Introduction

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Proportionality in Asia

Joining the Global Choir

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1.1 Introduction

In the twenty-first century, the Proportionality Analysis (PA) – in its varied manifestations and permutations – has emerged as the most ubiquitous legal doctrine relied upon by judges in rights-adjudication.[1]

Typically, when applying PA, the judiciary would ensure that (1) the State is pursuing a legitimate objective; (2) the governmental measure undertaken is rationally connected to the stipulated policy objective; and (3) the right-derogation is no more than necessary to achieve those stated goals. In several jurisdictions, PA has a fourth stage and the judiciary would further examine whether the regulatory measure is proportionate *stricto sensu:* Whether there is a fair balance struck between the rights of the individual and the interests of the community or whether the consequences of the law are unacceptably harsh on the individual.

With its genesis in German law, this PA doctrinal device has diffused globally across Europe to the Anglophone nations (for example the United Kingdom, Canada, and New Zealand), mixed legal systems that are rooted in the common law (for example Israel and South Africa), and even parts of Latin America and Asia.[2] The proportionality doctrine is now so commonly used that it is widely regarded as "generic constitutional law,"[3] or even the "ultimate rule of law."[4]

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[1] Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 72.

[2] Alec Stone Sweet and Jud Mathews, *Proportionality Balancing and Constitutional Governance* (Oxford University Press 2019).

[3] David S. Law, 'Generic Constitutional Law' (2005) 89 *Minnesota Law Review* 652.

[4] David M. Beatty, *The Ultimate Rule of Law* (Oxford University Press 2005).

PA is a doctrinal construction and an analytical procedure.[5] But it does not – in itself – produce substantive outcomes. Certainly, the deployment of PA has the capacity to override legislative arrangements and produce more rights-friendly outcomes, but this results from the choices judges make to curb legislative discretion. But as Alec Stone Sweet and Jud Mathews point out, the structured nature of PA's analytical procedure helps counsel sequence their arguments and courts frame their decisions,[6] thereby providing a stable, defined *legal* infrastructure for rights-contestation to be conducted.[7]

PA also provides the forum for a constitutional dialogue on rights to take place between courts and lawmakers.[8] Through PA, courts do not simply veto legislative action. Instead, legislatures are invited by courts to improve on their statutory product. Even if the original law was invalidated because it was in pursuit of nefarious goals, lawmakers can return and defend a similar law so long as the legislative sequel is in pursuit of a legitimate objective the second time round. Laws that do not achieve the very goals they seek to achieve can be re-tweaked so that there is now a fit between the legislation and its goals. Where there are less restrictive means to pursue these same statutory aims, lawmakers can simply pursue the less draconian legislative option on their second attempt. Moreover, integrated within PA is a margin of appreciation that courts afford the first-instance decisions of the legislature/executive, in view of the relative informational or institutional advantages the latter have over certain policy issues, for example national security and resource allocation.

Legal scholarship on PA is plentiful, but it can generally be divided into two groups. The first category focusses on the *normative/theoretical* conceptions of PA. Leading pieces in this group include Luc B. Tremblay's egalitarian defense of PA[9] and Kai Möller's justification for PA on the basis of an individual's right to autonomy.[10] The second category centers on the practice of proportionality, that is, the judicial use

[5] Stone Sweet and Mathews, 'Proportionality Balancing and Global Constitutionalism' (n. 1) 74–76.
[6] Ibid. 88–89.
[7] Vicki C. Jackson, 'Constitutional Law in an Age of Proportionality' 124 (2015) *Yale LJ* 3094, 3142.
[8] Stone Sweet and Mathews, *Proportionality Balancing and Constitutional Governance* (n. 2); Jackson (n. 7) 3144; Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (2nd edn, Irwin Law 2016) 393.
[9] Luc B. Tremblay, 'An Egalitarian Defense of Proportionality-Based Balancing' (2014) 12 *ICON* 864.
[10] Kai Möller, *The Global Model of Constitutional Rights* (Oxford University Press 2012).

of PA as a doctrinal device in constitutional adjudication, which is the focus of this volume of essays.

Foremost is Robert Alexy who viewed legal principles – enshrined as rights – as norms that require optimization to the "greatest extent possible given the legal and factual possibilities,"[11] and the judicial resolution of conflicting principles are achieved through PA.[12] Aharon Barak largely echoes Alexy's views on principle-optimization, but unlike Alexy, Barak would view PA as a doctrinal device that determines the judicial *realization* of a particular constitutional right and not its *scope*.[13] Central to both jurists' theses is their belief that judges can assess the relative harms and benefits of a regulatory act in a principled and objective way.[14] Stone Sweet and Mathews attribute PA's success to its structured infrastructure that concurrently introduces a "highly intrusive standard of judicial review"[15] that would render rights-adjudication more effective while mitigating the two-against-one – the neutral judge declares a winner in adjudication and takes a side against the losing party – dilemma in constitutional adjudication: PA and its menu of options available to the court, and generated by the parties themselves, allow the court to state that "it took every pain to minimize the negative consequences of its ruling for the losing party or interests."[16] Moshe Cohen-Eliya and Iddo Porat defend proportionality on the basis that PA instantiates a new constitutional "culture of justification,"[17] whereby legislatures are required to defend the "cogency and persuasiveness"[18] of their actions before the courts. According to Niels Petersen, the judicial use of PA corrects "political market failures"[19] that occur when

[11] Robert Alexy and Julian Rivers (trs), *A Theory of Constitutional Rights* (Oxford University Press 2002) 47.
[12] Robert Alexy, 'Proportionality and Rationality' in Vicki Jackson and Mark Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (Cambridge University Press 2017) 24.
[13] Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press 2012) 237.
[14] Alexy, 'Proportionality and Rationality' (n. 12) 16–18; Barak (n. 13) 542–545.
[15] Alec Stone Sweet and Jud Mathews, 'Proportionality and Rights Protection in Asia: Hong Kong, Malaysia, South Korea, Taiwan – Whither Singapore?' (2017) 29 *SAcLJ* 774, 781.
[16] Stone Sweet and Mathews, 'Proportionality Balancing and Global Constitutionalism' (n. 1) 96.
[17] Iddo Porat and Moshe Cohen-Eliya, *Proportionality and Constitutional Culture* (Cambridge University Press 2013) 111.
[18] Ibid. 112.
[19] Niels Petersen, *Proportionality and Judicial Activism: Fundamental Rights Adjudication in Canada, Germany and South Africa* (Cambridge University Press 2017) 181.

the legislative process intentionally or inadvertently neglects minority interests,[20] while Stephen Gardbaum argues that PA enhances democratic values within a constitutional regime by providing an interface for a current citizenry to reconceive enduring rights entrenched by a past majority.[21]

Naturally, PA is not without its sceptics and their criticisms usually come in two forms. The first form, commonly termed the "internal critique of balancing,"[22] questions whether incommensurable interests can be identified, valued, and compared. According to Stavros Tsakyrakis, balancing concerns "the assumption of a common metric in the weighing process,"[23] and it says "nothing about how various interests are to be weighted, and this silence tends to conceal the impossibility of measuring incommensurable values by introducing the image of a mechanistic, quantitative common metric."[24] Virgílio Afonso da Silva has since provided a robust reply to this "incommensurability" objection. According to him, the presence of incommensurable values does not preclude the possibility of balancing rights; on the contrary, weighting rights is a procedure that increases comparability among principles.[25] Where two constitutional interests collide, even though these values may be incommensurable, courts may establish a relation of precedence between them such that judges can "compare the numerous possibilities of protecting and realising such rights in a concrete situation and to weigh among them."[26] Therefore, proportionality is not about courts deciding between the protection of a constitutional right and the advancement of legitimate state goals in the abstract; instead, balancing is about comparing and considering trade-offs in concrete situations such that rational choices can be made between possible alternatives. As David Luban observes, "ounces and inches

[20] Ibid. 182.
[21] Stephen Gardbaum, 'Proportionality and Democratic Constitutionalism' in Grant Huscroft, Bradley W. Miller, and Grégoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press 2014) 272.
[22] T. Alexander Aleinikoff, 'Constitutional Law in the Age of Balancing' (1987) 96 *Yale LJ* 943, 972.
[23] Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7 *ICON* 468, 471.
[24] Ibid. See also Francisco J. Urbina, 'Incommensurability and Balancing' (2015) 35 *OJLS* 575.
[25] Virgílio Afonso da Silva, 'Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision' (2011) 31 *OJLS* 273, 276.
[26] Ibid. 286.

can't be compared; but percentage gains and losses can."[27] Naturally, there will not always be situations where a small sacrifice in the fulfilment of one right/interest would automatically lead to larger gains in another, as the balancing of interests may indeed lead to a stalemate, that is, a parity of values between plausible alternatives. But this "rough equality among alternative decisions"[28] is the *consequence* of balancing the competing rights/interests at stake and not the reasons against balancing rights in the very first place.

Grégoire Webber, on the other hand, advances a more refined version of this incommensurability objection. While Webber maintains that constitutional rights are incommensurable and cannot be weighted in the technical sense, he accepts that a reasoned choice can be made between competing trade-offs.[29] But for Webber, rights are constituted by their limitation, after one takes into account all the moral-political reasons that bear on what the right requires, and in a democracy it is for the *legislature* to articulate the contours and limits of such rights.[30] Therefore, the role of the judiciary in a democracy is not to assess the proportionality of legislative action but to overturn laws only when the limitation of a right adopted by the legislature falls outside the range of reasonable disagreement which animates democratic debate,[31] that is, when the legislature has made a mistake that is so clear that it is not open to rational question.[32] In essence, Webber's real objection to proportionality is not internal to PA, that is, whether PA can be used to choose between competing legislative trade-offs, but is an external critique of proportionality: Why should the judiciary have the right to recalibrate the competing rights and interests at stake after the legislature – the elected representatives of the people – have already openly debated and determined the appropriate balance?[33]

Echoing Webber, but from the political left flank, is Mark Tushnet:

> [L]egislation embodies a decision to achieve a permissible social goal with attendant intrusions on individual rights at a financial cost found

[27] David Luban, 'Incommensurable Values, Rational Choice, and Moral Absolutes' (1990) 38 *Cleveland State Law Review* 65, 76.
[28] Afonso da Silva (n. 25) 277.
[29] Grégoire Webber, *The Negotiable Constitution* (Cambridge University Press 2009) 98–99.
[30] Ibid. 10.
[31] Ibid. 210.
[32] James B. Thayer, 'The Origin and Scope of the American Doctrine of Constitutional Law' (1893) 7 *Harvard Law Review* 129, 144.
[33] Aleinikoff (n. 22) 984–985.

> acceptable when compared to other methods of achieving that goal (less effectively) with smaller intrusions on individual rights at a higher cost . . . And that, I suggest, is not susceptible to (non-arbitrary) evaluation by reviewing courts – except perhaps by a rather loosely administered rationality requirement (that is, that the combination of achieving the permissible goal, the intrusion on rights, and the costs level is rationally defensible).[34]

One must note that this Webber/Tushnet line of argument is not an argument against PA per se; it is in essence an argument against the judicial review of legislation in general. After all, whenever courts invalidate a statute passed by Parliament, regardless of whether this is a consequence of PA or categorical judicial rules, judges are supplanting the legislative will and enforcing individual rights at a higher premium. But while Webber engages in doublespeak and seeks only a "negotiable constitution,"[35] what he wants is to practically divest the judiciary of its power to protect individual rights from majoritarian will.[36] In contrast, Tushnet is clear, candid, and unequivocal about his intentions: He wants to take the constitution away from the courts.[37]

Turning our eye to Asia, it is unsurprising that we do not see the emergence of an Asian PA monotype as countries and courts typically evolve against the backdrop of their own sociopolitical traditions and developments. Singapore, for one, is an extreme outlier as it is the only Asian democracy whose courts are vested with the powers of constitutional review but rejects any use of PA to subvert legislation.[38] Stone Sweet and Mathews view PA's rise as a natural consequence of legislators *creating* trustee courts to superintend a rights-based constitution.[39] But in Asia, in those jurisdictions where its courts are vested with the formal powers of constitutional review, many of those courts were originally established for dominant-party regimes. Such autocratic regimes were in

[34] Mark Tushnet, 'Making Easy Cases Harder' in Vicki Jackson and Mark Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (Cambridge University Press 2017) 319.
[35] Webber (n. 29).
[36] Aharon Barak, 'Proportionality (2)' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 752.
[37] Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press 2000).
[38] Jack Tsen-Ta Lee, 'According to the Spirit and not to the Letter: Proportionality and the Singapore Constitution' (2014) 8 *Vienna Journal on International Constitutional Law* 276; Stone Sweet and Mathews, 'Proportionality and Rights Protection in Asia' (n. 15).
[39] Stone Sweet and Mathews, 'Proportionality Balancing and Global Constitutionalism' (n. 1) 85.

no danger of losing power and were thus not seeking to insure against a pending political loss,[40] and had little intentions of ceding policy control to the courts. But over time, as power fragmented across separate political institutions and governments became divided, judges gained policy discretion to impose tangible costs on the government without being overruled or punished.[41] PA or its structural equivalent then emerges as the doctrine of choice for this new judicial endeavor or adventure.

1.2 Structured Proportionality

In Asia, only the courts in Hong Kong, Taiwan, and South Korea deploy Structured Proportionality (SP): The courts reason through the structured three or four-stage PA described above sequentially and use PA to enforce constitutional rights against the government regularly.[42]

Rehan Abeyratne in his chapter on Hong Kong traces the Court of Final Appeal (HKCFA)'s efforts over time to add more structure to the PA. The term "proportionality" was first used by the HKCFA in 1999, but it had no "bite," and therein the court cursorily upheld a law that criminalized flag desecration.[43] In 2005, the HKCFA established the three-stage proportionality test,[44] that is, the legitimacy, suitability, and necessity subtests; and a fourth stage (proportionality *stricto sensu*) was most recently added in 2016.[45] But as the PA became more structured in Hong Kong, Abeyratne argues that the HKCFA has also added more

[40] For an insurance theory of judicial review, see Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press 2003).
[41] Po Jen Yap, *Courts and Democracies in Asia* (Cambridge University Press 2017) 3.
[42] The Supreme Court of India in September 2018 applied the four-stage SP for the first time in the country's history. In that case, *Justice K. S. Puttaswamy (Retired)* v. *Union of India* 2018 Indlaw SC 898, the Indian Supreme invalidated various governmental rules, which mandated that every bank account in India had to be linked to the individual's unique digital identification number or the account would be frozen, on the basis that the measures were a disproportionate violation of the person's constitutional right to property. Since then, no other governmental rule has not been invalidated for being failing SP, so it is unclear whether this case marked the dawn of SP in India or it is merely an anomaly. In *Anuradha Bhasin v Union of India* 2020 Indlaw SC 21, the Indian Supreme Court ruled that the indefinite suspension of internet services in Kashmir failed SP and was impermissible under the Temporary Suspension of Telecom Services (Public Emergency or Public Service) Rules, 2017. One should note that only governmental acts were quashed herein, and no legal rule was invalidated.
[43] *HKSAR* v. *Ng Kung Siu* (1999) 2 *HKCFAR* 442.
[44] *Leung Kwok Hung* v. *HKSAR* [2005] 3 *HKLRD* 164.
[45] *Hysan Development Co Ltd* v. *Town Planning Board* (2016) 19 *HKCFAR* 372.

deference to its analysis. Where legislation implicated resource-allocation[46] or involved "political or policy considerations,"[47] the HKCFA would usually uphold the law unless it was manifestly unreasonable. While the HKCFA's deference on socioeconomic legislation is typical of the judicial practice even in liberal democracies, deference on electoral issues, writ large and small, signals the court's increased willingness to acquiesce to Beijing's tightening grip over the city.[48] But this is not to say that the HKCFA is toothless. The court's most confrontational PA decisions usually concern Lesbian, Gay, Bisexual, and Transgender (LGBT) rights.[49] The outcomes of such cases are low stakes to Beijing such that the Hong Kong government would hold its nose and enforce these judicial orders, even if it may not agree with the court on the merits.

Turning to Taiwan, Chien-Chih Lin in his chapter has noted that the term "proportionality" was first used by the Constitutional Court of Taiwan (TCC) in Interpretation No. 414 (1996),[50] the same year Taiwan elected its first President by universal suffrage. A three-stage PA was formulated in Judicial Interpretation 476 (1999),[51] but Taiwan's three-stage variation included the "proper restrictions" subtest in lieu of the "*stricto sensu*" limb and omitted the "suitability" subtest. Not long after, in Interpretation No. 542 (2002),[52] the "suitability" subtest was introduced and "*stricto sensu*" test replaced "proper restrictions." With that, the four-stage PA in Taiwan was complete, and it is equally significant that this doctrinal shift occurred after Kuomintang, the dominant party that ruled the island without interruption since it fled from China in 1949, lost the Presidency for the first time in 2000. But as Lin argues in his chapter, the TCC has developed its own variant of PA: While PA is applied in most rights cases, the TCC adopts the tiered standard of review, applied by the United States Supreme Court, in equal

[46] *Fok Chun Wa* v. *Hospital Authority* (2012) 15 *HKCFAR* 409.
[47] *Kwok Cheuk Kin* v. *Secretary for Constitutional and Mainland Affairs* (2017) 20 HKCFAR 353.
[48] Po Jen Yap, 'Twenty Years of the Basic Law: Continuity and Changes in the Geoffrey Ma Court' (2019) 49 *HKLJ* 209.
[49] *Secretary for Justice* v. *Yau Yuk Lung* [2006] 4 *HKLRD* 196; *QT v Director of Immigration* [2018] HKCFA 28; *Leung Chun Kwong* v. *Secretary for the Civil Service* [2019] HKCFA 19.
[50] J.Y. Interpretation No. 414 (Taiwan) (1996), available at www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=414.
[51] J.Y. Interpretation No. 476 (Taiwan) (1999), available at www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=476.
[52] J.Y. Interpretation No. 542 (Taiwan) (2002), available at www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=542.

protection cases. Landmark PA decisions in Taiwan include Interpretation No. 710 (2013),[53] where the TCC invalidated a law that allowed the government to indefinitely detain undocumented immigrants from China, and Interpretation No. 669 (2009),[54] which voided a law that imposed a mandatory five-year prison sentence on any person who sold or manufactured air guns. Like most modern democracies, PA in Taiwan is enforced most robustly in the domain of civil-political rights, while TCC rules against the government less frequently in socio-economic cases.

Yoon Jin Shin in her chapter on the Constitutional Court of Korea (KCC) paints a similar picture. After the four-stage PA was established in 1989,[55] the court has imposed tangible costs on the government of the day and introduced significant sociopolitical reforms. In 2005, the KCC upended a patriarchal law that subordinated a woman to her father, husband (if she were married) or son (if her husband is deceased).[56] More recently, the KCC required the government to provide conscientious objectors to the nation's compulsory military service with an alternative to combat service, in lieu of imprisonment;[57] and the court also upended the country's virtually blanket ban on abortions.[58] Like the HKCFA and the TCC, the KCC accords a wider margin of discretion to the legislature on the enforcement of socioeconomic rights; and the KCC is highly deferential on politically charged cases: the validity of national security laws;[59] the dissolution of a far-left party sympathetic to the North Korean regime;[60] and labor-rights litigation that impacts the interests of the chaebols – large Korean conglomerates that are perceived to be the backbone of the national economy.[61]

For the TCC and the KCC, Germany is the foreign jurisdiction most considered by both courts;[62] for the HKCFA, the United Kingdom's case

[53] J.Y. Interpretation No. 710 (Taiwan) (2013), available at www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=710.
[54] J.Y. Interpretation No. 669 (Taiwan) (2009), available at www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=669.
[55] Constitutional Court of Korea 88Hun-Ka13 (Dec. 22, 1989).
[56] Constitutional Court of Korea 2001Hun-Ka9 (Feb. 3, 2005).
[57] Constitutional Court of Korea 2011Hun-Ba379 et al. (Jun. 28, 2018).
[58] Constitutional Court of Korea 2017Hun-Ba127 (Apr. 11, 2019).
[59] Constitutional Court of Korea 89Hun-Ka113 (Apr. 2, 1990).
[60] Constitutional Court of Korea 2013Hun-Da1 (Dec. 19, 2014).
[61] Constitutional Court of Korea 2009Hun-Ma408 (Jul. 28, 2011); 2014Hun-Ma367 (Mar. 31, 2016).
[62] David S. Law, 'Judicial Comparativism and Judicial Diplomacy' (2015) 163 *University of Pennsylvania Law Review* 927, 963, 979.