1325, 1361 (2006).
[53] Seana Shiffrin, *The Divergence of Contract and Promise,* 120 HARV. L. REV. 708, 722–24 (2007); Liam Murphy, *The Practice of Promise and Contract, in* THE PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 151, 154–58 (Gregory Klass, George Letsas & Prince Saprai eds., 2014).
[54] Charles Fried, *The Ambitions of Contract as Promise, in* THE PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW, *supra* note 53, at 17, 25.
[55] DORI KIMEL, FROM PROMISE TO CONTRACT: TOWARDS A LIBERAL THEORY OF CONTRACT 95–109 (2003).

contract-keeping is essential to the flourishing of a cohesive society and a functioning market—hence the law should help sustaining this convention. Arguably, the best way to do so is by forcing the promisor to perform the obligation they have undertaken.[56] Giving the promisor a de facto choice to perform or pay damages legitimizes the breach of contracts—thus adversely affects society as a whole.

This is not, however, the position taken by economic analysis of law. From an economic perspective, maximizing social utility does not require utmost deterrence against contract breaches, but rather *optimal*—i.e., efficient—deterrence. Accordingly, contractual obligations should be performed *if, and only if*, the net cost of performance to the promisor is less than its net benefit to the promisee. This argument, known as the *efficient breach theory*, has preoccupied the minds of contract theoreticians ever since its introduction in the early 1970s.[57]

In its crude form, this argument supports expectation damages as a remedy for breach of contract: to efficiently choose between performance and non-performance, the promisor should internalize the costs that the breach would impose on the promisee. In the world of economic models, expectation damages is the remedy chosen by the contracting parties ex ante, to maximize the contract surplus, because enforced performance might hinder efficient breach.

One criticism of this argument is the considerable discrepancy between expectation damages in the world of models—where they make the promisee indifferent between performance and damages—and in the real world. In the real world, promisees are typically undercompensated because they face difficulties in proving their losses and quantifying them; establishing the causal connection between the breach and the losses; persuading the court that their losses were foreseeable from the promisor's perspective at the time of contracting; fending off arguments about mitigation of damages; and overcoming courts' reluctance to award damages for non-pecuniary harms in contractual disputes—not to mention litigation costs.[58] These limitations on the availability of

[56] Adras, 42(1) PD 278.
[57] For overviews, see Gregory Klass, *Efficient Breach, in* THE PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW, *supra* note 53, at 362; Ariel Porat, *Economics of Remedies, in* 3 THE OXFORD HANDBOOK OF LAW AND ECONOMICS 308 (Francesco Parisi ed., 2017).
[58] William S. Dodge, *The Case for Punitive Damages in Contracts,* 48 DUKE L.J. 629, 664–65 (1999).

damages undermine the efficiency of expectation damages and lend support to enforced performance.[59] This argument is particularly applicable when the subjective value of performance to the promisee is higher than its market value—as is often the case with real property and unique goods. The limited ability of courts to determine subjective value of items weighs in favor of enforced performance, since the latter obviates such determination (and opens the door to negotiation between the parties).[60]

However, as Daniel Markovits and Alan Schwartz have argued, damages may be superior to enforced performance even if the injured party is not indifferent between performance and damages.[61] Whenever the promisor values the option to breach and pay damages more than the promisee values the entitlement to enforced performance, the parties would rationally exclude the promisee's right to enforced performance ex ante, and the contract price would reflect this exclusion. If these are the typical preferences, then an efficient default rule should mimic them. Indeed, some deduce from this analysis that an efficient breach is perfectly compatible with the moral duty to keep promises, because in the absence of any explicit agreement to the contrary, every contract includes an option to perform or to pay damages.[62]

However, survey experiments conducted by Daphna Lewinsohn-Zamir—including with experienced business professionals—have shown that the sums of money people demand for giving up performance and settling for monetary damages are extremely high; indeed, many people refuse to settle for damages for any price discount whatsoever.[63] Thus, it is doubtful that Markovits and Schwartz's argument holds true in the real world.[64]

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[59] Alan Schwartz, *The Case for Specific Performance,* 89 YALE L.J. 271, 274–78, 284–91 (1979).
[60] Anthony T. Kronman, *Specific Performance,* 45 U. CHI. L. REV. 351 (1978); Thomas Ulen, *The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies,* 83 MICH. L. REV. 358, 360–64 (1984).
[61] Daniel Markovits & Alan Schwartz, *The Myth of Efficient Breach: New Defenses of the Expectation Interest,* 97 VA. L. REV. 1939, 360–64 (2011).
[62] *Id.* at 1979–86; Steven Shavell, *Why Breach of Contract May Not Be Immoral Given the Incompleteness of Contracts,* 107 MICH. L. REV. 1569 (2009); Richard Posner, *Let Us Never Blame a Contract Breaker,* 107 MICH. L. REV. 1349 (2009); *but see* Seana V. Shiffrin*, Could Breach of Contract Be Immoral?,* 107 MICH. L. REV. 1551 (2009); EYAL ZAMIR & BARAK MEDINA, LAW, ECONOMICS AND MORALITY 265–67 (2010).
[63] Lewinsohn-Zamir, *supra* note 8.
[64] Other empirical studies have shown that—contrary to the predictions of standard economic analysis—people treat breaches that are done in a bid to increase the promisor's profits more severely than breaches

Moreover, even assuming that expectation damages do put the injured party in the position she would have been in had the contract been performed, the efficient breach theory does not imply that promisees should not be entitled to enforced performance, because such entitlement does not necessarily prevent efficient breach. Take the paradigmatic case of a sale of a unique good, where a third party approaches the seller and offers to pay more for it than its value to the first buyer. Even if the initial buyer is entitled to enforced performance, the efficient outcome may ensue, since the third party can purchase the good from the buyer, or, alternatively, the seller may approach the buyer and offer to buy out her contractual entitlement, thereby allowing the good to be sold to the third party without breach of contract.[65]

In response, it is argued that the negotiation between the seller and the buyer may fail due to the bilateral monopoly situation and possible information problems, and that a breach coupled with a payment of damages is cheaper than two separate transactions (between the seller and the buyer, and between the buyer and the third party).[66] However, resolving disputes following a unilateral breach may well be costlier than renegotiation between parties who already know each other (or an additional transaction).[67] In this respect, one might distinguish between a contract to convey an existing object, and a contract to produce a new object or to perform certain work. In the former case, failure of the renegotiation between the seller and buyer would not necessarily preclude the efficient outcome, since the third party can always buy the object from the buyer. In the case of a contract to produce a new object or to perform certain work, however, such failure may result in a waste of resources (and costly ex ante measures to avoid such waste).[68]

Behavioral and experimental-economic insights have also been brought to bear on this debate. Specifically, conflicting arguments have been made as to how the very

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designed to cut the promisor's losses. *See* Jonathan Baron & Tess Wilkinson-Ryan, *Moral Judgment and Moral Heuristics in Breach of Contract,* 6. J. EMPIRICAL LEGAL STUD. 407 (2009); Daphna Lewinsohn-Zamir*, Taking Outcomes Seriously,* 2012 UTAH L. REV. 861 Maria Bigoni et al., *Unbundling Efficient Breach: An Experiment,* 14 J. EMPIRICAL LEGAL STUD. 527 (2017).

[65] Scalise, *supra* note 1, at 733–34.

[66] Ulen, *supra* note 60, at 381–82.

[67] *Id.* at 382–83; Daniel Friedmann, *The Efficient Breach Fallacy,* 18 J. LEGAL STUD. 1, 6–7 (1989).

[68] Steven Shavell, *Specific Performance versus Damages for Breach of Contract: An Economic Analysis,* 84 TEX. L. REV. 831 (2006).

entitlement to enforced performance affects the value that the buyer attributes to her contractual right, and how the choice between unilateral breach and renegotiation affects the prospects of an agreement on the promisee's compensation.[69]

Other considerations pertain to institutional and pragmatic aspects.[70] One institutional consideration concerns the volume of litigation. On the one hand, broader availability of enforced performance might deter breaches more effectively—and fewer breaches mean fewer lawsuits. On the other hand, a simpler way to ease the burden on the courts is to award less effective remedies, or no remedies at all: the more paltry the remedies a plaintiff can expect, the less she is likely to file a lawsuit in the first place. Of course, the weaker the social, economic, and legal incentives to perform contracts, the less contracts are likely to be performed—to the detriment of the market and other social institutions.

The cost of designing and executing judicial remedies must also be considered. Enforced performance saves the court the need to determine the scope of compensable losses, and to quantify the damages—tasks that may require hearing and analyzing large amounts of evidence. Such quantification is particularly challenging when contracts pertain to unique assets that have no ascertainable market value, or whose subjective value to the promisee may be much higher. Sometimes, however, enforced performance entails greater judicial and administrative costs to the legal enforcement system. This is the case when a contract involves a complex, extensive project whose successful completion requires close cooperation and monitoring of the promisor's conduct.

These are but some of the relevant considerations. Given their importance and complexity, it would be surprising if legal systems operating under comparable social and economic conditions provided markedly different solutions in similar situations. For the same reason, it would be surprising if the actual impact of the legislative reform in Israel proved to be as dramatic as is commonly thought.

### *C. Taxonomy, Rules, and Exceptions*

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[69] Compare Jeffrey J. Rachlinski & Forest Jourden, *Remedies and the Psychology of Ownership,* 51 VAND. L. REV. 1541 (1998) and Depoorter & Tontrup, *supra* note 9, *with* Daphna Lewinsohn-Zamir, *The Choice between Property Rules and Liability Rules Revisited: Critical Observations from Behavioral Studies,* 80 TEX. L. REV. 219 (2001).

[70] *See, e.g.,* ANDREW S. BURROWS, REMEDIES FOR TORTS AND BREACH OF CONTRACT 475–81 (3rd ed. 2004).

In light of the argument that the actual difference between common-law and civil-law systems is smaller than it appears to be and the complex policy considerations described above, we take a closer look at Israeli law before and after 1970, which is commonly believed to represent two opposite approaches. Several terminological and taxonomic differences between the two legal regimes cast doubt on the common wisdom.

To begin with, there are two important differences between the pre-1970 concept of *bitzu'a be'ayin* (specific performance) and the post-1970 concept of *akhifa* (enforced performance). Common-law courts routinely order debtors to repay their debts. The right to enforce contractual monetary obligations is not an equitable, discretionary remedy, but rather a remedy in law. It is not an exception to the denial of specific performance, because such an order is not thought of as an instance of specific performance—a term that refers exclusively to non-monetary obligations.[71] In contrast, according to Section 1 of the Remedies Law 1970, enforced performance explicitly encompasses an order to pay a debt. Hence whenever an Israeli court awards enforced performance of monetary obligations under the 1970 Law, it would have most probably done so under the previous law as well.

The same is basically true of obligations to refrain from action—e.g., when an employee undertakes not to compete with her employer for the duration of her employment. Like an order to repay a debt, a restraining injunction is not considered an instance of specific performance,[72] and is awarded quite liberally in common-law systems. Again, the current Israeli definition of *enforced performance* explicitly covers restraining injunctions. Thus, in this regard too, the willingness of courts to issue such orders need not significantly depart from previous law.

Then, the primary exception to the denial of specific performance under common law pertains to real property transactions. Since both under the British common law and the pre-1970 Israeli law, contracts for the sale of real property were specifically enforced on a regular basis, here too, one should not expect any change following the enactment of the 1970 Law. A few years ago, Menachem Mautner examined all judgments of the Israeli Supreme Court in the field of contract law, as published in the official Report

[71] BURROWS, *supra* note 70, at 433.
[72] *Id.* at 527–29.

during the first sixty years of the State of Israel (1948–2008).[73] He found that the single most common transaction dealt with in those judgments was the sale of real property. Twenty-six percent of the judgments dealing with contract law issues pertained to sale of real property (and the total share of judgments dealing with transactions in real property, including tenancies and *combination transactions*,[74] was 36.5%). To the extent that the courts have specifically enforced these contracts after 1970, they most likely would have done so before 1970, as well.

Thus, whenever Israeli courts enforce contractual obligations to transfer title in real property (the primary exception to the common-law rule), or to pay a debt, or to refrain from a given action, they do not necessarily depart from the pre-1970 law.

Finally, there are the four exceptions to the availability of enforced performance under Section 3 of the Remedies Law 1970, cited above. Although it is often emphasized that in interpreting and applying these exceptions, the courts should not take their cue from English law, there is actually considerable overlap between them and between reasons for avoiding specific performance offered in English law. For example, the denial of enforced performance when performance is impossible (Section 3(1)), or against employees and other providers of personal services (Section 3(2)), echo similar English rules.

### *D. Practicalities*

Even in cases where enforced performance is available in principle under current Israeli law, there may be practical reasons not to sue for this remedy (or not to award it, when sought). It stands to reason that in many contractual disputes that are resolved in court (which are a small proportion of all contractual disputes), plaintiffs do not sue for enforced performance in the first place, or subsequently forgo this relief, and settle for monetary remedies only. A key reason for this lies in the disparity between substantive contract law and the rules of civil procedure.

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[73] Menachem Mautner, *How Does Israeli Contract Law Develop?,* 34 TEL AVIV U.L. REV. 527 (2011, in Hebrew).

[74] A combination transaction, which is quite common in Israel, is one where a landowner provides the land, a construction firm builds an apartment building on it, and the parties then divide the apartments between them.

Usually, to obtain an effective order of enforced performance—be it for the transfer of an asset, the performance of certain work, or refraining from a certain action—the plaintiff must get a preliminary injunction. Thus, to ensure the effectiveness of an order to transfer property in a sales contract, the buyer must get an interim injunction prohibiting the destruction or sale of the property to a third party. Likewise, to compel a contractor to complete a certain construction work, it is essential that the contractor proceed with the work during litigation, because suspension of the construction for several years until final judgment is issued would greatly harm the injured party. Similarly, enforcing a non-compete clause requires a preliminary injunction, because clients who move to the promisor are unlikely to return to the promisee after several years of litigation (indeed, the very obligation not to compete may expire by the time a judgment is handed down).

Alas, by their very nature, preliminary injunctions are awarded before the court has heard the evidence, assessed its reliability and weight, or decided on the legal issues. For this reason, courts are reluctant to issue preliminary injunctions—especially mandatory injunctions to perform a certain act (as opposed to preventing one); injunctions that change the status quo (as opposed to maintaining it); or ones that are virtually identical to the main relief that is being sought. As in other legal systems, the rule in Israel is that the award of preliminary injunctions is discretionary. One key consideration is whether refraining from issuing such an injunction would cause irreparable harm to the movant, if she prevails on the merits. Usually, a preliminary injunction is not issued if money can adequately compensate the plaintiff ex post for the harm caused in the absence of such an injunction.[75] Thus, while courts and scholars insist that the adequacy of a monetary relief does not weigh against the award of enforced performance, when it comes to preliminary injunctions the opposite rule has remained in effect after the enactment of the Remedies Law 1970. Since a plaintiff who fails to attain a preliminary injunction usually relinquishes enforced performance as the main relief (as it is likely to be pointless), this procedural rule has an enormous impact on the extent to which enforced performance is awarded. And even if, for whatever reason, a plaintiff insists on a pointless remedy, the court may well refuse to award it.

[75] URI GOREN, ISSUES IN CIVIL PROCEDURE LAW 907 (12th ed. 2015, in Hebrew).

Moreover, even if the court is willing to award a preliminary injunction, it would ordinarily condition it on the movant giving a security for compensating the defendant's losses caused by the injunction, if the plaintiff's claim is eventually dismissed.[76] Since providing a security may be rather costly, a plaintiff may refrain from asking for a preliminary injunction, or relinquish it ex post—thus practically abandoning enforced performance as the ultimate relief.[77] Even before filing a claim, insisting on enforced performance often means that the injured party would not take steps to mitigate her losses from the breach (e.g., by selling the sales object to another person or buying a substitute from another seller). However, this is a risky option. If for any reason the injured party eventually fails to obtain enforced performance and has to content herself with monetary damages, she would not be compensated for losses that she "could have prevented or reduced by reasonable measures" (Section 14(a) of the Remedies Law). Taking mitigation-of-damages measures—which often entails renouncing her claim for enforced performance—may thus be the safer option.[78]

Another reason for injured parties not to be keen on securing enforced performance is the expected lapse of time between the filing of a lawsuit and execution of the final judgment. Very often, the execution of an order of enforced performance years after the agreed time would not even remotely place the injured party in the position she would have been had the contract been duly performed. Even if a buyer is granted a preliminary injunction prohibiting the disposal of the sales object, receiving a used car or a new laptop computer two or three years after the due date is hardly satisfactory. In such cases, plaintiffs usually prefer monetary remedies (that said, if the plaintiff is granted a preliminary injunction, she may use it as leverage to obtain a favorable settlement).

Plaintiffs might also avoid suing for enforced performance because their relationship with the defendant has irrevocably deteriorated, or they have lost confidence in the latter's competence to perform the contract as promised. Finally, the choice of remedies is a reflection not only of the interests of the plaintiffs, but of their attorneys, as well. Often attorneys prefer a monetary relief, out of which it is easier to collect their fee.[79]

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[76] Dudi Schwartz, *Interlocutory Remedies – Guidelines for Judicial Discretion,* 13 BAR-ILAN L. STUD. 441, 454–57 (1996, in Hebrew).
[77] *Cf.* Herman, *supra* note 44, at 18–19.
[78] *Cf.* Herman, *supra* note 44.
[79] Arbel, *supra* note 7, at 388–89.

For all of these reasons, people often avoid litigation altogether, or are content with suing for monetary remedies only. A common example of contracts that are hardly ever specifically enforced are those for the supply of fungible goods: if the buyer can purchase a similar object on the market, she would almost invariably prefer this option, and at most claim damages for the losses caused by the breach. Even if plaintiffs initially sue for enforced performance, as time goes by they may well settle for substitutionary, monetary reliefs.

## IV. THE EMPIRICAL STUDY: MOTIVATION AND METHODOLOGY

### *A. Previous Studies*

While the reasons to doubt that the status of enforced performance has been transformed by the Remedies Law 1970 sound sensible, the question of whether such transformation has actually occurred is largely an empirical one. However, contrary to the burgeoning theoretical discussion, only few attempts have been made, in Israel or elsewhere, to examine the issue empirically; and they all have considerable limitations. Thus, Lewinsohn-Zamir conducted a survey experiment in which she studied people's preferences with regard to in-kind versus monetary remedies.[80] The study used both lay- and businesspeople as subjects, and examined both ex-post choices and ex-ante preferences (backed up by willingness to pay for their fulfillment). While this study is vulnerable to the usual criticism about the external validity of laboratory experiments, it did shed new light on the recurring claim that people, or at least experienced businesspeople, are indifferent between actual performance and monetary compensation. The findings clearly indicate that they are not. However, the study did not answer the question of how often plaintiffs sue for enforced performance—and how often courts award it—because plaintiffs' and judges' decisions in this regard involve many other considerations that cannot be tested in a stylized, vignette experiment.

These limitations also characterize two incentivized lab experiments, designed to examine individuals' judgment and decision-making under different remedy regimes. Ben Depoorter & Stephan Tontrup found that, when specific performance was the default remedy, promisees exhibited strong resentment toward efficient breach and a desire to

[80] Lewinsohn-Zamir, *supra* note 8.

enforce the contract—whereas in the absence of specific performance, they were more willing to accept such a breach.[81] In a stylized experiment, Christoph Engel and Lars Freund found that participants were considerably more willing to donate money to a charity of their choice when they could purchase "insurance" that the money would indeed go to that charity, than when they could only purchase an entitlement to have their expectation or reliance interests protected monetarily (no such difference between the "remedies" was apparent in a parallel experiment regarding the purchase of chocolate bars of a particular taste).[82]

In a study more directly relevant to our inquiry, Henrik Lando and Caspar Rose surveyed the judgments published in the Danish Weekly Law Report between 1950 and 2000, and found that specific performance is rarely used.[83] However, their study provides no details about the method used to collect and analyze the data. More importantly, Lando and Rose did not explore the full terrain of enforced performance, or even of *specific performance* in the common-law sense of the term, but rather limited their study to *duties to act*—as opposed to *duties to give* (including to pay money) and (implicitly) *duties to refrain from acting*. Since positive duties to perform an act are the least specifically enforced obligations in virtually all legal systems, the lessons to be learned from this study are limited. Finally, in order to draw a comparison between civil-law and common-law systems, one should ideally examine representatives of both families, which Lando and Rose did not.

Finally, Yonathan Arbel conducted a qualitative study in Israel, in which he interviewed eighteen people: five plaintiffs who won a claim for enforced performance; one defendant against whom an enforced performance was awarded, eleven lawyers; and the head of an execution office.[84] Interestingly, Arbel found that many plaintiffs do not sue for enforced performance, and enforced performance is not frequently awarded. The reasons for this included attorneys' preference for monetary relief; changes in the plaintiff's preference due to the lapse of time between the filing of the suit and the

[81] Depoorter & Tontrup, *supra* note 9.
[82] Engel & Freund, *supra* note 10.
[83] Lando & Rose, *supra* note 1. The authors referred to German and French law as well, but with regard to those systems they relied solely on academic writings of comparative law experts, without drawing on empirical data.
[84] Arbel, *supra* note 7.

judgment; and the difficulty in ensuring the quality of performance pursuant to a judicial order. At the same time, he found that in some cases suits for enforced performance are "motivated by a desire to signal to the court something about the merits of the case, to minimize procedural costs and delay, or to use as leverage in negotiations."[85] While this study offers further reason to be skeptical toward the prevailing rhetoric in Israeli law, its limited number of interviews, lack of any quantitative analysis, and absence of comparison between current practice and practice before 1970—or in other legal systems—limit the lessons that may be drawn from it.

In summary, to date no empirical study has used a quantitative methodology to examine the actual resort of litigants and courts to enforced performance. To start filling this gap, we conducted the study described below.

### *B. Methodology*

To examine the impact of the Remedies Law 1970 on enforcement remedies, we created a dataset of all accessible judgments of the Israeli Supreme Court relating to remedies for breach of contract, from the establishment of the State of Israel in 1948 until the end of 2016. The dataset included both judgments published in the official Supreme Court Report (*Piskei Din,* or *Pad"i*), and unpublished judgments included in the comprehensive electronic database of *Nevo*—the leading commercial publisher of legal materials in Israel. To create the dataset, we examined *all* judgments published in the official report until 1970, and all judgments classified as dealing with "remedies for breach of contract" in the official report's index after 1970. However, not all Supreme Court judgments have been published in the official Report, and the proportion of judgments that have been included has varied over the years. In recent decades, *all* judgments have been included in the Nevo database. To find all judgments concerning remedies for breach of contract that may have not been published in the official Report, or were not indexed under "remedies for breach of contract," we searched the Nevo Database for all judgments citing the *Contracts (Remedies for Breach of Contract) Law, 1970,* or including the phrase *remedies for breach of contract*. A considerable number of these were found in fact to deal with other issues and not with remedies for breach of contract, hence they

[85] *Id.* at 386.

were not included in our dataset. While we might have missed a few relevant judgments in the Nevo database, we are fairly confident that we encoded almost all of them.

Our main dataset thus comprised a total of 531 Supreme Court judgments (since in 42 cases the court discussed remedies sought by both parties, the dataset includes a total of 573 *observations*).[86] Of the 531 cases (573 observations), 169 (175) were handed down during the period of almost 23 years, from April 1948 until March 26, 1971—one day before the Remedies Law 1970 went into force and 333 (369) were delivered during the period of almost 46 years, between March 27, 1971 and the end of 2016. For the sake of convenience, we dub these two periods *pre-1970* and *post-1970*, respectively. In addition, 29 judgments (29 observations) were handed down after the Remedies Law 1970 had come into force, but pertained to contracts that had been concluded earlier, which were subject to the pre-1970 legal regime. In those cases, it is not always clear whether the court applied the pre-1970 doctrine (as required) or the post-1970 rules—and even when it did apply the previous law, the judges might have been consciously or unconsciously influenced by the new legal regime. For this reason, when comparing pre-1970 with post-1970 court rulings, we excluded these 29 cases from our analysis (we did not exclude them from other analyses).[87]

Our main dataset did not include lower-courts' judgments that had not been appealed and discussed in a Supreme Court judgment—because such judgments have rarely been officially reported, and lower-courts' judgments given before the 2000s are not available in electronic databases either. We did, however, create and analyze a complementary dataset of a large sample of 236 district court judgments (279 observations) given in the 2000s and 2010s, concerning remedies for breach of contract, that were included in the Nevo electronic database. As further explained below, we used this complementary dataset primarily to get a sense of the degree to which the picture of district court judgments emerging from the main dataset resembles the entire population of district

[86] Under Israeli law, the Supreme Court can convene a *further hearing* on its own judgments, with an extended panel of judges. Regarding the seven cases in which the court held a further hearing on judgments concerning remedies for breach of contract, only the final decision in the further hearing was included in the dataset.

[87] As it happens, the judgments handed down by the Supreme Court after 1970 with reference to pre-1970 cases were also those in which the district courts ruled after 1970 with regard to such cases. When comparing the remedies *claimed* by the litigants in each period, we omitted lawsuits filed after 1970 that pertained to contracts made before 1970. This category included 23 judgments (23 observations).

court judgments, during a comparable period (thereby overcoming part of the difficulty created by the selection of appealed cases).

For each judgment, we encoded a long list of variables, including case number; litigants' names and occupations; year of filing of the initial lawsuit and date of the final judgment; names of the judges; type of contract(s); type of alleged breach(es); rulings by the lower court and by the Supreme Court as to whether or not the contract had been breached; the appeal outcome; remedies initially sought; remedies awarded by the district court;[88] remedies awarded by the Supreme Court; the substance of the enforcement remedies; and the type of damages awarded. In the relatively rare cases of minority opinions at the Supreme Court, each judge's opinion was encoded separately. Comparable variables (excluding those pertaining to the Supreme court ruling) were encoded in the complementary dataset of district court judgments. All the variables were initially encoded by Leon Anidjar.[89] The key variables of the judgments included in the main dataset—the period in which the lawsuit was filed and the judgment was awarded (pre-1970, post-1970, or the interim period), type of contract, remedies sought, remedies awarded by the district courts and by the Supreme Court, and the type of enforcement remedy—were independently encoded again by Eyal Zamir, Ori Katz, and the research assistant Roi Yair (about 100 judgments were encoded by Roi, and the others by Eyal and Ori). In the great majority of cases there was agreement between the two encodings, and whenever there were differences, they were discussed and resolved.

Regarding the remedies sought or awarded by the district courts and the Supreme Court, we focused on enforcement remedies and encoded the type of enforcement order sought or awarded: to give, to refrain from giving, to do, to refrain from doing, or to pay a debt). As previously noted, due to the terminological differences between the pre- and post-1970 regimes, the term *enforced performance*, as used by the Remedies Law 1970

[88] In 29 cases, the Supreme Court discussed disputes that had first been adjudicated in a magistrate court, then on appeal at a district court, and finally, on second appeal, at the Supreme Court. To avoid undue complexity, and given the relatively small number of such cases, we did not encode the remedies awarded by the magistrate court (but the year of filing the lawsuit and the remedies sought were encoded according to the initial lawsuit).

[89] Information regarding the remedies initially sought and those awarded by the district court in the main dataset was gleaned from the Supreme Court judgments. However, whenever it was possible to obtain the judgment of the district court directly from the electronic database, that judgment was examined too.

and in post-1970 judgments, is equivalent to the aggregate of specific performance, prohibitory injunctions, and orders to pay debt under the previous regime. We therefore coined a new term—*enforcement remedies*—to denote both *enforced performance* in the post-1970 period, and all forms of specific performance, prohibitory injunctions, and orders to pay debt in the pre-1970 period. In contrast, the encoding described below does not differentiate between other remedies sought or awarded: damages (including the sub-categories of regular damages, *compensation without proof of damage*,[90] damages for non-pecuniary harms, and liquidated damages); declaration that a contract had been duly rescinded (the rescission itself does not require a court order under Israeli law), restitution, and disgorgement.

Importantly, whenever both an enforcement remedy and damages were sought or awarded, we encoded it as a claim or as an award of enforcement remedy only. Very rarely does an enforcement remedy fully compensate for all the losses incurred by the breach—if only because the performance pursuant to a court judgment occurs long after the contracted time. Regardless of whether or not the plaintiff sues for, or receives, damages, for our purpose the critical point in such cases is that she sought, or received, an enforcement remedy.

### *C. Strengths and Limitations*

To the best of our knowledge, ours is the first quantitative study of courts' awards of the remedy of enforced performance. Although a quantitative analysis misses much of the richness and nuance of doctrinal and qualitative-empirical analyses, it does have distinct advantages. An assessment of judicial practice that does not rely on a quantitative analysis is prone to various biases. People often determine the likelihood of events and the frequency of occurrences based on the ease with which they can recall similar events

[90] According to Section 11(a) of the Remedies Law 1970, "where an obligation to supply or receive any property or service has been broken and the contract is rescinded by reason of the breach, the injured party shall, without proof of damage, be entitled to compensation in the amount of the difference between the consideration for the property or service under the contract and its value on the date of rescission of the contract." Under Section 11(b), "where an obligation to pay a sum of money has been broken, the injured party shall, without proof of damage, be entitled to compensation in the amount of the interest on the sum in arrears from the date of the breach to the date of payment, at the full rate under the Adjudication of Interest Law 1961, unless the court prescribes a different rate."

or occurrences—the so-called *availability heuristic*.[91] Since judgments vary in terms of saliency and memorability, scholars might overestimate the likelihood of phenomena that are manifested in salient judgments (and vice versa).[92] People also exhibit *motivated reasoning* and *confirmation bias*—namely, they tend to automatically acquire and process information in ways that confirm their prior views and expectations.[93] In the present context, this means that people who believe that the Remedies Law did (or did not) transform Israeli law may ignore or underestimate evidence to the contrary. A quantitative analysis can overcome such pitfalls.

That said, a quantitative analysis of court judgments involves its own challenges.[94] As noted in the previous Section, our study faces the difficulty that for a considerable part of the period it covers, we do not have access to all Supreme Court judgments—only to the published ones. We do not know precisely what proportion of the court's judgments were included in the official Report at any given time. Only in the mid-1990s did the Nevo database begin to comprehensively include all Supreme Court decisions. Presumably, the choice of judgments to be published in the official Report in previous years was not random. While we concede this limitation, the proportion of published judgments does appear to have been always fairly high (particularly with regard to those that provided substantial reasoning), and in any event, there is no reason to believe that the choice of judgments for publication in the early years systematically biased our findings one way or the other.

As for coding methodology, our study has the disadvantages and advantages of being coded mostly by the principal researchers. The main disadvantage is that the coding was not blind, that is, the encoders were aware of the research question. The main advantage is that we did not rely much on students, whose legal expertise is more limited (the research assistant who took part in the encoding was a third-year student). The fact that

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[91] Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability,* 4 COGNITIVE PSYCHOL. 207 (1973).
[92] Jeffrey J. Rachlinski, *Does Empirical Legal Studies Shed More Heat than Light? The Case of Civil Damage Awards,* 29 RATIO JURIS 556, 560–61 (2016).
[93] Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises,* 2 REV. GENERAL PSYCHOL. 175 (1998).
[94] *See generally* Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions,* 96 CALIF. L. REV. 63 (2008); Gregory Klass, *Empiricism and Privacy Policies in the Restatement of Consumer Contract Law,* 36 YALE J. ON REG. __ (2018) (*available at:* https://scholarship.law.georgetown.edu/facpub/1987).

the key variables were coded twice by different encoders significantly enhances the reliability of the encoding.

A general limitation of observational studies is that they can identify correlations (or associations), but hardly prove causation. We concede this limitation, and would therefore welcome the use of other empirical methods to further study the present issue. However, in this respect our study has the advantage that it is not comparing the legal regimes of two different societies, but rather two legal regimes of a single society, exploiting the "legislative shock" of 1970. To be sure, in the 69 years covered by our dataset, myriad social, economic, legal, and political developments have occurred in Israel that might have affected plaintiffs' inclination to sue for enforcement remedies, and the courts' willingness to award them. In a bid to identify causal connections, we used a series of logistic regressions in which we controlled for various variables—including the legal regime (pre- or post-1970); the length of legal proceedings; the year of judgment; the filing year; the type of contract; and type of plaintiff. Still, we cannot rule out the impact of other, unobservable or unmeasurable variables on claims for enforcement remedies, or on awards thereof.

Our quantitative study focuses on judgments by the Supreme Court, because the great majority of judgments of lower courts—especially in the first decades of Israel's existence—were never published and are not otherwise available. The Nevo database began systematically including district court judgments only in the early 2000s, so it is practically impossible to get a reliable picture of rulings by the lower courts during most of the period in question. If one wishes to explore law-in-action, focusing exclusively on appeal judgments is obviously problematic: studies have shown that most contractual controversies are resolved without the involvement of lawyers, or—even if lawyers are involved—without filing a lawsuit.[95] Of all contractual disputes that reach the court system, a great many are settled before judgment. Of the lower courts' judgments, only some are appealed, and many appeals are settled before a Supreme Court ruling.[96] Disputes that are resolved at the Supreme Court are not only a tiny percentage of all

[95] Stuart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study,* 28 AM. SOC. REV. 55, 60–62 (1963).

[96] Unlike its U.S. counterpart, the Israeli Supreme Court does not have the discretion not to discuss appeals from the district court. Such discretion exists only with regard to cases that were initially heard by the magistrate court and then, on appeal, by the district court.

contractual disputes, there is no reason to assume that they are a random, representative sample of all adjudicated disputes (let alone of all contractual disputes). Since litigants decide which disputes are adjudicated (including those that are adjudicated all the way to a Supreme Court ruling); and since these decisions are a function of the litigants' expectations about the court's ruling—the resulting *selection effect* can seriously curtail the possibility of inferring lower courts' judgments and out-of-court settlements from Supreme Court rulings.[97]

A partial response to this difficulty is that disputes involving contract remedies are usually multi-dimensional, so it is unclear what determines the selection of cases for adjudication (or appeal). Typically, the parties disagree not only (or even primarily) about the appropriate remedy, but also, and often primarily, on the validity of the contract, its interpretation, whether it has been breached and by whom, whether it has been duly rescinded, whether the injured party waived her rights, and so forth. Hence, even if the litigants could perfectly predict the court's ruling about the remedy, the case may be adjudicated and even appealed for other reasons. Information asymmetry between the litigants, cognitive biases (e.g., the over-optimism bias), and other factors render the possible effects of selection indeterminate and unpredictable[98]—if they exist at all.[99] Moreover, in the present context, any one of the contracting parties (e.g., the seller or the buyer), the disputants (the alleged breacher or her counterparty), and litigants (the plaintiff or the defendant) may appeal the district court judgment (thereby possibly triggering a counter-appeal). And while the party alleging breach is certainly more likely to file a lawsuit, in contractual disputes (unlike typical tort cases), either party might be the plaintiff or the counter-plaintiff, since often the parties blame each other and react to alleged breaches in ways that may prompt either of them to file a lawsuit. It is therefore

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[97] On the selection effect, see George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation,* 13 J. LEGAL STUD. 1 (1984).

[98] *See* Lucian Bebchuk, *Litigation and Settlement under Imperfect Information,* 15 RAND J. Econ. 404 (1984); Donald Wittman, *Is the Selection of Cases for Trial Biased?,* 14 J. LEGAL STUD. 185 (1985); Steven Shavell, *Any Frequency of Plaintiff Victory at Trial is Possible,* 25 J. LEGAL STUD. 493 (1996); Jennifer K. Robbennolt, *Litigation and Settlement, in* THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 623 (Eyal Zamir & Doron Teichman, eds., 2014) (surveying the heuristics and biases that affect litigants' and lawyers' decisions regarding litigation and settlement).

[99] Eric Hellman, Daniel M. Klerman & Yoon-Ho Alex Lee, *Maybe There's No Bias in the Selection of Disputes for Litigation*, 174 J. INSTITUTIONAL & THEORETICAL ECON. 143.

particularly difficult to know how, if at all, the selection of cases to be resolved by the courts biases the picture emerging from these judgments.

To gain insight into the selection effect in the present context, we created a complementary dataset consisting a sample of all district court judgments (whether or not appealed to the Supreme Court) from the 2000s and 2010s—the first period in which the Nevo database covers virtually all of the district court judgments. The sample included all district court judgments concerning remedies for breach of contract that were delivered in the years 2005, 2008, 2011, and 2014—a total of 236 judgments (279 observations). To create the dataset, all the judgments of those years containing the phrase "remedies for breach of contract" were examined and those that actually dealt with remedies for breach of contract were included in the complementary dataset. We compared the remedies sought by plaintiffs and awarded by district courts in this complementary dataset to those sought and awarded by the district courts, as gleaned from the main dataset. To have a sufficiently large basis for comparison, we compared the complementary dataset to all district court judgments in the main dataset were mentioned in the main dataset, given from 2000 to 2016—a total of 83 observations. This comparison allowed us to gauge the extent to which the picture emerging from the main dataset is skewed due to the selection of cases for appeal to the Supreme Court (but not the selection of cases to be adjudicated in the first place). It should be noted that the concern about the selection effect characterizes all observational studies of appellate court judgments, in which respect we join a respectable list of studies.[100]

Analyzing Supreme Court rulings is worthwhile also because Israel follows the common-law tradition with regard to stare decisis: according to Section 20(b) of the Basic Law: The Judiciary, "a rule laid down by the Supreme Court shall bind any court other than the Supreme Court." While it is unclear whether lower courts and attorneys are influenced more by the Supreme Court's rhetoric or by its practice (inasmuch as these two differ), the Court's judgments do indubitably have an impact well beyond the particular cases they pertain to. Put differently, the Supreme Court's judgments are at once a manifestation of law in action and of law on the books. Hence, even if one is

[100] *See generally* LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE (2013).

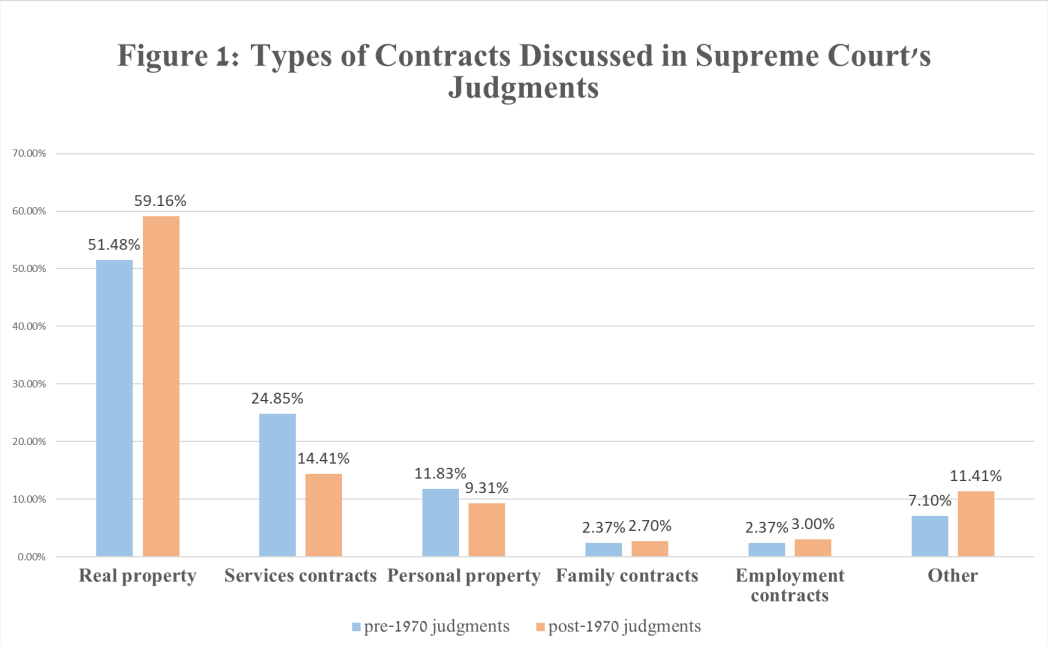
mostly interested in the legal doctrine—rather than its actual impact—Supreme Court judgments are one of the two primary sources of law, along with legislation. And while the meaning of statutory law depends first and foremost on the statutory text, the meaning of case law depends both on the court's rhetoric and its operative rulings. Inasmuch as the prevailing rhetoric about the transformation of the status of enforcement remedies departs from the court's actual rulings, one should doubt the efficacy of the declared doctrine, and perhaps even the sincerity of the judges. In any event, from this perspective, the fact that our dataset does not include unpublished judgments from the early decades is of lesser concern, since such judgments did not effectively shape Israeli law.

## V. THE EMPIRICAL STUDY: MAIN FINDINGS

This Part describes the findings of our empirical study. It first presents the types of contracts discussed in the Supreme Court judgments concerning contract remedies. It then describes the types of remedies initially sought by plaintiffs and the extent to which they were awarded by the district courts and the Supreme Court, before and after the Remedies Law 1970. We further examine the associations between the awarding of enforcement remedies and the judges' legal education, and between those awards and the length of the legal proceedings. Finally, we compare the district court judgments that have been delivered since the year 2000 and included in our main dataset, with a sample of district court judgments from that period.

### *A. Types of Contracts*

Both doctrinally and according to the pertinent policy considerations, the inclination to award enforced performance should vary from one type of contract to another. Table A1 (see Appendix) provides the absolute number and relative proportion of the various types of contracts among all judgments in our dataset, and Figure 1 depicts their relative share graphically, before and after the 1970 change in legislation.




As Table A1 and Figure 1 demonstrate, the relative proportion of the various contracts handled by the Supreme Court before the Remedies Law 1970 is roughly similar to those handled from then on. Comparing each of the categories before and after 1970 reveals a statistically significant difference only in the category of contracts for services.[101] Most of the decline in the proportion of these contracts is due to the fact that before 1970, 15 out 169 judgments (9%) dealt with brokerage contracts, whereas after 1970, only 6 out 333 judgments (2%) did.[102] In both periods, real-property transactions—including sales, long- and short-term leases, license, gifts of real property, and combination transactions—constituted more than half of the contracts. These findings are consistent with the finding that land transactions play a disproportionally large part in shaping Israeli contract law through Supreme Court precedents.[103]

[101] Real property: $\chi^2(1)=2.69$, p=0.1; services: $\chi^2(1)=8.3$, p=0.004; personal property: $\chi^2(1)=0.783$, p=0.38; family contracts: $\chi^2(1)=0.05$, p=0.82; employment contracts: $\chi^2(1)=0.167$, p=0.68; other: $\chi^2(1)=2.323$, p=0.13.

[102] Plausibly, a primary cause for this decline was the gradual expansion of the jurisdiction of the magistrate courts, in terms of the size of the lawsuits, between 1985 and 2001. Since claims for brokerage fees ordinarily refer to relatively small sums of money, and since the Supreme Court tends not to allow second appeals (that is, appeals on judgments in which the district courts have ruled on appeal from a magistrate court), the share of these contracts in the Supreme Court caseload has dramatically decreased.

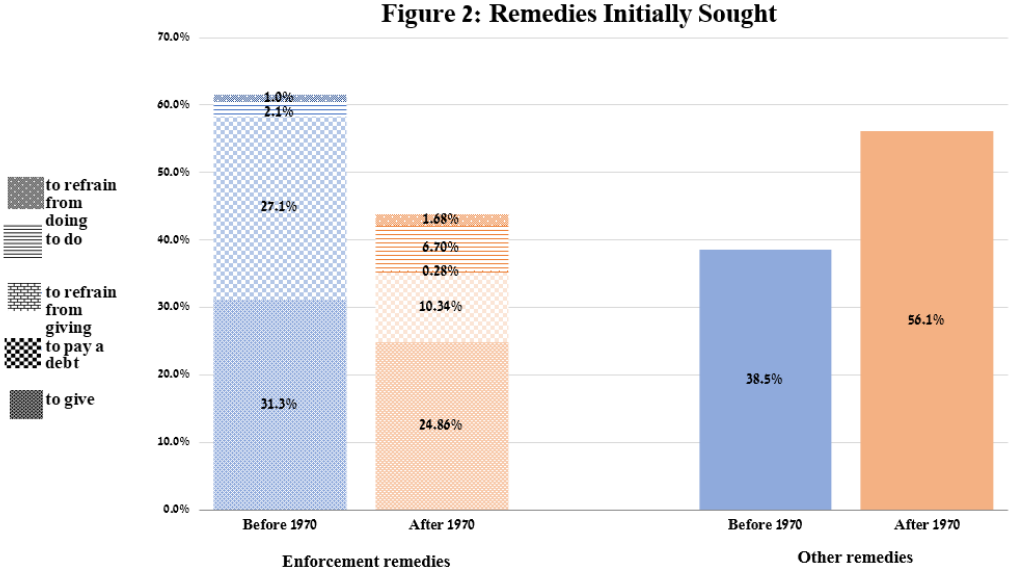
[103] Mautner, *supra* note 73, at 543–45, 553–55.

Of course, the relative share of the various contract types in Supreme Court judgments is by no means a reflection of their proportion in the economy, or even in the judicial system's caseload (which comprises many small-scale disputes that are settled in the lower courts—including the small-claims court). Most small-scale transactions likely never reach the Supreme Court because the stakes are too low, and most large-scale transactions between commercial entities are settled out of court.[104] Real-property transactions are often large enough to justify litigation all the way to the Supreme Court, and, being discrete—rather than relational—contracts, the incentives to resolve disputes amicably out of court are weak.

### *B. Remedies Initially Sought*

As a rule, courts do not award reliefs that litigants do not ask for. Hence, to understand the actual role enforcement remedies play in contract law, it is important to establish the extent to which plaintiffs actually seek these remedies. Table A2 presents the number of times and relative share each type of remedy was sought, and Figure 2 presents the relative shares graphically, in each of the two periods. Both the table and the figure refer to the remedies sought when the lawsuit was initially filed, in cases that reached a Supreme Court judgment.

**Figure 2: Remedies Initially Sought**




[104] Macaulay, *supra* note 95, at 60–62; Mautner, *supra* note 73, at 546–47, 559–60.

As Table A2 indicates, before 1970 the Supreme Court ruled in 192 cases in which remedies for breach of contract were sought, and after 1970 it ruled in 358 such cases (excluding cases in which the contract was made prior to 1970). The most striking finding is that the percentage of claims for enforcement remedies sharply declined from 61% in the pre-1970 period to 44% in the post-1970 period ($\chi^2(1)=15.491$, $p<0.001$).

To examine whether the 1970 legislative reform affected the inclination of plaintiffs to sue for enforcement remedies, we examined this inclination longitudinally. Figure A1 (see Appendix) presents the percentage of observations in which such remedies were claimed for each three-year period between 1950 and 2015. The use of three-year periods, rather than single years, is because the limited number of judgments—less than eight observations per year on average—would make a one-year graph very volatile. Even when we look at three-year periods, the 95% confidence interval is very wide, due to the small number of observations in each period (less than 24 on average), so this graphic illustration is not very informative.[105] When comparing the percentage of enforcement remedies sought three, six, and nine years before and after the legislative reform (i.e., when comparing 1971–73 to 1968–70; 1971–76 to 1965–70; and 1971–79 to 1962–70), none of the differences are statistically significant ($\chi^2(1)=1.05$, $p=0.306$; $\chi^2(1)=0.004$, $p=0.948$; and $\chi^2(1)=0.004$, $p=0.95$, respectively).

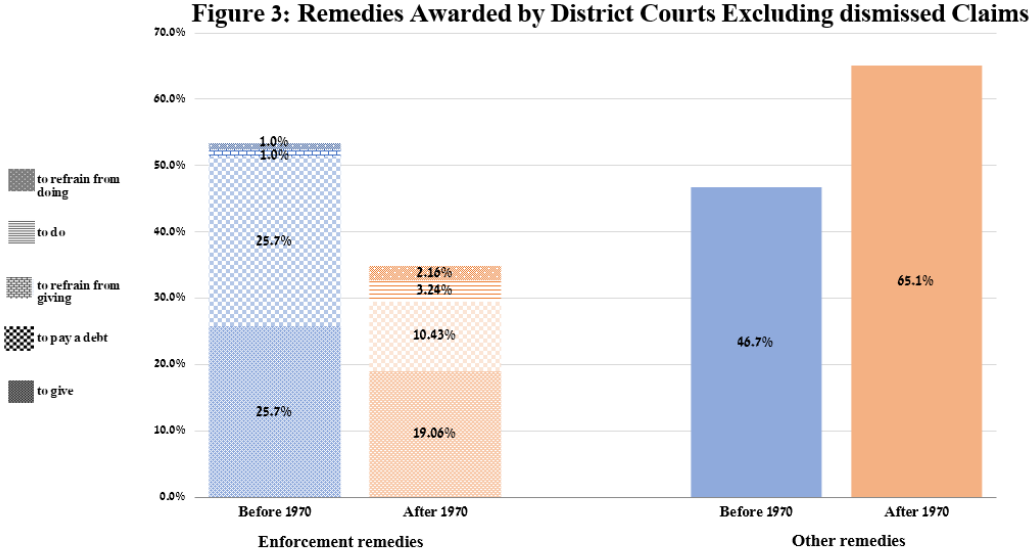
To sum up, the change in plaintiffs' chosen remedies strikingly contradicts the prevailing belief among judges and scholars that the Remedies Law 1970 upgraded the status of enforced performance from a secondary relief to the primary and routine remedy for breach of contract. It does not even fall into line with the alternative, skeptical conjecture that the Remedies Law 1970 did not brought about any real change with regard to the use of enforcement remedies. As far as we can tell, the legislative reform did not affect the inclination to sue for enforcement remedies. This conclusion should be treated with caution, however, due to the small number of observations.

[105] If Figure A1 shows anything, it is that there was a rise in the tendency to seek enforcement remedies just *before* 1970, and a relatively steady decline *after* that year. The apparent rise before 1970 can hardly be explained by an expectation of the legislative reform, because reforms in substantive law do not apply retroactively.

### *C. Remedies Awarded by District Courts*

Of all the cases in our main dataset, prior to 1970 the district courts dismissed (i.e., did not award any remedy for breach of contract) 40% of the claims and accepted—in whole or in part—60%. After 1970, 25% of claims were dismissed, and 75% were fully or partially accepted. The following analysis refers only to cases where the court awarded some form of remedy for breach of contract. Table A3 presents the number of times and relative proportion of each type of remedy awarded (out of all remedies), and Figure 3 presents their relative shares graphically, with reference to the two periods (excluding judgments that were given after 1970 with reference to contracts made before 1970). In a comparison between the two periods, out of all observations, the award of enforcement remedies by district courts dropped dramatically from 53% to 45% ($\chi^2(1)=10.804$, p=0.001). Again, this is in striking contrast to common wisdom (and it does not even comport with the alternative, skeptical view that no change has occurred after 1970).

**Figure 3: Remedies Awarded by District Courts Excluding dismissed Claims**




When one considers only the cases where one of the enforcement remedies was initially sought (and some remedy was awarded), the rate of awarding such remedies declined from 87% before 1970, to 81% after 1970, but this difference is not statistically significant ($\chi^2(1)=1.379$, p=0.24). Thus, even within the fewer cases in which enforcement remedies were sought, there was no increase in the district courts' willingness to award them—if anything, there was a decline.

To examine whether the 1970 legislative reform affected the district courts' inclination to award enforcement remedies, we examined this inclination longitudinally—as we had done for the inclination to seek such remedies. The results are shown in Figure A2. Due to the exclusion of judgments awarded after 1970 with regard to contracts made before 1970, there was only one observation in the 1971–73 period, hence we excluded this period from the comparisons. Again, due to the small number of observations, the 95% confidence interval is very wide, and none of the three-, six-, or nine-year before/after comparisons yield statistically significant results (1974–76 versus 1968–70: $\chi^2(1)=0.113$, p=0.737; 1974–79 versus 1965–70: $\chi^2(1)=0.44$, p=0.507; 1974–82 versus 1962–70: $\chi^2(1)=0.015$, p=0.904).[106] Thus, it appears that the Remedies Law 1970 had no discernible effect on the inclination of district courts to award enforcement remedies. Yet, this conclusion should be treated cautiously because the number of observations is small.

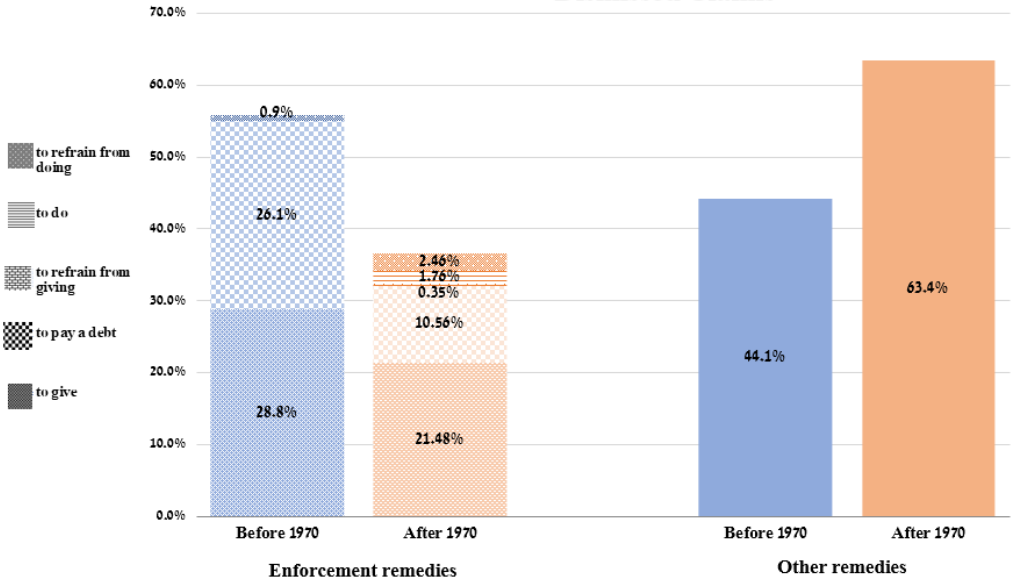
### *D. Remedies Awarded by Supreme Court*

Table A4 and Figure 4 show the types of remedies awarded by the Supreme Court in the pre- and post-1970 periods.[107] Similarly to litigants' choices and district courts' decisions as described above, we found that out of all observations where remedies were awarded, the proportion of enforcement remedies in the post-1970 period is considerably lower than in the pre-1970 period: 37% versus 56% ($\chi^2(1)=12.121$, p=0.001). Once again, these findings contradict not only what one would expect based on the Remedies Law, case law, and scholarly common wisdom, but also the alternative, skeptical hypothesis, that the inclination to award enforcement remedies did not substantially change after 1970.

[106] Adding the single district court judgment in the 1971–73 period, that did not refer to a contract made before 1970, does not change the picture (1971–76 versus 1965–70: $\chi^2(1)=1.463$, p=0.226; 1971–79 versus 1962–70: $\chi^2(1)=0.376$, p=0.54).

[107] Yoram Shahar and Miron Gross examined all judgments delivered by the Israeli Supreme Court from 1948 to 1994 and published in the official Report. They found that in the sphere of private (as opposed to public, or criminal) law, 40% of the appeals were accepted in whole or in part, and 60% were dismissed. *See* Yoram Shahar & Miron Gross, *Success and Failure of Appeals to the Supreme Court—Quantitative Analysis,* 13 BAR-ILAN L. STUD. 329, 332 (1996, in Hebrew). Our study takes a much closer look at the substance of the judgments, so we are not interested in the appeal acceptance rate as such. Shahar and Gross's rates nonetheless appear to be a good approximation of the appeal acceptance rate in breach-of-contract disputes, as well.

**Figure 4: Remedies Awarded by the Suprme Court Excluding Dismissed Claims**




When we examine only the cases where an enforcement remedy was initially sought (and the lawsuit was fully or partially accepted), the award of enforcement remedies declined from 89% of cases before 1970, to 84% after it—although this difference is not statistically significant ($\chi^2(1)=0.84$, $p=0.36$).

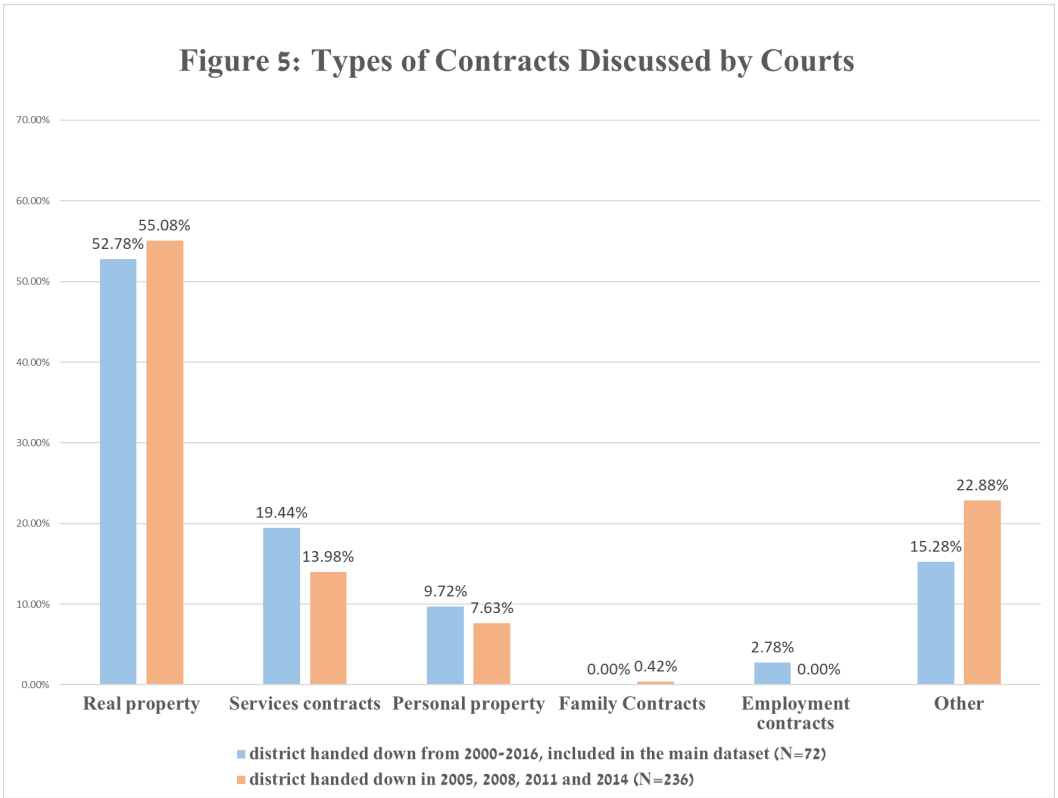
To examine whether the 1970 legislative reform affected the Supreme Court's inclination to award enforcement remedies, we examined this inclination longitudinally, as we did for the claims for such remedies and their award by the district courts. The results are shown in Figure A3. Due to the exclusion of judgments awarded after 1970 with regard to contracts made before 1970, there are zero observations in the 1971–73 period, so we excluded this period. Once again, the 95% confidence interval is very wide, and none of the before/after comparisons yield statistically significant results (1974–76 versus 1968–70: $\chi^2(1)=1.269$, $p=0.26$; 1974–79 versus 1965–70: $\chi^2(1)=1.194$, $p=0.66$; 1974–82 versus 1962–70: $\chi^2(1)=2.67$, $p=0.605$).[108] Hence, there is no evidence that the legislative reform affected the Supreme Court's inclination to award enforcement remedies—but once again this lack of evidence should be treated with caution as the number of observation is small.

[108] Including the 1971-1974 period does not change the picture: 1971–76 versus 1965–70: $\chi^2(1)=1.973$, $p=0.16$; 1971–79 versus 1962–70: $\chi2(1)=0.054$, $p=0.817$.

### *E. Complementary Dataset of District Court Judgments*

While we had reliable data about the rulings of the Supreme Court (and about plaintiffs' choices and district courts' judgments in cases that ended with a Supreme Court judgment) for the entire 1948–2016 period, there is no available data on the rulings of lower (magistrate and district) courts for most of that period (including the entire pre-1970 period) in cases that did not culminate in a Supreme Court judgment. The Nevo database only began comprehensively covering lower court judgments in the early 2000s. In a bid to overcome this limitation (if only partly), we sought to examine the degree to which the picture of district court rulings and of plaintiffs' choices, as reflected in the main dataset, mirrors the picture emerging from district court judgments in general, during the period on which we have data. To that end, we created a complementary dataset consisting of a sample of all district court judgments (irrespective of whether they were subsequently appealed to the Supreme Court) between 2000 and 2016. The sample included all district court judgments concerning remedies for breach of contract that were handed down in 2005, 2008, 2011, and 2014—a total of 236 judgments (279 observations). We did not examine earlier years, because the Nevo database's coverage of district courts' judgments delivered prior to 2000 was partial. Within the chosen sample, we examined all the judgments that included the expression "remedies for breach of contract," and included in the complementary dataset only those that actually dealt with remedies for breach of contract. To have a sufficiently large basis for comparison, we compared the complementary dataset with all judgments in the main dataset in which the *district court* judgment was handed down between 2000 and 2016—totaling 72 judgments (83 observations).

First, we wanted to see to what extent the relative share of the various types of contracts in the complementary dataset resembles their proportion in the main dataset. As shown in Figure 5, the general picture is quite similar. There is a marginally statistically significant difference between the types of contracts discussed in the 72 judgments in the main dataset, and those discussed in the 236 judgments in the complementary dataset ($\chi^2(5)=9.803$, $p=0.081$). Similarly, there was little difference between the two datasets in terms of the composition of plaintiffs (and counter-plaintiffs)—individuals, corporations, or public body ($\chi^2(2)=0.415$, $p=0.813$).




We then compared plaintiffs' inclination to sue for enforced performance and the district courts' willingness to award it. We found statistically significant difference in the inclination to claim enforced performance between the 83 observations of the main dataset (where they were sought in 38% of the times), and the 279 observations of the complementary dataset (where they were sought in 26.5%) ($\chi^2(1)=4.471$, $p=0.034$). In contrast, there was no statistically significant difference in terms of the inclination to award enforced performance when some remedy was awarded ($\chi^2(1)=2.406$, $p=0.121$). Of all the observations in which enforced performance was initially sought, the district courts awarded it in 65% of the 23 pertinent observations in the main dataset and in 77% of the 47 observations in the complementary dataset. Again, this difference is not statistically significant ($\chi^2(1)=1.011$, $p=0.315$).

Thus, the only statistically significant difference between the two datasets was found in the inclination of plaintiffs to seek enforced performance, which was higher in the main dataset. It is difficult to identify the cause of this difference, and in the absence of data regarding other periods (especially the pre-1970 period) it is impossible to draw clear conclusions from it. At any rate, the difference may indicate that plaintiffs'

disinclination to claim enforced performance in the past decades, as reflected in the main dataset, is more pronounced in the entire set of district court judgments (including those that have not ended in a Supreme Court judgment). Therefore, inasmuch as there is a selection effect in the choice of judgments to be appealed to the Supreme Court, this effect may well strengthen our main findings rather than weakening them.

### *F. Summary and Additional Comments*

It may be useful at this point to recapitulate our key findings. *First*, we found that both before and after the enactment of the Remedies Law 1970, the most common remedy awarded by the Supreme Court and by the district courts (in disputes that culminated in a Supreme Court judgment) was not the one considered the primary remedy. Prior to 1970—when damages were deemed to be the primary remedy—enforcement remedies were awarded by the Supreme Court in 56% of the cases in which some remedy for breach of contract was awarded, while after 1970 they were awarded in only 37% of those cases—that is, a drop of 19 percentage point or 34%. In the district court judgments, the drop was from 53% to 45%, that is, a of 8 percentage point, or 15%.

*Second,* the main *direct* cause of this drop was the sharp decline in plaintiffs' inclination to seek enforcement remedies, from 61% to 44%, that is, a drop of 17 percentage points or 28%. Even in the fewer cases in which enforcement remedies were initially sought (and some remedy was awarded) there was no increase in the courts' willingness to award them; in fact, there was some decrease: from 89% to 84% (5 percentage points or 6%) in the Supreme Court judgments, and from 87% to 81% (6 percentage points or 7%) in the district courts judgments—although these differences are not statistically significant. Of course, the decline in plaintiffs' claims for enforcement remedies may have been associated with their expectations about the court's willingness to award them.

*Third,* plaintiffs' disinclination to claim enforcement remedies after 1970 was even more pronounced in the complementary dataset of district court judgments in the 2000s and 2010s than in the district court judgments of the same period that were appealed and ended in a Supreme Court judgment. However, there was no statistically significant difference between these two categories in terms of the overall award of enforced

performance. This means that if there was a selection effect at the stage of appeal, it strengthens our findings rather than weakens them.

*Fourth,* based on longitudinal analysis and comparisons of three, six, and nine years before and after 1970, it appears that the Remedies Law had no statistically significant effect on plaintiffs' inclination to seek enforcement remedies, nor on the courts' willingness to award them. However, this result should be interpreted with caution, given the small number of observations in each year, before and after 1970.

The next Part examines possible explanations for the decline in plaintiffs' claims and courts' awards of enforcement remedies after 1970. Before we turn to this examination, it should be recalled that, according to our analysis of the terminological and doctrinal differences between the two regimes (supra Section III.C), no change was necessarily expected regarding the enforcement of obligations to repay debts, obligations to refrain from action, or obligations arising from real property transactions—as enforcement remedies were available in those cases prior to the Remedies Law, as well. When excluding cases pertaining to monetary debts, obligations to refrain from action, and real property transactions, the main dataset includes only eight judgments in which enforcement remedies have been awarded: none before 1970, one in the interim period, and seven in the post-1970 period. Though few and far between, it may seem that in these cases the Remedies Law has actually made a difference. However, even this very modest conclusion is dubious.

In the one judgment from the interim period that applied the pre-1970 rules (*Magen v. Nakar,*)[109] and in three of the seven cases from the post-1970 period (*Chala"tz (Israeli Tire Marketing Co.) Ltd. v. Tzemeg – Tires and Services Ltd.*;[110] *Tza'adi v. Ben-Tzvi*;[111] *Erez Kochva Holdings (1999) Ltd. v. Key Vesting Ltd.*),[112] the court enforced an obligation to sell or issue unquoted shares in a company. Such obligations have been enforceable under the English common law at least since the nineteenth century.[113] In another case (*Costa v. Levi*),[114] the judicial enforcement order was part of a settlement

[109] 29(1) PD 189 (1974).
[110] 30(3) PD 831 (1979).
[111] Nevo, August 24, 2010.
[112] Nevo, June 24, 2015.
[113] JONES & GOODHART, *supra* note 49, at 161–64.
[114] 35(4) PD 274 (1981)

agreement approved by the court rather than the court's own order. In the sixth case (*Nachmani v. Nachmani*),[115] a 5:4 majority of the court dismissed a husband's objection to the delivery of fertilized ovules by a hospital to his wife, who wished to complete the reproduction process through a surrogacy mother (the wife lost her womb and could not bear children). The majority judges opined that they were not forcing the husband to do (or refrain from doing) anything, hence it is unclear whether this is actually a case of enforced performance. The seventh judgment (*Pundaki v. The Labor Court*)[116] involved the reinstatement of an employee who was unlawfully laid off. While this decision deviates from the pre-1970 practice and from the Supreme Court's ruling in the interim period (*Zori*),[117] it should be noted that in this regard there have been considerable developments not only in Israeli law, but in the English common law, as well. In both legal systems there has been a growing willingness to issue reinstatement orders against large—and especially public—employers.[118] Interestingly, this development has occurred in Israel despite the clear language of Section 3(2) of the Remedies Law, which denies enforced performance when "the contract consists in compelling the doing or acceptance of personal work or a personal service."

We are thus left with the *Florian* case,[119] in which the Supreme Court dismissed an appeal on a district court decision to specifically enforce a commercial contract for the sale of carpets that had been breached by the seller. This is indeed a case in which enforced performance would not have been awarded under the pre-1970 legal regime, nor under English law. Ironically, the appeal was submitted by the buyer, who regretted his seeking enforced performance, preferring in retrospect monetary damages (the remedy he had claimed as an alternative). The Supreme Court held that a plaintiff who got what he asked for cannot appeal the court's judgment.

Thus, even if one examines only the judgments in which enforced performance was awarded in cases that neither pertained to real transactions nor to debt repayment nor to

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[115] 50(4) PD 661 (1996).
[116] Nevo, November 19, 2013.
[117] 28(1) PD 372.
[118] JONES & GOODHART, *supra* note 49, at 171–72; Peter Charleton, *Employment Injunctions: An Over-Loose Discretion,* 9(2) JUD. STUD. INST. J. 1, 6–7 (2009); CHITTY ON CONTRACTS, VOL. 1: GENERAL PRINCIPLES 1979–82 (Hugh G. Beale ed., 32d ed. 2015); SHALEV & ADAR, *supra* note 11, at 206–11; FRIEDMANN & COHEN, *supra* note 11, at 199–206.
[119] Florian v. Galnot Carmel Ltd., 54(1) PD 504 (1990).

obligations to refrain from action, there is hardly sound evidence for the alleged revolution brought about by the Remedies Law. But this does not explain the *declined* use of enforcement remedies after 1970—an issue to which we turn next.

## VI. POSSIBLE EXPLANATIONS FOR THE DECLINED RESORT TO ENFORCEMENT REMEDIES

Even if the Remedies Law had no impact on the status of enforcement remedies, this cannot explain the finding that the resort to those remedies after 1970 has sharply declined. Since it is extremely unlikely that upgrading enforced performance and making it the key remedy for breach of contract caused a decrease in its use, this Part examines other factors that might explain this decline. These include the availability of supra-compensatory remedies for breach of contract (which arguably make enforcement remedies less attractive), Judges' legal education, the rise of individualism in Israeli society, and the length of legal proceedings.

### *A. Supra-Compensatory Remedies*

Arguably, one explanation for the declined use of enforcement remedies could be the availability of supra-compensatory remedies for breach of contract under Israeli law: if plaintiffs can obtain remedies that make them better off than they would have been in had the contract been performed, they are less likely to settle for enforcement remedies, which at best puts them in that position. Two such monetary remedies are disgorgement of the breacher's profits from the breach, and (monetary or in-kind) restitution following rescission of contract—both of which can, under Israeli law, exceed the injured party's expectation interest.[120]

However, the availability of these remedies cannot explain our findings for several reasons. Restitution in excess of the injured party's expectation interest was available both before and after 1970; and while disgorgement was broadly recognized only in

[120] SHALEV & ADAR, *supra* note 11, at 66–67.

1988,[121] we found that—consistent with the findings of Zamir[122]—in the entire dataset there was only one case in which such a remedy was initially sought, none in which it was awarded by the district courts, and only two in which it was awarded by the Supreme Court (and of these two, only in one case did the disgorgement remedy exceed the injured party's expectation interest).[123]

We are left with *compensation without proof of damage,* under Section 11 of the Remedies Law 1970, which (again, at least theoretically) may exceed ordinary expectation damages. Without delving into the doctrinal issues, there were only five cases in our entire dataset where such damages were awarded by the Supreme Court, and seven where it was awarded by the district courts. Even if these cases are excluded from the analyses, the findings presented in the previous Sections remain basically the same.

In fact, insofar as the availability of supra-compensatory reliefs had any effect on enforcement remedies, it appears to have made them *more*, rather than less, attractive after 1970. Between the mid-1970s to the mid-1980s, Israel experienced hyperinflation. It took some time for the market to adopt price indexing mechanisms—and when it did, these were often imperfect. As a result, many sellers breached their contracts, because the inadequately-indexed price quickly fell below the present market value of the asset, due to hyperinflation. In such cases, Israeli courts often compelled sellers to deliver the asset, on condition that the buyer paid the portion of the price that she had withheld in response to the breach. Usually, however, the courts *only partially* indexed that amount—thereby effectively awarding the buyer a supra-compensatory remedy, because in real terms, it meant that she paid less than the agreed price.[124] During the hyperinflation period, enforcement remedies were therefore particularly attractive in these circumstances. And

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[121] *Adras,* 42(1) PD 221.

[122] Eyal Zamir, *Loss Aversion and the Marginality of the Disgorgement Interest, in* SHLOMO LEVIN BOOK: ESSAYS IN HONOUR OF JUSTICE SHLOMO LEVIN 323 (Asher Grunis, Eliezer Rivlin & Michael Karayanni eds., 2013, in Hebrew).

[123] Reliance damages and monetary restoration of the contractual equivalence may also exceed the injured party's expectation interest. However, it is unclear whether the former is available under Israeli law, and even if both reliance damages and monetary restoration are available (*see* Eyal Zamir, *Remedies for Breach of Contract: Expectation Damages, Reliance Damages, Restitution of Unjust Enrichment, and Restoration of the Contractual Equivalence,* 34 MISHPATIM (HEBREW U.L. REV.) 91 (2004, in Hebrew)), the number of cases in which they have been claimed or awarded is negligible.

[124] Shirly Renner, *An Assessment of Recent Trends in Israeli Contract Law,* 21 MISHPATIM (HEBREW U.L. REV.) 33, 50–52 (1991, in Hebrew).

yet, as we have seen, the incidence of claiming and awarding enforcement remedies declined after 1970.

The upshot of all this is that, even if in principle the injured party may, under Israeli law, obtain monetary and other supra-compensatory remedies, the actual use of such remedies has been so minor that it cannot explain the decline in the use of enforcement remedies after 1970.

### *B. Judges' Legal Education*

Another factor that might be associated with the award of enforcement remedies is the judges' legal education. In the first decades following the establishment of the State of Israel, most public officials, including judges, were immigrants from other countries. Thus, it is possible that judges who received their legal education in a civil-law system—where the proclaimed rule is enforced performance—may have awarded this remedy more generously than judges from common-law countries, where specific performance is the exception. Beyond the attempt to explain the decline in resorting to enforcement remedies after 1970, testing this hypothesis is independently important. It relates to a much broader question, namely to what extent judicial decisions are dictated by the applicable legal rules and to what extent by judges' personal background.

Information about the legal education of Supreme Court judges was obtained from the Israel courts' official website, which details the legal education of all judges, past and present. We focused on the legal system where each judge obtained his or her basic legal training—that is, their first academic degree in law—on the premise that even if some of them subsequently pursued higher academic degrees in another system, it is the basic education that shaped their legal outlook. In addition to judges who obtained their legal education in a foreign civil-law or common-law system, the number of judges who completed their legal education in Israel has gradually increased over time. Thus, during the period of our study, 14 of the judges (representing a combined total of 135 years on the Supreme Court bench) had studied law in a civil-law country; 11 had been educated in a common-law country (for a combined total of 187 years of service at the Supreme Court); and 50 had been trained in Israel (442 years of Supreme Court service). In the pre-1970 period, none of the judges had obtained his or her basic legal education in Israel, so the comparison pertains only to the remaining two categories. Excluding judges

who received their legal education in Israel also removes any concerns arising from the fact that, overall, Israel is a mixed legal system.

We took into account the interdependence of judges' rulings when sitting on the same panel. A previous study showed that in 94% of Israel Supreme Court's judgments between 1948 and 1994, there were no differences of opinion between the judges.[125] Given the lack of independence of rulings by different judges in the same case, we clustered the standard errors by judgments.

Table A5 presents the results of logistic regressions we used to examine whether judges' choice of remedies for breach of contract (when such remedies were awarded) was associated with their legal education. The analysis refers to 552 decisions by judges who had received their legal education overseas. As the table demonstrates, the judges' legal education bore no statistically significant association with their inclination to award enforcement remedies. This result did not change when we controlled for the legal regime (pre- or post-1970; Model 2), or for the year of judgment and length of legal proceedings (Model 3).[126]

We then ran the same regressions while excluding cases where enforcement remedies had not been initially sought—that is to say, examining only those where the plaintiff had sought enforcement remedies. Table 1 presents the results. This

**Table 1:** Judges' Legal Education and the Probability of Awarding Enforcement when Enforcement Initially Sought

| Variable | *Model 1* | *Model 2* | *Model 3* |
|---|---|---|---|
| Education[a] | | | |
| Civil law | -0.568<br>(0.303) | -0.563<br>(0.313) | -0.733*<br>(0.306) |
| Regime[b] | | | |
| Pre-1970 | | -0.273<br>(0.504) | |

[125] Yoram Shahar, Miron Gross & Ron Harris, *Anatomy of Discourse and Dissent in Israel's Supreme Court,* 20 TEL AVIV U.L. REV. 749, 755–56 (1997, in Hebrew).

[126] We controlled for the legal regime (pre- or post-1970) and year of judgment separately, to avoid any concerns about multicollinearity, given the high correlation between these two variables (0.816). As further explained in the next Section, length of proceedings was estimated by subtracting the year of filing the suit from the year of judgment. We used a logistic transformation of the length of legal proceedings (*Log(length)* in Table 1), because of the diminishing marginal effect of this variable; and added a constant of 1 before the transformation, because the length could be 0, and log(0) is not defined.

| | | | |
|---|---|---|---|
| Intermediate[c] | | -0.091<br>(0.87) | |
| Year of judgment | | | -0.027<br>(0.017) |
| Log(length) | | | -1.455<br>(1.324) |
| (Constant) | 2.049***<br>(0.278) | 2.127***<br>(0.355) | 56.04<br>(33.13) |
| Observations | 319 | 319 | 306 |
| Model Chi-square | 3.51* | 3.86 | 9.1 |
| Pseudo $R^2$ | 0.012 | 0.014 | 0.042 |

NOTES: Standard errors (clustered by judgments) in parentheses.
[a] Common-law education serves as a reference category. [b] Post-1970 serves as a reference category. [c] *Intermediate* denotes judgments handed down after 1970 relating to contracts made before that year.
* p < .05, ** p<.01, *** p<.001.

time, when controlling for the year of judgment and length of legal proceedings (Model 3)—but not when examining only judges' education (Model 1) or controlling only for the legal regime (Model 2)—the judges' legal education was statistically significantly associated with their inclination to award enforcement remedies. Unexpectedly, in the model where such association was found, judges with common-law education were *more* inclined to award enforcement remedies.

A lack of association between legal education and the inclination to award enforcement remedies would have comported with the view that, despite their conflicting points of departure, common-law and civil-law systems are not markedly different in their operative outcomes (Section III.B above)—and, of course, with the belief that judges faithfully implement the law, regardless of their legal background. However, we have no explanation for the finding that in two of the three models, civil-law education was associated with a *lesser* inclination to award enforcement remedies.

### *C. Rise of Individualism in Israeli Society*

The two explanations considered thus far relate to the legal rules and to judges' training. However, it is possible that the explanation for the declined resort to enforcement remedies (or part thereof) lies outside the confines of the legal system, narrowly

understood. Thus, it is widely accepted that in recent decades Israeli society has gradually become less collectivist, less communitarian, and more individualistic than it was in the 1950s and 1960s.[127] One may argue that settling for monetary damages for breach is more consistent with an individualistic outlook, as it enhances autonomy by offering the promisor an option to perform or pay damages, while enforcement remedies are more in line with a notion of contracts being based on solidarity and community.[128] This, perhaps, is why civil-law systems—which generally put greater emphasis on the moral and social duties of contracting parties (compared, for example, with U.S. law)—highlight the availability of enforced performance.

This link between individualism and the choice of remedies for breach of contract may be questioned. But even if accepted, it does not necessarily explain the declining use of enforcement remedies in Israel in recent decades. A competing account might be that during the early years of the state's history, the Supreme Court promoted liberal values to counteract the then-dominant collectivist values,[129] while in recent years it has done the opposite—championing values of solidarity and mutual consideration to counterbalance the growing trend toward individualism in Israeli society.[130] This competing account is supported by the court's rhetoric in contract law, including in the sphere of remedies for breach of contract (as described in Part II). Admittedly, our methodology does not shed much light on these competing hypotheses. Hence, we will leave it at that.

### *D. Length of Legal Proceedings*

The final factor that may have caused the decline in claims and awards of enforced performance after 1970 is the length of legal proceedings. As noted in Section III.D, waiting several years for a certain work to be completed, or to receive a certain property, or for a defective product to be repaired, is often impractical. In such cases, monetary relief may be deemed to be more appropriate. Therefore, we hypothesized that the longer

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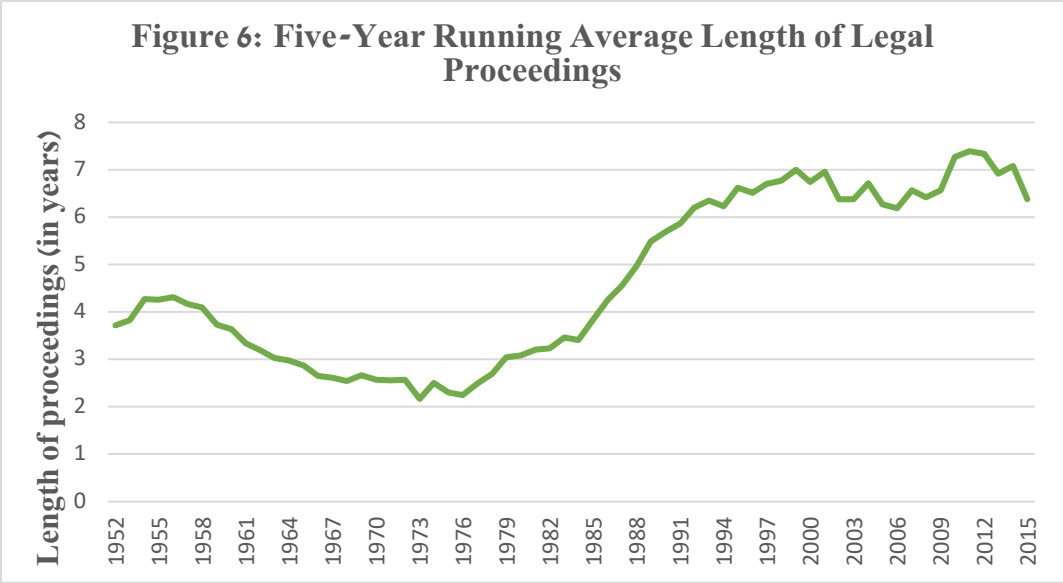
[127] BARAK MEDINA, HUMAN RIGHTS LAW IN ISRAEL 755–61 (2016, in Hebrew).
[128] Roy Kreitner, *Frameworks of Cooperation: Competing, Conflicting, and Joined Interests in Contract and Its Surroundings,* 6 THEORETICAL INQ. L. 59, 79–80 (2005).
[129] MENACHEM MAUTNER, LAW AND THE CULTURE OF ISRAEL 86–87 (2011).
[130] Eyal Zamir, *Justice Aharon Barak and Contract Law: Between Judicial Activism and Judicial Restraint, Between Freedom of Contract and Social Solidarity, Between Adjudication and Academia, in* THE JUDICIAL LEGACY OF AHARON BARAK 343, 364–78 (Celia W. Fassberg, Barak Medina & Eyal Zamir eds., 2009, in Hebrew).

the lapse of time between the filing of a lawsuit and the final judgment by the Supreme Court, the less attractive enforced performance becomes both to litigants and to the courts— irrespective of the legal rule. The longer the expected length of legal proceedings, the greater the relative attractiveness of monetary awards. In this respect, an order to perform a monetary obligation—although analytically and doctrinally a form of enforced performance—is more akin to damages and monetary restitution, than to an order to perform (or refrain from performing) a certain act, or to transfer (or refrain from transferring) an asset. In fact, the boundaries between enforcement of a monetary obligation, damages for breach of a payment obligation, and monetary restitution in lieu of in-kind restitution, are sometimes blurred.[131]

Supreme Court judgments very often fail to state the precise date on which the initial lawsuit was filed, but since each claim is numbered, and the number includes the year of filing, our dataset does include the filing year.[132] It also indicates the date of the Supreme Court ruling. We were therefore able to estimate the length of legal proceedings in each case in our dataset by subtracting the filing year from the judgment year. Figure 6 describes the running average of the length of legal proceedings in all the cases in our main dataset, by years. To avoid excessive volatility due to the small number of judgments in each year (about eight), the graph depicts the mean length of proceedings in a period of five consecutive years ending at that year, from 1952 onwards.

[131] Imagine a contract for the sale of an asset for a price of 100—its market value—in which the seller delivered the asset, but the buyer did not pay the stipulated price. The seller may sue for and receive the sum of 100 as enforced payment of the agreed amount; as damages for not receiving it; or as restitution of the asset's value following the contract's rescission (Section 9 of the Remedies Law 1970 allows an injured party who has rescinded the contract to choose between restitution in kind and restitution of the value of the object transferred to the breacher).

[132] We omitted from the analysis twelve cases (16 observations) in which the filing year was unknown.

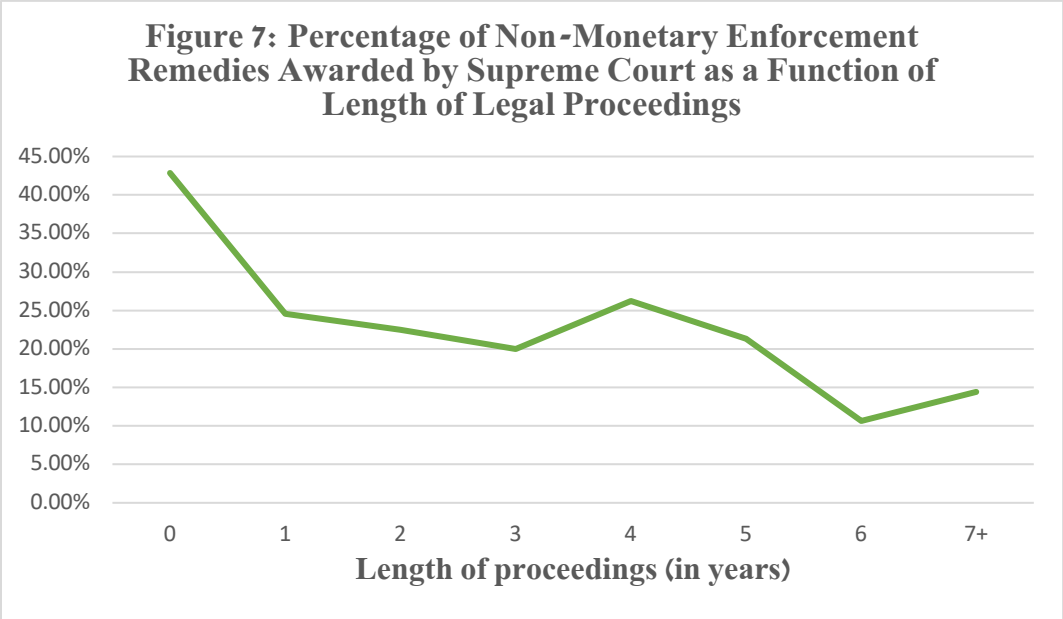



As Figure 6 demonstrates, from the establishment of the State of Israel in 1948 until the early 1970s, the average length of legal proceedings in cases involving remedies for breach of contract that ended up in a Supreme Court judgment gradually declined, from four to two years. From the mid-1970s until the late 1990s, the length of proceedings steeply increased to around seven years, and has since remained around the six- or seven-years mark.

Insofar as the expected length of legal proceedings affects the inclination of plaintiffs to sue for non-monetary enforcement remedies—and of courts to award them—one would expect these inclinations to decline as the length of proceedings increases. Figure 7 describes the percentage of non-monetary enforcement remedies out of all remedies awarded in cases where the claim was not dismissed, as a function of the length of legal proceedings.[133] As expected, the longer the legal proceedings, the lower, in general, the percentage of awards of non-monetary enforcement remedies.

[133] The distribution of cases as a function of the length of legal proceedings was as follows:

| Length | 0 | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 | 13 | 14 | 15 | 16 | 17 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Cases | 7 | 53 | 80 | 90 | 80 | 61 | 47 | 45 | 43 | 11 | 16 | 15 | 2 | 2 | 0 | 2 | 2 | 1 |




To examine the relationship between the length of legal proceedings and the Supreme Court's awards of non-monetary enforcement remedies, we used logistic regression analyses. Since the length of proceedings is likely to have a marginally diminishing effect on the award of enforcement remedies (e.g., the effect of the difference between one and two years is plausibly much greater than the effect of the difference between five and six years), we used the logistic transformation of the length of legal proceedings as the independent variable.[134] We conducted the analyses with reference to judgments where the Supreme Court awarded some form of remedy for breach of contract. The results are depicted in Table 2, which comprises four models. Model 1 includes the length of proceedings as the predictor of whether enforcement would be awarded. Model 2 controls for the legal regime—pre-1970, post-1970, and cases pertaining to pre-1970 contracts that were decided after 1970 (dubbed *intermediate*). Model 3 controls for the year in which the judgment was handed down.[135] Model 4 controls for legal regime, year of judgment, type of contract, and type of plaintiff (an individual, corporation, or public body).

[134] Since the length can be 0 (and log(0) is not defined) we added to the variable a constant of 1 before the transformation.

[135] We controlled for the legal regime and the year of judgment separately in Models 2 and 3, to avoid any concern about multicollinearity, given the high correlation between legal regime (pre- or post-1970) and year of judgment (0.802), and the relatively small number of observations (398).

**Table 2:** Length of Proceedings and Probability of Awarding Non-Monetary Enforcement

| Variable | *Model 1* | *Model 2* | *Model 3* | *Model 4* |
|---|---|---|---|---|
| Log(length) | -1.623***<br>(0.5) | -1.597**<br>(0.527) | -1.540**<br>(0.543) | -1.51*<br>(0.639) |
| Regime[a] | | | | |
| Post-1970 | | 0.14<br>(0.269) | | 0.134<br>(0.51) |
| Intermediate[b] | | 0.899<br>(0.529) | | 0.869<br>(0.643) |
| Year of judgment | | | 0.003-<br>(0.007) | -0.009<br>(0.014) |
| Type of contract[c] | | | | |
| Real property | | | | 1.563*<br>(0.638) |
| Services | | | | -1.684<br>(0.954) |
| Personal property | | | | -0.196<br>(0.826) |
| Family contracts | | | | -0.72<br>(1.231) |
| Employment | | | | 1.511<br>(0.983) |
| Plaintiff type[d] | | | | |
| Individual | | | | --1.901<br>(1.368) |
| Corporation | | | | -2.079<br>(1.402) |
| (Constant) | -0.978***<br>(0.115) | -0.22<br>(0.488) | -0.98***<br>(0.115) | 0.677<br>(1.616) |
| Observations | 398 | | | |
| Model Chi-square | 10.77*** | 13.62** | 10.93** | 83.012*** |
| Nagelkerke $R^2$ | 0.038 | 0.048 | 0.039 | 0.271 |

NOTES: Standard errors in parentheses;. [a] Pre-1970 serves as a reference category. [b] *Intermediate* denotes judgments handed down after 1970 that dealt with contracts made before that year. [c] *Other* serves as a reference category;[d] *Public body* serves as a reference category.
* p < .05, ** p<.01, *** p<.001

Table 2 shows that the length of legal proceedings is highly significantly associated with the award of non-monetary enforcement remedies in all models.[136] In these regressions, other variables do not show a statistically significant association, except for real property transactions.

Finally, as previously indicated, assuming that plaintiffs can (with the help of their attorneys) roughly predict the expected length of legal proceedings, the tendency to claim non-monetary enforcement remedies would be associated with the actual length of proceedings, which serves as a proxy for the plaintiffs' expectation. Table 3 presents the results of logistic regressions similar to the ones presented in Table 2—but with four modifications. First, since we are searching for variables that might predict whether non-monetary enforcement remedies would be sought, the analyses cover both cases where such remedies were sought, and those where they were not. Second, lawsuits filed before the enactment of the Remedies Law 1970 are included in the pre-1970 category—even if the Supreme Court judgment was given after the Law's enactment—because the present analyses do not pertain to the court's ruling, which might have been influenced by the new Law (even though lawsuits filed before 1970 were expected to be governed by the pre-1970 legal regime). Third, the analyses cover both cases were some form of remedy was eventually awarded by the court and those where it was not—as this is unlikely to have affected the plaintiff's initial choice of remedies. Fourth, instead of the year of judgment, we look at the year in which the lawsuit was filed—since that is when the plaintiff decided which remedies to seek.

**Table 3:** Length of Proceedings and Probability of Seeking Non-Monetary Enforcement

| **Variable** | ***Model 1*** | ***Model 2*** | ***Model 3*** | ***Model 4*** |
|---|---|---|---|---|
| Log(length) | -1.191***<br>(0.389) | -1.158**<br>(0.416) | -1.202**<br>(0.428) | -1.228*<br>(0.487) |
| Regime[a] | | | | |
| Psot-1970 | | 0.21<br>(0.209) | | 0.287<br>(0.404) |
| Intermediate | | -1.32**<br>(0.428) | | 1.304*<br>(0.506) |

[136] When we ran the regressions only on the cases where enforcement remedies had initially been sought (N=144), the results were in the same direction, but no longer statistically significant.

| | | | | |
|---|---|---|---|---|
| Filing year | | | 0<br>(0.006) | -0.006<br>(0.011) |
| Type of contract[b] | | | | |
| Real property | | | | 0.496<br>(0.342) |
| Services | | | | -1.893***<br>(0.954) |
| Personal property | | | | -1.141*<br>(0.505) |
| Family contracts | | | | -1.432<br>(0.840) |
| Employment | | | | 0.379<br>(0.678) |
| Plaintiff type[c] | | | | |
| Individual | | | | -1.519<br>(1.326) |
| Cooperation | | | | -1.867<br>(1.344) |
| (Constant) | -0.629***<br>(0.9) | -0.485<br>(0.398) | -0.629***<br>(0.09) | 0.706<br>(1.385) |
| Observations | 557 | | | |
| Model Chi-square | 9.557** | 19.654*** | 9.56** | 105.255*** |
| Nagelkerke $R^2$ | 0.023 | 0.048 | 0.023 | 0.237 |

NOTES: Standard errors in parentheses. [a] Pre-1970 serves as a reference category. [b] *Other* serves as a reference category. [c] *Public body* serves as a reference category.
* p < .05, ** p<.01, *** p<.001

As hypothesized, in all four models, the ex-post length of proceedings is significantly associated with the initial decision to sue for non-monetary enforcement remedies: the longer the proceedings, the less likely plaintiffs are to sue for those remedies. There is also significant association with two types of contracts: plaintiffs are less likely to sue for non-monetary enforcement remedies in contracts for services and in Personal property transactions.

Finally, we examined whether the length of proceedings was associated with the inclination to award non-monetary enforcement remedies in the complementary dataset of district court judgments (described in Sections IV.B and V.E). Since the complementary dataset was considerably smaller than the main one, we could only reliably test the association between the length of proceedings and the probability of

awarding enforcement remedies with regard to *all* observations in which some remedy for breach of contract was awarded (N=192) (without excluding the cases in which enforced performance had not been initially sought—which would have left us with only 67 observations).[137] Table 4 presents the results of the logistic regression analyses that we conducted, similar to the analyses we had conducted of the Supreme Court judgments (Table 2).

**Table 4:** Length of Proceedings and Probability of Non-Monetary Enforcement Awards in Complementary Dataset

| Variable | *Model 1* | *Model 2* | *Model 3* |
|---|---|---|---|
| Log(length) | -1.783*<br>(0.727) | -1.646*<br>(0.777) | -2.166*<br>(0.871) |
| Year of judgment [a] | | | |
| 2005 | | -0.33<br>(0.734) | -0.110<br>(0.758) |
| 2008 | | 0.531<br>(0.599) | 0.816<br>(0.631) |
| 2011 | | 0.851<br>(0.531) | 0.921<br>(0.554) |
| Type of contract[b] | | | |
| Real property | | | 0.087*<br>(0.581) |
| Services | | | -0.858<br>(0.929) |
| Personal property | | | -20.057<br>(10005.84) |
| Family contracts | | | -18.75<br>(40192.97) |
| Plaintiff type[c] | | | |
| Individual | | | -0.292<br>(1.252) |
| Cooperation | | | -0.877<br>(1.304) |
| (Constant) | -0.761<br>(0.446) | -1.134<br>(0.528) | -0.335<br>(1.428) |
| Observations | 192 | | |

[137] The distribution of all cases as a function of the length of legal proceedings was as follows:

| Length | 0 | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 | 13 | 14 | 15 | 16 | 17 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Cases | 14 | 30 | 42 | 35 | 29 | 41 | 25 | 26 | 14 | 8 | 6 | 2 | 1 | 1 | 0 | 0 | 0 | 1 |

| | | | |
|---|---|---|---|
| Model Chi-square | 5.982* | 10.209* | 20.067* |
| Nagelkerke $R^2$ | 0.055 | 0.093 | 0.187 |

NOTES: Standard errors in parentheses
[a] The year 2014 serves as a reference category. [b] *Other* serves as a reference category. [c] *Public body* serves as a reference category.
* p < .05, ** p<.01, *** p<.001.

As Table 4 shows, the increase in the length of legal proceedings is statistically significantly associated with a decrease in the probability of non-monetary enforced performance awards in all models. It thus appears that the complementary dataset lends support to the main positive finding in the main dataset, namely that the longer the legal proceedings, the less enforcement remedies are awarded.

### *E. Summary*

This Part examined possible explanations for the declined use of enforcement remedies in the post-1970 period. *First,* we argued that the availability, in principle, of supra-compensatory monetary remedies cannot explain the disinclination to seek or award enforcement remedies in that period. *Second,* the hypothesis that judges who had been educated in civil-law countries would be more inclined to award enforcement remedies than those educated in common- law countries was not borne out: in fact, common-law judges were found to be *more* inclined to award enforcement remedies. *Third,* we raised the possibility that the declining use of enforcement remedies had to do with the rise of individualism in Israeli society, but were unable to prove or disprove this conjecture.

We did, however, find clear support for a fourth explanation, that is, a highly statistically significant association between the length of legal proceedings and the Supreme Court's inclination to award non-monetary enforcement remedies: the longer the proceedings, the lesser the tendency to award enforcement remedies. This association persisted when we controlled for a host of other variables. It was also evident in the complementary dataset of district court judgments. A similar association was found between the length of legal proceedings (which serves as a proxy for their predicted length) and the plaintiffs' initial decision to seek non-monetary enforcement remedies.

## DISCUSSION AND CONCLUSION

Legal scholars and policymakers around the world continue to wrestle with the question of whether an injured party should be entitled to insist on actual performance of contractual obligations, or whether she should only be entitled to damages in lieu of performance. The theoretical literature offers a host of sophisticated arguments for and against any conceivable rule. The comparative-law literature debates the question of the degree to which the two opposing doctrinal points of departure—namely, the broad availability of enforcement remedies (with some exceptions) in civil law systems versus the denial of specific performance (with some exceptions) in common law systems—translate into contradictory operative rulings. Our analysis and empirical findings contribute to both literatures. As far as the theoretical literature is concerned, our study suggests that mundane, unsophisticated considerations, such as the length of legal proceedings (and other factors, such as the rules pertaining to interim injunctions) likely have a greater impact on the choice of remedies by plaintiffs and courts than the substantive legal rules or the complex policy considerations underpinning them. As for the comparative literature, the findings show that under the civil-law rule, plaintiffs and courts may, in certain circumstances, resort to enforcement remedies *less often* than under the common-law rule.

According to our findings, one primary reason for the decrease in the use of enforcement remedies after 1970 was the decline in plaintiffs' initial claims for such remedies, while the drop in courts' tendency to award such remedies when sought was smaller and not statistically significant. However, it would be a mistake to infer from these results that the courts have not played a major role in this respect, for several reasons. First, absence of statistical significance in the case of courts' rulings is a natural corollary of the fact that the number of observations was smaller. While in the case of initial claims we looked at the entire set of cases, the smaller and less statistically significant difference with regard to judicial decisions pertained only to cases where enforcement remedies had initially been sought—and among those, only to cases where the suit was ultimately successful, and a remedy of some sort was awarded. Second, it stands to reason that a plaintiff's decision to sue for enforcement remedies is influenced by his or her assessment of the prospect of receiving them—so at least some of the

diminished inclination by plaintiffs to sue for enforcement remedies is likely due to the courts' lesser inclination to award them. Finally, the goal of our inquiry was not to establish the effect of the Remedies Law on court rulings (in which case, low statistical significance would have been troubling), but rather to *disprove* that premise. Our findings do refute the belief that the use of enforcement remedies increased following the enactment of the Remedies Law. Not only the use of these remedies did it not increase—it fell considerably.

It should be emphasized, however, that our findings do not rule out the possibility that a broad recognition of an entitlement to enforced performance does increase the propensity to seek and to award this remedy: it may be that in the absence of such recognition by the Remedies Law 1970 and the case law, the incidence of plaintiffs resorting to enforcement remedies and courts' awards thereof would have been even lower than it is today. However, if there was such an effect, it was not discernible in our longitudinal analyses, and it must have been overwhelmed by countervailing factors.

Our findings indicate that a key factor associated with the declining use of enforcement remedies has been the length of legal proceedings. Admittedly, association does not imply causation, and the relationships between the two phenomena may be more complex than first meets the eye. Possibly, in response to the proclaimed primacy of the remedy of enforced performance in the wake of the Remedies Law, defendants have come to use procedural tactics to deliberately delay the proceedings, in a bid to render this remedy less appropriate. It is also possible that judges who wish to refrain from awarding enforced performance deliberately delay the proceedings for the same reason.

While there is a grain of truth in these conjectures, we tend not to place too much weight on them. For one thing, our findings indicate that already at the filing stage—before any delay tactics are used by the defendant or the court—plaintiffs are increasingly disinclined to sue for enforcement remedies. For another, while publicly available statistics are scarce, there can be no doubt that the Israeli court system is suffering from a general, acute problem of unreasonably protracted proceedings, which is not unique to disputes over contract breaches.

Another limitation of our study is that it did not examine the behavior of contracting parties when no lawsuit is filed, or when it is settled before a court judgment. It might be argued that since the enactment of the Remedies Law in 1970 there have been fewer

breaches of contracts and that defendants are more likely to settle cases, because they know that if the contract is breached and a judgment is given, the promisee would be awarded an effective enforcement remedy. An alternative hypothesis is that, knowing that the Israeli court system is heavily congested and hence not very effective—especially when it comes to the enforced performance of non-monetary obligations—promisors and defendants are *less* likely to perform such obligations or to accept settlement offers that favor the plaintiff. The decline of claims for enforcement remedies in the post-1970 period (as described in Section V.B) is consistent with the latter hypothesis, which we believe is more plausible (or, at the very least, that the two effects counteract each other)—but based on our results, we cannot rule out the former possibility.

Be that as it may, the belief that, notwithstanding the declining incidence of enforced performance awards by the courts, the broad availability of that remedy under statutory and case law deters breaches and induces pro-plaintiff settlements, raises a general question: Are contracting parties, litigants, and their attorneys predominantly influenced by judicial rhetoric, or by judicial practice? Presumably, were contracting parties and litigants equipped with perfect information about the courts' rhetoric and practice, they would be mostly influenced by the latter. However, attorneys—and even more so their clients—never possess such perfect information, so they are likely to be influenced by both judicial rhetoric and practice. Meir Dan-Cohen has pointed to the possible advantages of an *acoustic separation* between *conduct rules*—aimed at the general public and designed to guide its behavior—and *decision rules*, used by judges when making their decisions.[138] Another relevant distinction is between the two roles played by the courts (especially Supreme Courts, in systems with stare decisis)—namely, resolving past disputes, and guiding future behavior. There is typically a correspondence between the court's rhetoric and the conduct rules it wishes to lay down, and between the court's practice (bottom-line rulings) and the decision rules that it applies. Thus, maintaining a discrepancy between judicial rhetoric and practice—as manifested in the Israeli law of contract remedies after 1970—arguably serves a useful social goal.[139]

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[138] Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law* 97 HARV. L. REV. 625 (1984).

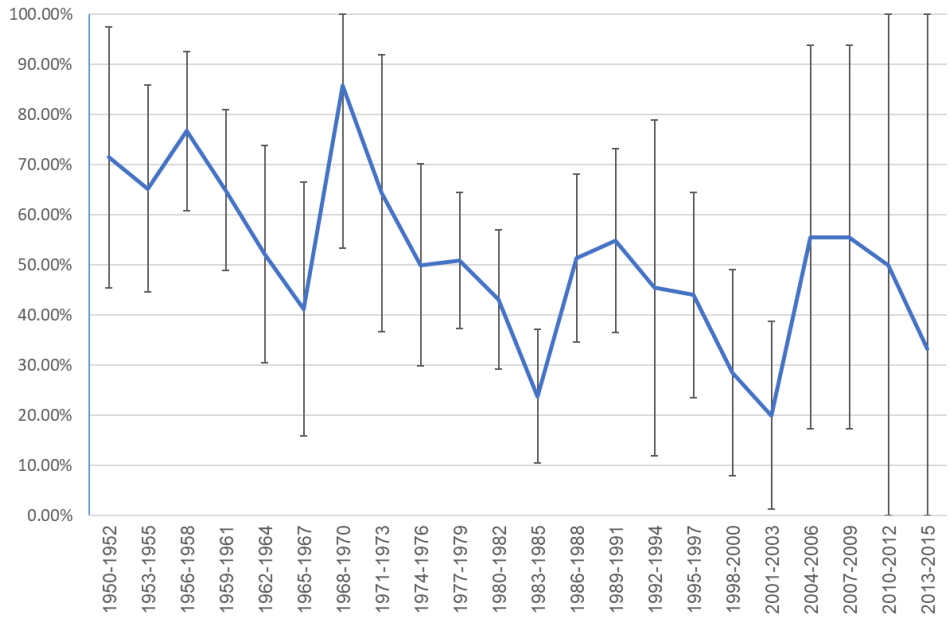
[139] On the merits of discrepancy between judicial rhetoric and practice, see Zamir, *supra* note 130, at 399–409

The final issue raised by our findings—whose ramifications, again, extend well beyond the issue of remedies for breach of contract—is the excessive length of court proceedings. However, discussion of this problem, which is not unique to Israel, is far beyond the scope of the present study.

Putting the broader issues to one side, our focus is on remedies for breach of contract—in particular, the choice between enforced performance and monetary substitutes. We concede the limitations of our empirical inquiry, and certainly agree that no analytical, normative, or policy conclusions directly or necessarily flow from empirical findings. We nevertheless believe that our results—which in the Israeli context, at least, run counter to common wisdom—can enrich the theoretical, comparative, and analytical debates about remedies for breach of contract.

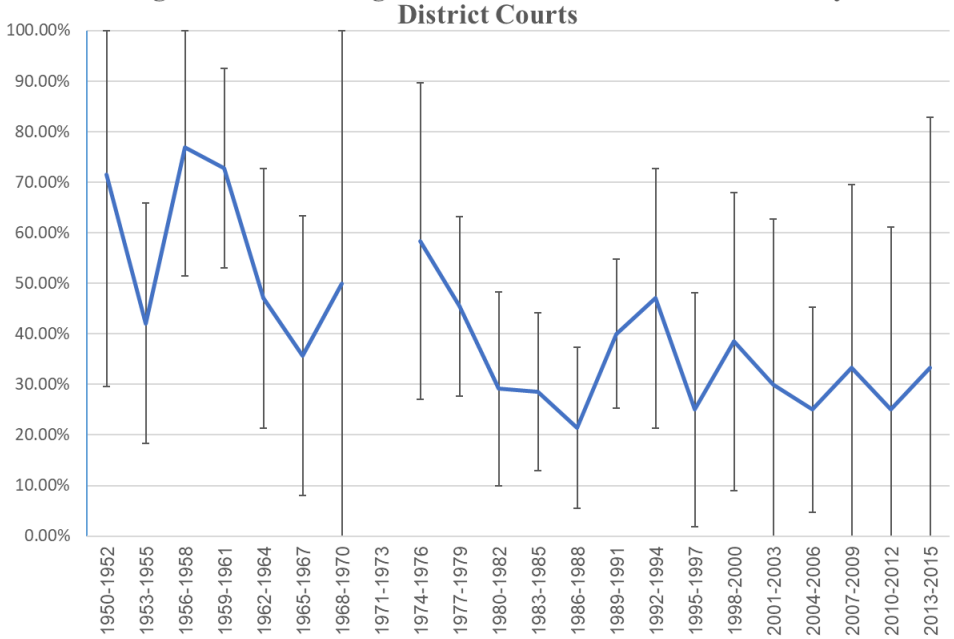
## APPENDIX

**Figure A1: Percentage of enforcement remedies sought**




NOTE: Error bars represent a 95% confidence interval.

**Figure A2: Percentage of enforcement remedies awarded by District Courts**




NOTE: Error bars represent a 95% confidence interval.

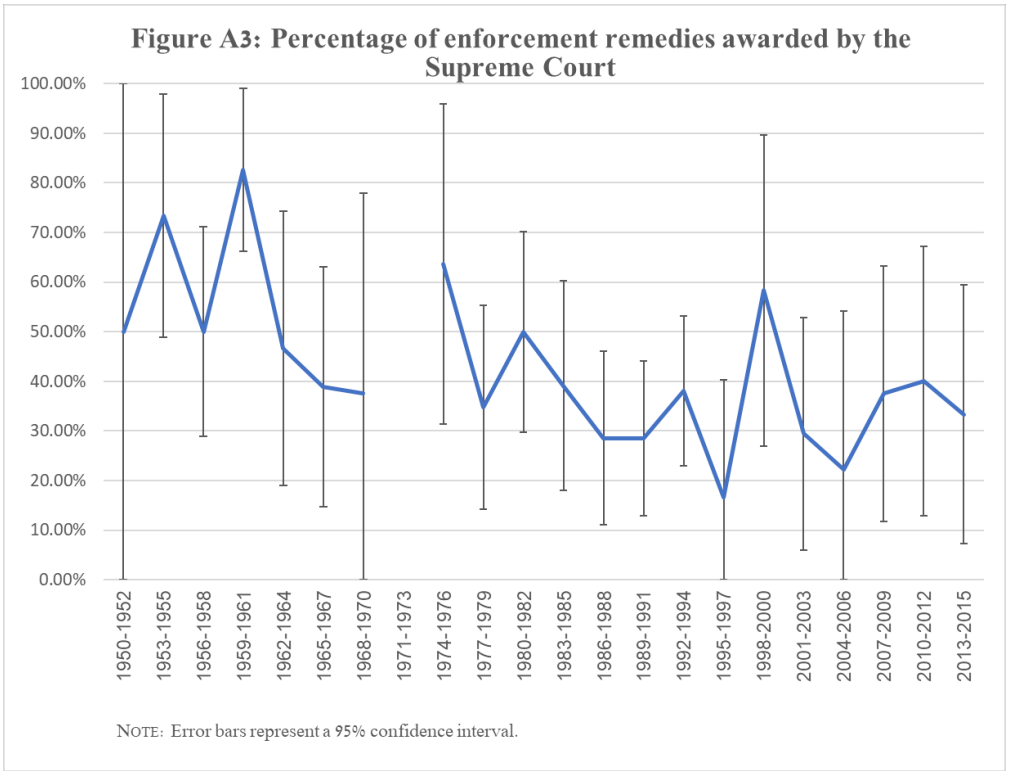



**Table A1**: Types of Contracts Handled in Supreme Court's Judgments

| Type of Contract | Absolute number (and relative share) *pre-1970* judgments | | Absolute number (and relative share) *post-1970* judgments | |
|---|---|---|---|---|
| Real property transactions (including sales, leases, licenses, gifts and *combination transactions*) | 87 | (51.48%) | 197 | (59.16%) |
| Services (including construction) contracts | 42 | (24.85%) | 48 | (14.41%) |
| Personal property transactions (including sales, leases, and securities transactions) | 20 | (11.83%) | 31 | (9.31%) |
| Family Contracts (dowry, marriage, divorce and alimony | 4 | (2.37%) | 9 | (2.7%) |
| Employment contracts | 4 | (2.37%) | 10 | (3%) |
| Other (loans, banking, partnership, joint venture, etc.) | 12 | (7.1%) | 38 | (11.41%) |
| Total | 169 | (100%) | 333 | (100%) |

**Table A2**: Remedies Initially Sought

| Type of remedy | Absolute number (and relative share) in 1948–1970 | | Absolute number (and relative share) in 1970–2016 | |
|---|---|---|---|---|
| To give | 60 | (31.25%) | 89 | (24.86%) |
| To refrain from giving | 0 | (0%) | 1 | (0.28%) |
| To do | 4 | (2.08%) | 24 | (6.70%) |
| To refrain from doing | 2 | (21.04%) | 6 | (1.68%) |
| To pay a Debt | 52 | (27.08%) | 37 | (10.34%) |
| Other remedy | 74 | (38.54%) | 201 | (56.159%) |
| Total | 192 | (100%) | 358 | (100%) |

**Table A3**: Remedies Awarded by District Courts

| Type of remedy | Absolute number (and relative share) in 1948–1970 | | Absolute number (and relative share) in 1970–2016 | |
|---|---|---|---|---|
| To give | 27 | (25.71%) | 53 | (19.05%) |
| To refrain from giving | 1 | (0.95%) | 0 | (0%) |
| To do | 0 | (0%) | 9 | (3.24%) |
| To refrain from doing | 1 | (0.95%) | 6 | (2.16%) |
| To pay a Debt | 27 | (25.71%) | 29 | (10.43%) |
| Other remedy | 49 | (46.67%) | 181 | (65.11%) |
| Total | 105 | (100%) | 278 | (100%) |

**Table A4**: Remedies Awarded by Supreme Court

| Type of remedy | Absolute number (and relative share) in 1948–1970 | | Absolute number (and relative share) in 1970–2016 | |
|---|---|---|---|---|
| To give | 32 | (28.83%) | 61 | (21.48%) |
| To refrain from giving | 0 | (0%) | 1 | (0.35%) |
| To do | 0 | (0%) | 5 | (31.76%) |
| To refrain from doing | 1 | (0.9%) | 7 | (2.46%) |
| To pay a Debt | 29 | (26.13%) | 30 | (10.56%) |
| Other remedy | 49 | (44.14%) | 180 | (63.38%) |
| Total | 111 | (100%) | 284 | (100%) |

**Table A5:** Judges' Legal Education and the Probability of Awarding Enforcement

| Variable | *Model 1* | *Model 2* | *Model 3* |
|---|---|---|---|
| Education[a] | | | |
| Civil law | 0.092<br>(0.168) | 0.102<br>(0.167) | 0.027<br>(0.175) |
| Regime[b] | | | |
| Pre-1970 | | -0.609<br>(0.285) | |
| Intermediate[c] | | -0.236<br>(0.495) | |
| Year of judgment | | | -0.021*<br>(0.011) |
| Log(length) | | | -1.288<br>(0.708) |
| (Constant) | -0.065<br>(0.15) | 0.135<br>(0.201) | 43.01*<br>(20.966) |
| Observations | 558 | 558 | 543 |
| Model Chi-square | 0.3 | 5.26 | 10.34 |
| Pseudo $R^2$ | 0.0004 | 0.014 | 0.026 |

NOTES: Standard errors (clustered by judgments) in parentheses.
[a] Common-law education serves as a reference category. [b] Post-1970 serves as a reference category. [c] *Intermediate* denotes judgments handed down after 1970 that dealt with contracts made before that year.
* p < .05, ** p<.01, *** p<.001.