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A CASE FOR PROPORTIONALITY REVIEW IN SINGAPOREAN CONSTITUTIONAL ADJUDICATION

MARCUS **TEO***

Singapore's courts have long refused to adopt proportionality review in constitutional adjudication. However, their instinct to reject proportionality, while possibly well-founded, has yet to be thoroughly tested. This article forwards three arguments for proportionality's use in Singaporean constitutional adjudication. First, as a matter of precedent, proportionality's four enquiries are already latent in Singapore's constitutional jurisprudence. Second, as a matter of principle, Singapore's courts have the constitutional authority to adopt proportionality as a ground of constitutional review and are not institutionally incompetent to answer its enquiries. Third, on grounds of policy, proportionality is desirable because it helps ensure the cogency and rationality of legislative or executive acts within Singapore's burgeoning political culture of justification. By making a case for proportionality in precedent, principle and policy, this article hopes to initiate a considered discussion on whether and, if so, to what extent proportionality should be used in Singaporean constitutional adjudication.

I. INTRODUCTION

Singapore has long remained a persistent objector to proportionality review's apparently global constitutional revolution.[1] Though proportionality's four-step framework for the constitutionality of legislative and executive acts has spread throughout the jurisprudence of courts in Europe, North America, Latin America, Africa, Asia and even international tribunals,[2] Singapore's courts continue to reject proportionality's use in constitutional disputes. Courts have done so as a matter of precedent, arguing that proportionality is foreign to the common law in general and Singapore law in particular. Courts have also done so on grounds of principle, arguing that proportionality review would be inconsistent with the separation of powers, and the principles of constitutional authority and institutional competence that undergird it. Finally, courts have done so on grounds of policy, arguing that

* Sheridan Fellow, National University of Singapore. I am grateful to Professor Thio Li-ann and the anonymous reviewer for their advice and comments. All errors remain mine alone.

1 Alec Stone Sweet & Jud Mathews, "Proportionality and Rights Protection in Asia: Hong Kong, Malaysia, South Korea, Taiwan—Whither Singapore?" (2017) 29 Sing Ac LJ 774; Yap Po Jen, "Proportionality in Asia: Joining the Global Choir" in Yap Po Jen ed. *Proportionality in Asia* (Cambridge: Cambridge University Press, 2020) at 21-22 [Yap, *Proportionality in Asia*].

2 Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Constitutional Governance: A Comparative and Global Approach* (Oxford: Oxford University Press, 2019) at 59-95 [Stone Sweet & Mathews, *Constitutional Governance*].

proportionality's searching enquiries would be antithetical to Singapore's political culture, which emphasises trust in the Government and respect for its authority. Given these concerns—of precedent, principle and policy, respectively—the use of proportionality in Singaporean constitutional adjudication seems to be largely off the table.

Singapore's instinct to reject proportionality review may well be warranted. However, since courts and commentators have not interrogated this instinct in great depth,[3] Singapore's wholesale rejection of proportionality appears to lack the "intelligent sifting" of foreign "ideas and solutions" so often touted as a "secret of Singapore's success".[4] This, surely, is unsatisfactory. Rather, the responsible thing to do would be to carefully consider whether and to what extent proportionality's use would be legally defensible and normatively desirable. This task is by no means easy, but it must be undertaken to ensure that Singapore's constitutional jurisprudence stays true to its contemporary ethos of principled pragmatism, which seeks to reconcile constitutional "fundamental truths or foundational norms" in a manner which accommodates Singapore's "context" and the "real-world consequences" of adopting certain positions therein.[5]

To that end, this article aims to initiate a considered discussion on the defensibility and desirability of proportionality review in constitutional adjudication in Singapore, by making a case in favour of its adoption on grounds of precedent, principle and policy. It starts with a brief description of proportionality (Part II). Then, on precedent, this article argues that all of proportionality's stages are already found in certain tests for constitutionality under the fundamental rights provisions in Part IV of the *Constitution of the Republic of Singapore*[6] (Part III). On principle, it goes on to argue that the judiciary has the constitutional authority to adopt proportionality in constitutional adjudication and does not lack the institutional competence to do so (Part IV). Finally, on policy, it argues that Singapore's burgeoning political culture of justification provides a positive reason for proportionality's use in constitutional adjudication (Part V).

As a preliminary, this article's scope should be further defined in three ways. First, this article offers a *single* (albeit three-pronged) case for the use of proportionality review in constitutional adjudication. This case does not purport to be exhaustive or conclusive; instead, its modest aim is to address the main arguments which have thus far been used to reject proportionality in Singapore. Second, the case offered here is in support of a particular *account* of proportionality review, sometimes called "balancing as reasoning".[7] That account asserts only that proportionality provides

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3 *Cf* Jack Lee, "According to the Spirit and not to the Letter: Proportionality and the Singapore Constitution" (2014) 8 Vienna J Intl Constitutional L 276. This appears to be the only full-length article addressing the question.

4 For an example of this rhetoric, see Jon Quah, "Why Singapore works: five secrets of Singapore's success" (2018) 21 Public Administration and Policy 1 at 16.

5 See Thio Li-ann, "Principled pragmatism and the 'third wave' of communitarian judicial review in Singapore" [Thio, "Principled pragmatism"] in Jaclyn Neo ed. *Constitutional Interpretation in Singapore* (Singapore: Routledge, 2016) ch 4 at 77-78 [Neo, *Constitutional Interpretation*].

6 1999 Rev Ed Sing [*Constitution*].

7 Kai Möller, "Proportionality: Challenging the critics" (2012) 10 Intl J Constitutional L at 709, 715, 722; see also Mattias Kumm, "The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review" (2010) 4 L & Ethics Human Rights 141. In somewhat

courts with a method of reaching reasonable conclusions in constitutional disputes; it does not assert that proportionality can quantitatively "optimise" the conflicting rights or public interests in, or lead to a single "correct" answer for, any such dispute.[8] Third, the case offered here is one in favour of proportionality's use in Singaporean *constitutional* adjudication, in particular in applications for constitutional review of legislative or executive acts on grounds of their inconsistency with the *fundamental rights* contained in Part IV of the *Constitution*. While many of the arguments offered herein may also be applicable to proportionality's use in the enforcement of other provisions of the *Constitution* or in other fields of public or private law, a thorough discussion on this must await another day.

II. Proportionality Review in a Nutshell

Proportionality review is a method of reasoning which courts can use to enforce constitutional rights against legislative or executive acts. If a constitutional right claimed by the plaintiff is curtailed by a legislative or executive act, the court then asks four questions to determine whether such curtailment is legitimate.

First, courts ask whether the impugned legislative or executive act purports to further a *proper purpose*: is the act's purpose (*ie*, its underlying public interest or policy) one which the *Constitution* itself recognises as legitimate? This enquiry's strictness depends on the extent to which the *Constitution* in question expressly or impliedly limits the purposes legislative or executive acts may be used for.[9] If the act's stated purpose is legitimate, this first stage is passed.

Second, courts ask whether the impugned legislative or executive act is *rationally related* to, or *suitable* to achieve, its stated purpose: would the means chosen go some way to achieving that purpose? In order words, does the act deal with a concern relevant or pertinent to the achievement of that purpose at all?[10] If the act can plausibly further the chosen purpose to at least some degree, this second stage is passed.

Third, courts ask whether the legislative or executive act is *necessary*, in the sense of it being the *least restrictive means*, to achieve the stated purpose. This is stricter than the rational relation enquiry: is there an alternative means the government can use to achieve the same purpose, which would be equally effective while infringing the claimed right less? There are, however, two senses in which an alternative measure may be said to be a less restrictive means, depending on whether one adopts a

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more pejorative terms, this has also been called "proportionality as unconstrained moral reasoning" (see Francisco Urbina, "Is it Really That Easy? A Critique of Proportionality and 'Balancing as Reasoning" (2014) 27:1 Can J L & Jurisprudence 167 at 178), although this is only a negative label if one believes that doctrinal decision-making has virtues which trump those of more free-form reasoning methods. This article does not purport to make an abstract choice between these competing virtues; it only shows how a choice in favour of the latter would be consonant with precedent, principle and policy in Singaporean constitutional adjudication.

8 Möller, *ibid* at 725-726; Kai Möller, "'Balancing as reasoning' and the problem of legally unaided adjudication: a rejoinder to Francisco Urbina" (2014) 12 Intl J Constitutional L 222.

9 Dieter Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence" (2007) 57:2 U Toronto L J 383 at 388.

10 Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge: Cambridge University Press, 2012) at 305-306.

narrow or broad understanding of "equally effective".[11] The first sense, which we will call *absolute necessity*, involves a narrow understanding of an "equally effective" measure and sees the alternative measure as less restrictive only if it would achieve the stated purpose to the exact same extent as the impugned act while affecting the countervailing right less. This is a strictly empirical enquiry: both measures are compared against the same benchmark, namely the extent to which the government wishes to further the stated purpose. The second sense, which we will call *relative necessity*, involves a broad understanding of an "equally effective" measure and sees the alternative measure as less restrictive even if it would achieve the legitimate purpose to a marginally lesser extent than the impugned act, if it would also infringe the countervailing right significantly less. This enquiry is not strictly empirical, but has a normative dimension as well: courts do not compare both measures against a single benchmark, but also ask whether the benchmark set by the government should itself be shifted, given the importance of the stated purpose and the importance of the right limited.[12] Courts in different jurisdictions tend to adopt one or the other of these necessity enquiries,[13] but we will consider both here for completeness' sake. If no equally effective yet less rights-restrictive means exist, this third stage is passed.

Finally, if all three questions above are answered in the affirmative, most[14] courts will then carry out "balancing" in the "strict sense"—which we will call *strict balancing*—between the "[legislative or executive] act's marginal addition to the realisation of [the stated] purpose against the marginal injury incurred by infringement of the right".[15] This final enquiry has two components: a normative and an empirical sub-enquiry. Under the normative sub-enquiry —which we will call *abstract weighing*—courts must determine the relative normative weight the competing values have in the abstract, by constructing a hierarchy of values to determine their relative importance within the Constitution's framework, which may require courts to enter into "moral" and "value-laden" judgments.[16] By contrast, under the

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11 See Tom Hickman, *Public Law after the Human Rights Act* (Oxford: Hart Publishing, 2010) at 179-193. These two enquiries have also been called "Pareto efficiency" or "Kaldor-Hicks efficiency" enquiries respectively, but I shall avoid this terminology because it carries connotations of precise optimisation which sit uneasily with the idea of proportionality as reasoning.

12 This has also been described as part of proportionality's fourth strict balancing stage instead; see Barak, *supra* note 10 at 352-356.

13 Courts tend to adopt the relative necessity enquiry if they only adopt a three-stage proportionality test culminating in necessity (see *eg*, *Elloy de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 at 80) and tend to adopt the absolute necessity enquiry if they intend to move on to a fourth strict balancing stage (see Talya Steiner, Andrej Lang & Mordechai Kremnitzer, "Comparative and Empirical Insights into Judicial Practice: Towards an Integrative Model of Proportionality", in Mordechai Kremnitzer *et al.* eds. *Proportionality in Action: Comparative and Empirical Perspectives on the Judicial Practice* (Cambridge: Cambridge University Press, 2020) ch 7 at 580-583.

14 Admittedly, not all courts which endorse structured proportionality review accept this fourth strict balancing stage (see *ibid*). However, the full four-stage test is certainly more representative of contemporary understandings of 'proportionality' (see *eg*, Stone Sweet & Mathews, *Constitutional Governance*, *supra* note 2; Barak, *supra* note 10), and even English courts have gravitated toward the full four-stage test in recent years (see Adam Ramshaw, "The case for replicable structured full proportionality analysis in all cases concerning fundamental rights" (2019) 39 Leg Studies 120 at 122-123). The four-stage test is thus considered here for completeness' sake.

15 Stone Sweet & Mathews, *Constitutional Governance*, *supra* note 2 at 37.

16 Barak, *supra* note 10 at 342-343.

empirical sub-enquiry—which we will call *circumstantial weighing*—courts must also determine empirically the "trade-off" that prioritising one value over another in the circumstances will entail, by assessing the extent to which the rights and competing values at play are infringed, and the likelihood of the legislative or executive act achieving its stated purpose, on the facts before it.[17] Ultimately, courts will determine which party should triumph, given the normative weights of both values they rely on in the abstract and the empirically assessed consequences of denying either value in the circumstances.

Proportionality review, as a method of reasoning about and enforcing constitutional rights, is often differentiated from categorical doctrines of constitutional review. Categorical constitutional review involves abstract deontological reasoning: courts only determine whether a particular legislative or executive act falls within a constitutionally prohibited or permissible category, and then enforce the legal outcomes of that characterisation, without taking into account the consequences of their decisions.[18] By contrast, proportionality review involves fact-specific teleological reasoning: it sees constitutional rights and countervailing purposes as constitutional principles, which courts must balance on the particular facts of a case while keeping in mind the consequences that might eventuate.[19] In practice, few courts adopt completely deontological or teleological approaches to constitutional review, although they may prioritise one over the other. Nevertheless, this broad distinction between the two approaches, and proportionality's clear affiliation with the teleological approach, illustrates why proportionality can have a drastic impact constitutional adjudication when employed.

III. Proportionality's Latency in Singaporean Constitutional Jurisprudence

The first argument made in favour of proportionality's use is one of precedent. It responds to the most basic objection often levied against proportionality in Singapore: that it has historically been alien to English and Singaporean constitutional jurisprudence. Thus, in *Chee Siok Chin v Minister for Home Affairs*, the High Court considered proportionality review a legal transplant from European human rights jurisprudence, which has no place in the constitutional jurisprudence of states which are not party to the European Convention of Human Rights;[20] a position the Court recently re-iterated in *Ong Ming Johnson v Attorney-General*.[21] In the context of English law, however, commentators have stridently refuted such claims as ahistorical. Thus, Paul Craig has argued that doctrines similar to proportionality review were historically applied in English decisions involving administrative law and judicial review, from as early as the 16th century.[22] Further, Mark Elliott has noted that, even

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17 *Ibid* at 342-343, 357-362.

18 *Ibid* at 502-509.

19 David M Beatty, *The Ultimate Rule of Law* (Oxford: Oxford University Press, 2004) at 166-168.

20 *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR (R) 582 at para 87 (HC).

21 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at paras 232-237.

22 Paul Craig, "Proportionality and Judicial Review: A UK Historical Perspective" in Stefan Vogenauer & Stephen Weatherill eds. *General Principles of Law: European and Comparative Perspectives* (Oxford: Hart Publishing, 2017).

prior to the enactment of the Human Rights Act in the UK, English courts protected certain common law fundamental rights by employing tests similar to proportionality.[23] So understood, proportionality review is not alien to, but a familiar feature of, English law.

To the extent that Singapore's constitutional jurisprudence remains heavily inspired by English law, these observations about proportionality's relationship with latter support an argument that proportionality is not exactly foreign to Singapore law as well. We may, however, go one step further, to note that even within Singapore's own autochthonous constitutional jurisprudence, courts have engaged in enquiries similar to proportionality's. As Jack Lee has argued, case law on fundamental rights in Singapore employs certain concepts and reasoning structures that are analogous to proportionality's four enquiries.[24] Here, I build on Lee's findings in light of recent cases, to demonstrate that all four of proportionality's enquiries are already latent in Singaporean constitutional jurisprudence today.

First, Singapore's courts clearly do seek to ensure that the purposes underlying rights-curtailing legislative or executive acts are purposes recognised as proper or legitimate under the *Constitution*. Many of the fundamental rights provisions in the *Constitution* contain express limitations clauses which set out the purposes which right-curtailing acts may legitimately be adopted to further,[25] and a fair amount of constitutional cases have involved that precise issue of whether impugned acts fall within those purposes.[26] Conversely, even provisions like Articles 9(1) and 12(1), which are worded in an absolute manner, have been read as precluding laws enacted for *improper* purposes. For example, the Court of Appeal in *Yong Vui Kong v Attorney-General* held that, for a statute to be "law" under Article 9(1), it could not be "so absurd or arbitrary a nature that it could not possibly have been contemplated by our constitutional framers as being 'law"';[27] an enquiry which the High Court in *Tan Eng Hong v Attorney-General* later confirmed is directed at the impugned law's "purpose".[28] Similarly, Article 12(1) contains a proper purposes enquiry as well: the High Court in *Lim Meng Suang v Attorney-General* opined that legislation may contravene Article 12(1)'s reasonable classification test if the purpose is seeks to further is "illegitimate"[29] and the Court of Appeal in *Yong Vui Kong v Attorney-General* subsequently confirmed that Article 12(1) "imports a limited requirement of legitimacy" under which "a law which adopts a manifestly discriminatory object would not pass muster".[30] Evidently, Singapore's courts frequently assess the legitimacy of purposes furthered at the expense of constitutional rights.

Second, Singapore's courts clearly apply a rational relation enquiry in constitutional rights litigation. At a conceptual level, it is hard to see how courts could

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23 Mark Elliott, "Beyond the European Convention: Human Rights and the Common Law" (2015) 68 Current Leg Problems 85 at 102-103.

24 Lee, *supra* note 3 at 301-302.

25 See *eg*, arts 12(3), 13(2), 14(2), 15(4), 149(1) of the *Constitution*.

26 See *eg*, *Chan Hiang Leng Colin v Minister for Information and the Arts* [1996] 1 SLR (R) 294 at para 64 (CA) [*Colin Chan*]

27 *Yong Vui Kong v Attorney-General* [2010] 3 SLR 489 at para 16 (CA).

28 *Tan Eng Hong v Attorney-General* [2013] 4 SLR 1059 at paras 37-39 (HC).

29 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at paras 114-116 (HC).

30 *Yong Vui Kong v Attorney-General* [2015] 2 SLR 1129 at para 106 (CA).

ever find that a legislative or executive act legitimately limits a constitutional right without searching for a "nexus between the object of the impugned law and one of the permissible subjects stipulated in [the exception clauses] of the Constitution",[31] which evidently involves a rational relation enquiry. Moreover, the Court of Appeal in *Lim Meng Suang* noted that a "clear disconnect" between an impugned act's stated purpose and the differentia it employs would render it unconstitutional under Article 12(1)'s reasonable classification test; this sub-limb of the test is literally described as a "rational relation" enquiry.[32]

Third, Singapore's courts have occasionally engaged in enquiries similar to proportionality's necessity enquiry. Courts appear to have done so when determining whether applicants can show a *prima facie* violation of their rights, at the leave stage. In *Vijaya Kumar v Attorney-General*, the High Court denied applicants leave to apply to review an order partially restricting the playing of music during Thaipusam, on grounds that there was no *prima facie* violation of their freedom of religion under Article 15 of the *Constitution*. In response to counsel's argument that the police should not have imposed "restrictions. . . *necessary* to address specific public order concerns", the Court upheld the police's order, on grounds that it did not prohibit the playing of music in "blanket fashion", but instead took a "nuanced" and "calibrated approach" of allowing music in certain locations and at a certain volume.[33] One reading[34] of *Vijaya Kumar* thus suggests that the Court was concerned that limitations of the applicants' freedom of religion be no more restrictive than necessary to protect public order. Courts have also carried out necessity enquiries in the context of applications for the issuance of committal orders for scandalising contempt. In *Shadrake Alan v Attorney-General*, the Court of Appeal maintained that a statement will only amount to scandalising contempt, and thus, a committal order restricting the statement-maker's Article 14 right is only justified if that statement poses a "real risk of undermining public confidence in the administration of justice".[35] This test assesses the degree of harm *(ie*, "real risk of undermining") a statement would cause to a legitimate public interest (*ie*, "public confidence in the administration of justice") before determining whether taking measures against it (*ie*, the issuance of a committal order) would be appropriate. Although the common law test for scandalising contempt has since been replaced by Section 3(1)(a)(ii) of the *Administration of Justice (Protection) Act 2016*,[36] in *Wham Kwok Han Jolovan v Attorney-General* the Court of Appeal developed a similar test under Section 3(1)(a)(ii): "is the risk one that the reasonable person coming across the contemptuous statement would think *needs* guarding against so as to avoid undermining public confidence in the

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31 *Chee Siok Chin*, *supra* note 20 at para 49.

32 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at para 68 (CA).

33 *Vijaya Kumar v Attorney-General* [2015] SGHC 244 at paras 37-38 (HC) [emphasis added].

34 Another reading of the decision would be that the Court only asked whether the police genuinely considered their order was necessary to protect public order in the circumstances, instead of whether the order was objectively necessary; see Swati Jhaveri, "Localising Administrative Law in Singapore: Embracing Inter-branch Equality" (2017) 29 Sing Ac LJ 828 at 848-849. However, the difference between the two readings may be more apparent than real, if (on the second reading) the evidence required to determine the police's subjective satisfaction that their order was necessary involved the court's determination of whether the order was "nuanced" and "calibrated".

35 *Shadrake Alan v Attorney-General* [2011] 3 SLR 778 at para 25 (CA).

36 No 19 of 2016.

administration of justice?"[37] Evidently, Singapore's courts have on occasion been willing to assess the necessity of limiting constitutional rights.

Finally, Singapore's courts have, when engaging in constitutional adjudication, entered into enquiries similar to those employed at proportionality's strict balancing stage. The first sub-enquiry of this stage, abstract weighing, was endorsed in *obiter* in *Review Publishing v Lee Hsien Loong*.[38] There, the Court of Appeal, hypothesising how it might determine the extent to which Article 14(2) preferred freedom of speech over the protection of reputation, noted that it would have to "strik[e] [a] *balance* between freedom of expression and protection of reputation" by making "a *value judgment* which depends upon local political and social conditions".[39] The Court of Appeal also noted that, if it were to undertake such a balancing exercise, a "consequential consideration" would be whether the right to free speech claimed could properly be considered a "fundamental" or "preferential" right, as compared to being "co-equal" or "subsidiary" to the countervailing public interest.[40] This reasoning strongly resembles that which courts would employ under the abstract weighing sub-enquiry.

The circumstancing weighing sub-enquiry, on the other hand, is reflected in various other constitutional decisions. For instance, in *Vellama d/o Marie Muthu v Attorney-General*, the Court of Appeal interpreted Article 49 as imposing a duty on the Prime Minister to call by-elections to fill casual vacancies in Single Member Constituencies within a "reasonable time".[41] This enquiry was one which required the court to consider "the *circumstances* of each particular case", with the ultimate concern being the "need to *balance* the rights of the voters in a Parliamentary system of government and the discretion vested in the Prime Minister".[42] Likewise, in *James Raj s/o Arokiasamy v Public Prosecutor*, the Court of Appeal held that an accused person's right to counsel under Article 9(3) required only that such access to counsel be availed of him within a "reasonable time", which requires courts "to ensure that in *any given case*, the *balance* is in fact being appropriately struck between the interests of the arrested person on the one hand and the public interest in effective police investigations on the other".[43] Both these cases thus arguably demonstrate reasoning similar to the circumstantial weighing sub-enquiry of proportionality's strict balancing stage.

Thus, all four of proportionality's enquiries already exist in Singapore's constitutional jurisprudence. Proportionality review is therefore not some outlandish

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37 *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 at para 38 (CA) [emphasis added].

38 *Review Publishing v Lee Hsien Loong* [2010] 1 SLR 52 (CA).

39 *Ibid* at paras 27, 273 [emphasis added].

40 *Ibid* at paras 286-289.

41 *Vellama d/o Marie Muthu v Attorney-General* [2013] 4 SLR 1 at paras 80-84 (CA).

42 *Ibid* at paras 84-85. One might argue that the Court merely intended to suggest that the Prime Minister should balance the rights of voters against his discretion and that the Court's role was limited only to considering whether the Prime Minister gave due consideration to the former rights. However, the Court also noted that it would disagree with the Prime Minister in some cases—in particular, by finding that the Prime Minister would not, under art 49, "be entitled to defer the calling of an election to fill a vacancy *indefinitely*" [at para 85, emphasis added]—which suggests that the Court *itself* would engage in that balancing exercise, even if a finding that the rights outweighed countervailing policy considerations would only be reached in extreme circumstances.

43 *James Raj s/o Arokiasamy v Public Prosecutor* [2014] 3 SLR 750 at para 36 (CA).

doctrine completely without precedent in Singapore law. Instead, its essential elements have from time to time been employed by Singapore's courts in constitutional adjudication.

IV. Proportionality's Defensibility under Principles of Constitutional Authority and Institutional Competence

The second argument made in favour of proportionality's use is one of principle. It responds to oft-made argument that proportionality's use in constitutional adjudication would contravene the separation of powers. In this regard, it is relevant that the separation of powers has been considered part of the "basic structure" of the *Constitution*,[44] which makes it central to the paradigm of constitutional theory most accepted in Singaporean constitutional adjudication today. Since this Part focuses on arguments on principle, and since arguments from principle can only cogently be made within a single theoretical paradigm,[45] it is not the burden of this Part (but rather that of Part V below) to argue that this separation of powers-based paradigm of constitutional theory should be displaced.

Here, it is argued that, under the separation of powers, it is in principle justifiable for Singapore's courts to use proportionality review in constitutional adjudication. This argument responds to principled objections which are often made at two levels, which stems from two different understandings of the separation of powers. The first objection often made is that the separation of powers, understood in a *categorical* sense, deprives Singapore's court of the *constitutional authority* to develop an intrusive test for the enforcement of constitutional rights, and so courts cannot use proportionality review. The second objection, on the other hand, accepts that the separation of powers, understood in a *functional* sense, allows courts to develop any test to enforce rights, but asserts that courts should still be cognisant of their limited *institutional competence*, which discourages them from using proportionality review. However, both these principled objections hold no water. Rather, in principle, Singapore's courts have the constitutional authority to use proportionality review when enforcing of constitutional rights, and there are no reasons of institutional competence why they should not do so.

A. *Constitutional Authority*

In Singapore, constitutionalism and constitutional review are often defined and scoped by the separation of powers. One understanding of the separation of powers is *categorical*: it describes the judiciary on the one hand and the legislature and executive on the other having clearly-identifiable functions which are mutually-exclusive from each other. Thereunder, Articles 38, 23 and 93 of the *Constitution* are said to

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[44] See *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] 4 SLR 947 [*Faizal*] at para 11 (HC); *Yong Vui Kong*, *supra* note 30 at para 68-69.

[45] See Ralf Michaels, "Two Paradigms of Jurisdiction" (2006) 27:4 Mich J Intl L 1003 at 1022-1024; Thomas Kuhn, *The Structure of Scientific Revolutions*, 3d ed (Chicago: University of Chicago Press, 1996) at 10-22.

allocate the "legislative power", the "executive power" and the "judicial power", to the legislative, executive and judicial branches, respectively and exclusively.[46] Consequently, the judiciary can (and can only) act within the scope of the judicial power.

Unfortunately, this bare-bones description of the categorical separation of powers does not tell us whether or not the judiciary has the constitutional authority to adopt proportionality review, because the abstract labels it utilises are too vague to provide answers to such contentious questions. As Jaclyn Neo notes, "[b]eyond the core activities of law-making, law-enforcing and adjudication. . . there are areas of overlap that can be said to fall within the functions of different branches of government."[47] The inadequacy of the categorical separation of powers is particularly evident when one considers the assertion often made by Singapore's courts, that proportionality review comes close to exercises of legislative or executive power and so are beyond the constitutional authority of the courts. For instance, in *Chan Hiang Leng Colin v Minister for Information and the Arts*, the Court of Appeal rejected proportionality's use in an Article 15 challenge because it would "involve a usurpation of power and responsibility that rightly belongs to the Minister".[48] In *Lim Meng Suang*, the Court of Appeal refrained from developing a test similar to proportionality to enforce Article 12, for fear of "usurp[ing]. . . the legislative function".[49] As Neo notes, however, any test which seeks to enforce fundamental rights against legitimate public interests could be said to fall into more than one constitutional competence: it would be "legislative insofar as the legislature needs to determine for itself if the law is necessary for whatever public interest it has in mind", but "it is also a judicial matter and subject to the review of the courts insofar as they have been tasked with the duty of interpreting and upholding a supreme constitution".[50]

The only way to operationalise such a categorical understanding of the separation of powers, then, is to sidestep the impossible task of untangling overlapping competences by simply defining the scope of the "judicial power" as whatever the provisions of Part IV of the *Constitution*, properly interpreted, allow the judiciary to do. In the context of Singaporean administrative law, Thio Li-ann and Kenny Chng have argued that, because Singapore's *Constitution* is supreme, the justification and scope of judicial review cannot rest on an assumption that some branches of government are supreme over others, but must instead start from the premise that all branches of government are subject to some higher independent constitutional

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46 *Faizal*, *supra* note 44 at para 11.

47 Jaclyn Neo, "Autonomy, Deference and Control: Judicial Doctrine of Separation of Powers in Singapore" (2018) 5 J Intl & Comparative L 461 at 464 [Neo, "Separation of Powers"]. See also Aileen Kavanagh, "The Constitutional Separation of Powers" in David Dyzenhaus & Malcolm Thorburn eds. *Philosophical Foundations of Constitutional Law* (Oxford: Oxford University Press, 2016) ch 11 at 225-226 [Kavanagh, "Separation of Powers"], concluding ultimately that "all three branches exercise all three functions to some degree".

48 *Colin Chan*, *supra* note 26 at paras 38-44.

49 *Lim Meng Suang*, *supra* note 32 at para 77. The test rejected would have been a stringent test of legitimate legislative purposes and would prevent laws from being over-inclusive or under-inclusive in light of those purposes (*cf* para 84)—essentially, proportionality's proper purposes, rational relation and necessity stages.

50 Neo, "Separation of Powers", *supra* note 47 at 464.

norm which the judiciary interprets and applies.[51] The very same argument applies to the justification and scope of constitutional review, because, even as Singapore's *Constitution* sets out a tripartite separation of powers, it also contains two additional propositions which bear materially on the scope of these powers. First, the constitutional authority of the legislative and executive branches are limited *ex ante* by the provisions of the *Constitution*, or at least those contained in Part IV—as M Karthigesu JA noted in *Taw Cheng Kong v Public Prosecutor*, it is simply not within the "scope" of the powers of those branches to act in a manner prohibited by fundamental rights provisions.[52] In other words, the "legislative power" or "executive power" consists of "X" or "Y" *minus* the entirety of the matters covered by the fundamental rights provisions. Second, as the Court of Appeal noted in *Tan Seet Eng v Attorney-General*, while the judiciary is "subject to the Constitution", the judiciary's power of "adjudication" also "carries with it the power to pronounce authoritatively and conclusively on the meaning of the Constitution and all other laws."[53] In other words, because the *Constitution* gives the judiciary the exclusive power to interpret and apply law and because the *Constitution* is itself law, only the judiciary can interpret and apply the provisions of the *Constitution*. Together, these two propositions state that the *Constitution* expressly limits the constitutional authority of the legislative and executive branches in accordance with the fundamental rights provisions in Part IV and vests the judiciary with the constitutional authority to interpret and apply those provisions. The upshot is that it is the *fundamental rights provisions* of the *Constitution* and those provisions *alone* which determine the scope of the judiciary's constitutional authority to adopt a particular test of constitutional review in rights adjudication. One need not attempt the impossible task of determining the exact boundaries of the "legislative power" or "executive power" under the *Constitution*, since those powers are *ipso facto* limited by the fundamental rights provisions.

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[51] More specifically, they argue that judicial review in Singaporean administrative law cannot be attributed to the doctrine of parliamentary supremacy but the rule of law as a high constitutional principle. See Thio Li-ann, "The Theory and Practice of Judicial Review of Administrative Action in Singapore" in Yeo Tiong Min *et al.* eds. *SAL Conference 2011: Developments in Singapore Law 2006-2010—Trends and Perspectives* (Singapore: Singapore Academy of Law, 2011) at 751 [Thio, "Theory and Practice"]; Kenny Chng, "The Theoretical Foundations of Judicial Review in Singapore" [2019] Sing JLS 294 at 306-315.

[52] See *Taw Cheng Kong v Public Prosecutor* [1998] 1 SLR (R) 78 at paras 22-23 (HC), noting that "courts must firstly presume that the legislation falls within the scope of Parliament's powers", but that this presumption may be rebutted (and that therefore such legislation would fall *outside the scope* of such powers) if the law fell within the "scope of the right", because "a statute is only valid in so far as it does not intrude on the *scope* of the protection contemplated" [emphasis added]. Later parts of Karthigesu JA's decision further support this understanding of the power-limiting role of the Constitution's fundamental rights provisions: he notes that "[t]o the extent that the Constitution is supreme, those rights are inalienable", and when individuals are deprived of those rights by legislation or executive acts, this is justifiable only "because the Constitution, which confers that liberty on him, confers a corresponding right on the State to draw the boundaries of that liberty" (at paras 56-57). This suggests that it is first and foremost the fundamental rights provisions that define the scope of the legislative and the executive power. While Karthigesu JA's decision was overturned in *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR (R) 489 (CA), this was largely on the basis of a different interpretation of the underlying purpose of the statute at issue, and so Karthigesu JA's extensive discussion of the power-limiting role of constitutional rights was left untouched and remains good law today.

[53] *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at para 90 (CA).

Thus, the *only* question which bears on the constitutional authority of Singapore's courts to adopt a test like proportionality is whether a proper interpretation of the provisions in Part IV of the *Constitution* would allow it. As recent cases like *Tan Cheng Bock v Attorney-General* confirm, constitutional interpretation is limited by the text and context of the provisions in questions.[54] The text of most of the fundamental rights provisions, however, do not in any way preclude the adoption of proportionality review, because they do not appear to set out any test for the enforcement of the rights they contain, which thus leaves the formulation of the appropriate test entirely to the courts.[55] Thus, the judiciary clearly has constitutional authority to use proportionality review to enforce most of the fundamental rights in Part IV.

The exception to this general pattern appears to be Article 14 of the *Constitution*. David Tan has argued that the text of Article 14, which states that "Parliament may by law impose [on freedom of speech] such restrictions as it considers necessary or expedient in the interest of [various public interest grounds]", precludes the use of proportionality.[56] However, this conclusion is not required by the text, context or underlying purposes of Article 14. Even though Article 14's plain wording states that legislative or executive acts restricting free speech need only be "necessary" or "expedient" in the interest of various public interest grounds, neither of those terms clearly excludes proportionality: "necessity" is in fact one of proportionality's enquiries and "expediency" may conceivably refer to a rough cost-benefit analysis like proportionality's strict balancing stage.[57] Moreover, as Jack Lee notes, the legislative debates and drafting history of Article 14 do not tell us much about the test to be used to enforce it, since the provisions of Part IV of the *Constitution* were drafted in haste, without much discussion in both the Reid and Wee Constitutional Commissions on their underlying purpose,[58] let alone how they should be operationalised.

Unsurprisingly, then, there have been reasonable disagreements as to whether the text of Article 14 does indeed deny the judiciary the constitutional authority to employ proportionality review to enforce the right to free speech. While Singaporean decisions such as *Chee Siok Chin* see courts reading Article 14 strictly to exclude

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54 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at paras 46-54.

55 Thio Li-ann, "Protecting Rights" in Kevin Tan & Thio Li-ann eds. *Evolution of a Revolution: Forty Years of the Singapore Constitution* (Singapore: Taylor & Francis, 2008) ch 6 at 220-221 [Tan & Thio, *Evolution*]. Some provisions, such as arts 9(6), 13(2), 12(3) and 15(4) of the *Constitution*, merely set out the proper purposes which certain rights can be derogated from, without stating the applicable test to be applied to determine whether the impugned legislative or executive act indeed meets those purposes. Other provisions, such as arts 10, 11 and 16 of the *Constitution*, appear to set out categorical rights which cannot be limited at all.

56 David Tan, "Walking the Tightrope between Legality and Legitimacy: Taking Rights Balancing Seriously" [2017] Sing Ac LJ 743 at 762-765 [Tan, "Tightrope"].

57 Admittedly, the term "expediency" may suggest a particular kind of cost-benefit analysis, namely one conducted in haste without due regard for the importance of the rights that may potentially be weighed away. Interestingly, however, a similar description of proportionality as trivialising rights and weighing them without sufficient regard for their normative worth is often adopted by many of proportionality's critics; see Grégoire Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge: Cambridge University Press, 2009) at 87-115; Stavros Tsakyrakis, "Proportionality: An assault on human rights?" (2009) 7 Intl J Constitutional L 468. Reasonable people may disagree on whether those critics are right (*cf* Barak, *supra* note 10 at 488-490). The important point for our purposes is simply that proportionality review may reasonably be described as an "expedient" cost-benefit analysis.

58 Lee, *supra* note 3 at 291-294.

proportionality,[59] Malaysian decisions interpreting an identical right to free speech contained in Article 10 of the *Federal Constitution of Malaysia* have managed to reach the opposite conclusion while guarding against fears of departing from the constitutional text.[60] Interestingly, even Singapore's Government appears to be of the opinion that Article 14's wording is wide enough to grant courts the authority to assess the proportionality of rights-restricting legislative or executive acts. Noteworthy here is Section 4 of the *Protection from Online Falsehoods and Manipulation Act*,[61] which is phrased in a matter similar to Article 14, stating that Ministerial orders to correct false statements of facts will only be in the public interest if such orders would be "necessary or expedient" to further one of various proper purposes. Importantly, when introducing the Bill in Parliament, the Minister for Law expressed the opinion that Section 4 thereof, which applicants can only rely on in judicial review applications,[62] "incorporated" a requirement of "proportionality".[63] Of course, the opinions of Malaysian courts and Singapore's Government on how a provision in Singapore's *Constitution* should be interpreted are not conclusive on whether that provision permits proportionality—but it does show that, to reasonable persons,[64] that provision may bear such an interpretation. Thus, it is not apparent from the text, context and underlying purpose of Article 14 that it necessarily precludes courts from assessing the proportionality of legislative or executive acts limiting the right to free speech.

In sum, the judiciary's constitutional authority to adopt any ground of constitutional review is defined solely by the wording of the fundamental rights provisions in Part IV of the *Constitution*, none of which appear to exclude the adoption of proportionality review.

B. *Institutional Competence*

However, just because Singapore's courts *have* the constitutional authority to adopt proportionality review in constitutional adjudication does not mean they *should* do so: the fact that a legal power exists does not mean that it should be exercised. We thus now turn to the question of whether there are any principled reasons why Singapore's courts, notwithstanding their constitutional authority to do so, *should* or *should not* use proportionality review in constitutional adjudication. In this respect,

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59 *Chee Siok Chin*, *supra* note 20 at paras 49-54.

60 Most recently in *Public Prosecutor v Azmi bin Sharom* [2015] 6 MLJ 751 at paras 40, 43, where the Federal Court adopted proportionality in a free speech dispute while taking care not to "rewriting the provisions of [Article 10]", by reading Article 10 alongside Article 8 of the *Federal Constitution* (which is identical to Article 12 of Singapore's *Constitution*). For a discussion of the use of proportionality in free speech disputes in Malaysia, see Benjamin Joshua Ong, "Proportionality in Malaysia: New Dawn or 'Merely Obiter'?" in Yap, *Proportionality in Asia*, *supra* note 2, ch 5, generally.

61 No 18 of 2019.

62 *The Online Citizen v Attorney-General* [2020] SGHC 36 at para 40.

63 K Shanmugam, "Second Reading Speech on the Protection from Online Falsehoods and Manipulation Bill" (7 May 2019), online: Ministry of Law <https://www.mlaw.gov.sg/news/parliamentary-speeches/second-reading-speech-by-minister-for-law-k-shanmugam-on-the-protection-from-online-falsehoods-and-manipulation-bill> at paras 254, 309.

64 It is assumed here that Malaysia's courts and Singapore's Government (and the Attorney-General's Chambers that advises the latter in the drafting of legislation) are in fact comprised of reasonable persons.

another understanding of the separation of powers is relevant—not a strict categorical understanding which places a hard limit on what courts *can* do, but a *functional* contextual understanding which guides the exercise of judicial power using broad principles of institutional competence. Under a functional understanding of the separation of powers, the extent to which courts ought to refrain from exercising their power to examine and possibly declare as unconstitutional a legislative or executive act, depends on the extent to which the judiciary (given its institutional design) lacks a particular trait needed to properly carry out that examination.[65] Indeed, today Singapore's dominant conception of the separation of powers is functional and delineated by principles of institutional competence, rather than divided into strict categorical functions. Thus, in *Lee Hsien Loong v Review Publishing*, Sundaresh Menon JC noted that "the correct approach [to the separation of powers] is not to assume a highly rigid and categorical approach"; "[r]ather. . . the *intensity* of judicial review will depend upon the context in which the issue arises and upon common sense".[66] Later, in *Tan Seet Eng v Attorney-General*, Menon CJ noted that the separation of powers requires courts to determine "the degree and extent of scrutiny. . . in judicial review" by scrutinising "the true nature of the question" before it", "assess[ing] their institutional competence to deal with [that] particular issue" and then "show[ing] restraint to the extent that their competence is limited".[67]

Unfortunately, if we take as a starting point the prevailing understanding of the judiciary's institutional competence, any discussion on the defensibility of the adoption of proportionality review (or any ground of constitutional review) is stacked against a positive conclusion. This is because that prevailing understanding of the judiciary's institutional competence tends to be defined in terms of traits which the judiciary *lacks*—such as democratic credentials, subject-matter expertise, fact-finding capabilities and policy-reforming capabilities[68]—instead of traits it possesses.[69] Thus, any discussion on the judiciary's institutional competence as defined by those traits cannot logically lead to a *positive* explanation for why proportionality review should be used in constitutional adjudication. Nevertheless, a neutral *(ie*, *non-negative*) explanation for why there are no principled reasons why proportionality review *should not* be so used may still be made. In particular, the argument can be made that the judiciary's adoption of proportionality despite its lack of

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65 Kavanagh, "Separation of Powers", *supra* note 47 at 229-232.

66 *Lee Hsien Loong v Review Publishing* [2007] 2 SLR (R) 453 at para 98 (HC) [*Review Publishing*].

67 *Tan Seet Eng*, *supra* note 53 at para 105.

68 Aileen Kavanagh, "Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication" in Grant Huscroft ed. *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge: Cambridge University Press, 2008) ch 8 [Kavanagh, "Deference or Defiance"]; Murray Hunt, "Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of Due Deference" in Nicholas Bamforth & Peter Leyland eds. *Public Law in a Multi-Layered Constitution* (Oxford: Hart Publishing, 2003) ch 13.

69 While some argue that there is indeed one which courts possess—political independence—which make them more institutionally well-equipped to answer proportionality's enquiries than the Government (see *eg*, Kavanagh, "Separation of Powers", *supra* note 47 at 231), such arguments tend to assume the very thing it hopes to justify: that institutions without political affiliations are best-placed to make final decisions with political ramifications. See for *eg*, Timothy Endicott, "Proportionality and Incommensurability" in Grant Huscroft *et al.* eds. *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge: Cambridge University Press, 2014) ch 14 at 326, calling this a "presupposition" and an "institutional premise".

those four traits—democratic credentials, subject-matter expertise, fact-finding capabilities and policy-reforming capabilities—raises only concerns which frequently arise in ordinary non-constitutional litigation and to the same extent. Thus, any objection to proportionality's use based on any of these four traits is unconvincing, unless coupled with the (presumably untenable) argument that courts are institutionally incompetent to carry out much of ordinary non-constitutional adjudication as well.[70] This therefore means that Singapore's courts are both constitutionally authorised and institutionally competent to adopt proportionality review in constitutional adjudication.

1. *Democratic credentials*

First, Singapore's courts do not need democratic credentials to answer the enquiries posed by proportionality review. The importance of this trait, however, must be properly delineated. As Aileen Kavanagh notes, a decision-maker's democratic credentials render its decisions worthy of judicial deference when those decisions involve "particularly sensitive" issues of "widespread social controversy", because there is a greater chance that those decisions, being made by the people's chosen representatives, will be more acceptable to the public thereafter.[71] This therefore means that a decision-maker's democratic credentials only justify deference on *normative* questions or questions of political morality, such as proportionality's proper purposes enquiry, its relative necessity enquiry, its abstract weighing sub-enquiry, and its strict balancing enquiry as a whole. On the other hand, even if a question touches on a matter of political morality, a court should still be able to answer it if it is *empirical* in nature, since such questions are in principle be answerable by anyone with sufficient evidence and expert assistance.[72] Moreover, a decision-maker's democratic credentials are unrelated to the fact that it may be better-equipped to assess popular sentiment on political issues than the court; the latter, strictly speaking, is less a consequence of its democratic credentials and more one of its fact-finding capacity (a separate trait which may also render a decision worthy of deference),[73] which is dealt with in detail below.

The judiciary certainly lacks democratic credentials when compared to the Government, and (to a lesser degree)[74] the civil service which is accountable to the Government. However, it also cannot be gainsaid that courts do routinely answer those same normative enquiries which proportionality raises when engaging in ordinary non-constitutional adjudication.

We may first deal with the most controversial of proportionality's normative enquiries—proportionality's strict balancing enquiry as a whole, pitting the weights on both sides of the scales against each other—which is often criticised as requiring the balancing of incommensurable values.[75] Timothy Endicott's swift answer to

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70 *Cf* Jeff King, "The Pervasiveness of Polycentricity" [2008] Public L 101.

71 Kavanagh, "Deference or Defiance", *supra* note 68 at 200-201.

72 See Mark Elliott, "Proportionality and Deference: the Importance of a Structured Approach" in Christopher Forsyth *et al.* eds. *Effective Judicial Review: The Cornerstone of Good Governance* (Oxford: Oxford University Press, 2010) ch 16 at 273, 276-277 [Elliott, "Proportionality and Deference"].

73 See Alison Young, "In Defence of Due Deference" (2009) 72:4 Modern L Rev 554 at 565-566, 570.

74 *Cf* Elliott, "Proportionality and Deference", *supra* note 72 at 284.

75 Endicott, *supra* note 69 at 315-319.

this objection is that the comparison of incommensurable values is commonplace in ordinary non-constitutional adjudication: for instance, in comparing the harmfulness of a tort with the amount of damages than ought to be awarded, or the seriousness of a crime with the heaviness of the sentence that ought to be imposed.[76] Since courts frequently compare the incommensurable, there is no reason why courts cannot do so in constitutional adjudication, their lack of democratic credentials notwithstanding.

The other three normative enquiries may be dealt with together, since all of them—*ie*, whether a legislative or executive act's purpose is proper within the *Constitution*, and what the abstract weights of the right and countervailing purpose are within the *Constitution* for the purposes of relative necessity and abstract weighing—essentially involve constitutional interpretation. In this regard, courts frequently engage in normative enquiries when they carry out statutory interpretation in ordinary litigation: while the interpretation and application of legal norms is inherently a normative and value-laden exercise, it has always been accepted that the judiciary is not only authorised but also well-equipped to interpret the law, their lack of democratic credentials notwithstanding. As the Court of Appeal noted in *Saravanan Chandaram v Public Prosecutor*, the interpretation of law "lies exclusively within the ambit and competence of the courts" and "must be undertaken in accordance with the applicable principles."[77] Thus, because constitutional interpretation is legal interpretation, is an exercise which "a judge is well-equipped to handle, using the usual tools of judicial reasoning",[78] and so the fact that that judge lacks democratic credentials is entirely irrelevant.

One might counterargue that constitutional interpretation is not really like ordinary (*ie*, statutory) interpretation, because it engages normative and moral considerations that statutory interpretation would not,[79] which therefore implicates the court's lack of democratic credentials in a manner that statutory interpretation would not. Yet, this argument is unfounded, because constitutional interpretation need not generally engage normative or moral considerations any more than statutory interpretation does. As mentioned above, constitutional interpretation's point of departure is the same as orthodox statutory interpretation: the text and context of a constitutional provision.[80] In certain cases, this will be sufficient to dispose of proportionality's abstract weighing enquiry. Thus, the Court of Appeal in *Review Publishing* noted that Article 14's wording and structure might suggest that the right to free speech is a "subsidiary right" within the *Constitution*.[81] The Court of Appeal in *Yong Vui Kong* also noted that Article 9(1) could not include a right against inhumane punishments

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76 *Ibid* at 323-327.

77 *Saravanan Chandaram v Public Prosecutor* [2020] SGCA 43 at para 154.

78 VK Rajah SC, "Interpreting the Singapore Constitution" in Neo, *Constitutional Interpretation*, *supra* note 5 at 26. One must concede that the proposition that courts are "experts" in legal interpretation may itself rest on some normative assumption that legal interpretation constitutes some kind of objective science (see Thio, "Principled pragmatism", *supra* note 5 at 78 for this assumption identified in Singaporean constitutional jurisprudence). However, the important point for our purposes is that this assumption is already made everywhere in statutory interpretation, and so there is no reason why it should not also be made in constitutional interpretation.

79 Jeffrey Goldsworthy, "Introduction" in Jeffrey Goldsworthy ed. *Interpreting Constitutions: A Comparative Study* (Oxford: Oxford University Press, 2006) ch 1 at 1.

80 See *Tan Cheng Bock*, *supra* note 54 and accompanying text.

81 *Review Publishing*, *supra* note 39 at para 286.

as a sentence for criminal offences, because the provision's drafting history showed that Parliament had rejected a proposal to include such a right in the *Constitution*.[82]

Admittedly, in other cases, courts must inevitably engage in normative or moral value-judgments while carrying out constitutional interpretation, since many other provisions in Part IV of the *Constitution* employ broad and inherently value-laden wording and lack relevant extrinsic materials from which drafters' intent may be discovered.[83] As VK Rajah SC notes, "the fundamental liberties are broadly framed, and intentionally so. . . concepts such as equal protection [contained in Article 12] and free speech [contained in Article 14] may have a clear general meaning, but their application to specific facts requires exposition and value judgments."[84] However, this problem of vague value-laden legal language is not exclusive to constitutional interpretation: Parliament frequently uses such language in ordinary legislation, which courts must flesh out subsequently, on the assumption that Parliament gave them the mandate to do so.[85] Hence, as Chan Sek Keong SC notes, when courts likewise encounter vague value-laden language in the *Constitution*, this "only means that the constitution-makers have left it to the courts to formulate the [relevant] principles."[86]

Thus, when courts address proportionality's normative enquiries through constitutional interpretation according to the text and legislative intent behind constitutional provisions (when provisions have clear text or legislative intent) or through use of value-judgments (when provisions contain broadly-worded value-laden terms), courts act within their competence despite their lack of democratic credentials, just as they would when engaging in ordinary statutory interpretation.

2. *Subject-matter expertise*

Second, Singapore's courts do not need subject-matter expertise in matters of policy to answer the questions posed by proportionality review. This might seem doubtful, given the obvious importance of technical expertise to government decision-making: as the Court of Appeal noted in *Tan Seet Eng*, courts are not trained in matters of socio-economic policy and thus, should accord deference to the Government and administration to the extent that the issues before it involves questions of such policy.[87] But the importance of a decision-maker's subject-matter expertise must also be seen in context. Subject-matter expertise is only relevant to factual questions which may plausibly have objectively "correct" answers[88]—namely, *empirical*, rather than normative, enquiries, such as proportionality's rational relation, absolute necessity, and circumstantial weighing enquiries. The subject-matter expertise problem is therefore an essentially pragmatic one: courts are simply concerned with whether they

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82 *Yong Vui Kong*, *supra* note 27 at paras 64-65, 70-72.

83 As is not uncommon for Constitutions; see Richard Fallon, "A Constructivist Coherence Theory of Constitutional Interpretation" (1987) 100 Harv L Rev 1189 at 1204-1206.

84 Rajah, *supra* note 78 at 24.

85 Randal Graham, "The Unified Theory of Statutory Interpretation" (2002) 23 Stat L Rev 91 at 118-130.

86 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code" (2019) 31 Sing Ac LJ 773 at 830.

87 *Tan Seet Eng*, *supra* note 53 at paras 93-94.

88 Elliott, "Proportionality and Deference", *supra* note 72 at 272.

can understand factual evidence relating to proportionality's empirical enquiries, if such evidence were available and admissible.[89]

In this regard, it is useful to differentiate between legislation and regulations on one hand, and isolated administrative decisions on the other, since they raise different quantities of empirical uncertainty, which courts have reacted to differently in ordinary non-constitutional litigation. For isolated administrative decisions, as Alan Brady notes, courts are confronted with only a discrete degree of empirical uncertainty:[90] courts applying proportionality's empirical enquiries to such decisions must consider only the rights of individual applicants, and the discrete impact of that decision upon those individuals and a discrete aspect of socio-economic policy. Importantly, this degree of empirical uncertainty is one which courts routinely consider themselves competent to adjudicate upon without assistance: for example, Tan Zhong Xing argues that in disputes involving contractual illegality, courts now adopt reasoning similar to that employed at proportionality's absolute necessity and circumstantial weighing stages.[91] Of course, the use of proportionality to review isolated administrative decisions could set precedents for future cases with identical facts and in that sense has an indirect macro effect on socio-economic policy—but this too is an effect that the use of the doctrine of contractual illegality to determine contractual disputes would also perpetuate. Thus, courts should not, by virtue of their lack of subject-matter expertise in socio-economic policy, be considered incompetent to employ such policy-based reasoning in constitutional adjudication.

However, a court's lack of subject-matter expertise in matters of socio-economic policy would appear more objectionable when they apply proportionality's empirical enquiries to legislation or executive regulations. Such empirical enquiries must assess that law's immediate macro effect on socio-economic policy, which raises empirical uncertainties of such degrees that courts are not well-equipped to answer themselves.[92] Yet, it is also evident that courts, when engaged in ordinary litigation, are not confined only to relying on their own subject-matter expertise when answering complex empirical questions brought before them. As Tom Hickman notes, courts may deal with their lack of subject-matter expertise by according due weight to the Government's opinions, just as they rely on credible expert opinions to answer technical factual questions on matters outside their subject-matter expertise in ordinary litigation.[93] Indeed, as Mark Elliott argues, courts could also go further by also according due weight to the opinions of sufficiently qualified expert witnesses called by the applicant and determining which of the two opinions is more persuasive[94] when answering proportionality's empirical enquiries. Thus, even though proportionality's empirical enquiries may require courts to answer complex questions of socio-economic policy, there is no reason why they cannot make up for their lack of

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89 Concerns about disputes where such evidence is not available or should not be admissible are dealt with in Part IV.B.3 below.

90 Alan Brady, *Proportionality and Deference under the UK Human Rights Act: An Institutionally Sensitive Approach* (Cambridge: Cambridge University Press, 2012) at 94.

91 Tan Zhong Xing, "The Proportionality Puzzle in Contract Law: A Challenge for Private Law Theory?" (2020) 33:1 Can JL & Jur 215 at 226-229.

92 Brady, *supra* note 90 at 94-97.

93 Hickman, *supra* note 14 at 135-139.

94 Elliott, "Proportionality and Deference", *supra* note 72 at 274.

subject-matter expertise as they do in ordinary non-constitutional litigation: with the assistance of expert opinions, including the Government's.

3. *Fact-finding capabilities*

Third, courts do not need *fact-finding capabilities* to answer the questions posed by proportionality review. It is unarguable that the Government, because of Parliament's participatory processes and the civil service's significant investigative resources, are well-equipped to conduct fact-finding enquiries relevant to the exercise of policymaking. Thus, in *Review Publishing*, Menon JC noted that "[w]here it is the [Government] that has access to the best materials available to resolve the issue, its views should be regarded as highly persuasive, if not decisive."[95]

However, a court's lack of fact-finding capabilities alone should never be a reason for it to avoid any empirical enquiry. This is because courts in common law jurisdictions always lack fact-finding capabilities, even when they carry out ordinary non-constitutional adjudication, but always consider themselves competent to be triers of fact anyway. In this regard, a distinction must be drawn between the court's fact-finding capabilities and its competence as a trier of fact. To say that courts lack the latter competence simply because they lack the former capabilities is plainly ridiculous: if that were so, the police force, the organisation equipped with fact-finding capabilities for criminal investigations, should also discharge the role of trier of fact in criminal trials instead of the court. Evidently, then, the judicial process is perfectly comfortable with depending on other actors and institutions to carry out the fact-finding or investigative process, but then carrying out the act of trying complex questions of fact itself.

Against this, one might argue that, in cases which engage complex facts which are not practically accessible to applicants, or which implicate sensitive or confidential information which should not be admitted in judicial proceedings, courts cannot meaningfully carry out their role as triers of fact. This proposition is beyond doubt—but neither does it justify excluding courts from every empirical question relevant to the proportionality of legislative or executive acts, because such concerns do not elsewhere affect the shape of substantive legal doctrines, but instead are dealt with by rules of evidence and civil procedure. Thus, if evidence which plaintiffs require to establish their cases is not easily accessible to them, they may seek discovery orders against the defendant or third-parties—there is no reason why such orders should not be granted, unless the evidence in question is sensitive or confidential, in which case the party resisting disclosure may invoke the public interest immunities contained in Sections 125 and 126 of the *Evidence Act*.[96] Thus, concerns that the evidence required to satisfy proportionality's empirical enquiries are not accessible or should not be admissible are immaterial, because they are adequately dealt with by ordinary rules of evidence and civil procedure.

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95 *Review Publishing*, *supra* note 66 at para 98(a).

96 Cap 97, 1997 Rev Ed Sing. Interestingly, commentators have argued that s 125, which sets out a broad public interest immunity against the disclosure of "unpublished official records relating to affairs of state", may be read to comport a "balancing test" between the needs of individual litigants and the public interest sought to be protected in a given case; see Jeffrey Pinsler, *Evidence and the Litigation Process*, 7th ed (Singapore: LexisNexis, 2020) at paras 15.038-15.039.

4. *Policy-reforming capabilities*

Fourth, courts do not need any *policy-reforming capabilities* which they do not already have to effectively address disproportionate legislative or executive acts. Kavanagh notes that courts generally only make rules in a piecemeal fashion, and so are ill-equipped to carry out "radical reform";[97] a point that the Court of Appeal emphasised in *Lim Meng Suang*.[98] It is important to note that this concern only implies that courts *cannot* effect policy changes through constitutional review at a pace and on a scale which may be considered "radical" or sweeping, because the kinds of remedies and orders courts can grant to successful applicants are blunt tools and/or may lead to manifest uncertainty in the law.[99] It does not imply that courts *should not* effect sweeping changes of policy because they are not best-equipped to do — those objections in fact relate to courts' lack of democratic credentials, subject-matter expertise or fact-finding capabilities, which have been dealt with above.

Accepting that constitutional review amounts to policy "reform" requires a certain value-judgment about the role of the *Constitution* in Singapore's political system— it implies that the Government rather than the *Constitution* should set the policy agenda, such that enforcing the *Constitution* against that policy agenda is seen as an attempt to "reform" it rather than merely keep it on track. Even if this account of constitutional review as "reforming" policy is accepted as appropriate,[100] however, limiting disproportionate acts through use of proportionality review often does not require courts to do anything like engage in "*radical* reform" of the Government's policy agenda, if by "radical reform" one refers to the initiation of legal change at a pace and on a scale alien to ordinary judicial experience in non-constitutional adjudication.

We note that, because proportionality review operates by reconciling constitutional principles on the particular facts of the case, it will generally generate narrowly tailored constitutional rules and will only rarely generate broad constitutional rules. More specifically, proportionality generates *broad* constitutional rules only when a legislative or executive act is declared unconstitutional at the proper purposes or rational relation stages, but empirical evidence from comparative constitutional studies has shown that such findings of unconstitutionality are uncommon.[101] Thus, in a proportionality dispute involving, for example, the right to liberty and a statutory provision setting out a mandatory term of imprisonment for rioting, the statute is unlikely to be found to be unconstitutional on grounds that the purpose sought to be furthered *(eg*, protecting public order) can never justify a derogation of an individual's liberty, or on grounds that imprisonment cannot rationally further that

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97 Kavanagh, "Deference or Defiance", *supra* note 68 at 193-194.

98 *Lim Meng Suang*, *supra* note 32 at para 180.

99 Thus, Aileen Kavanagh refers to the need to reform policy by devising detailed regulatory schemes and rolling them out in a manner that engenders certainty in the law; see Kavanagh, "Deference or Defiance", *supra* note 68 at 193-194. The question of the remedies courts may grant to successful applicants is not uncontroversial and is dealt with in some detail in Part V below.

100 One may doubt this, given that the *Constitution*'s fundamental rights, which limit *ex ante* the scope of the legislative and executive powers, should also limit *ex ante* the Government's ability to adopt a certain policy agenda (see Part IV.A above).

101 See Steiner *et al*, *supra* note 13 at 557-564, 568-573. See also Barak, *supra* note 10 at 315-316; Stone Sweet & Mathews, *Constitutional Governance*, *supra* note 2 at 35-36.

purpose at least to some extent. But if the statute is indeed found unconstitutional at that stage, the constitutional rule generated as the *ratio* of the decision would be quite broad: "any term of imprisonment for rioting is unconstitutional". On the other hand, proportionality review generates *narrow* constitutional rules only when a legislative or executive act is declared unconstitutional at the necessity or strict balancing stages, and empirical evidence shows that the majority of successful proportionality challenges are indeed resolved at these stages.[102] Thus, the same dispute mentioned above is much more likely to be decided in favour of the applicant on grounds that the length of the particular imprisonment term mandated is not the least restrictive means of achieving the government's desired degree of public order; or because, given the weight of public order and the extent to which it is furthered by criminalising the acts that constitute rioting, a term of such length disproportionately curtails an accused's right to liberty. In these comparatively common situations, the constitutional rule generated would be relatively narrow: "a term of imprisonment above X months/Y years for rioting is unconstitutional".

Thus, proportionality will commonly produce narrow constitutional rules and will only rarely produce broad constitutional rules. What then is the pace of "reform" introduced by the constitutional rules generated by proportionality? Article 4 of the *Constitution* declares that legislative or executive acts "inconsistent with [the] Constitution shall, *to the extent* of the inconsistency, be void". This means that legislative and executive acts are only unconstitutional to the extent that they are *inevitably* caught by constitutional rules, while the remainder of those acts (and the policies they further) are left untouched.[103] Thus, the fact that proportionality will often produce narrow constitutional rules means that it will often only lead to slight alterations of impugned acts and so slight "reforms" of existing policies. Importantly, such slight "reform" is identical to the pace of legal change in the common law, where courts often adopt a piecemeal approach.[104] Moreover, while proportionality occasionally requires courts to produce broad constitutional rules which have sweeping policy implications, there is no reason why these decisions should not be seen as necessary instances of courts stepping in to provide change in the face of governmental inertia,[105] when indeed such broad constitutional rules are demanded by a proper interpretation of the *Constitution* and a proper appreciation of the facts.[106] After all, sweeping judicial reformulations of the common law do occasionally happen as well—and, when truly necessary, these are praised rather

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[102] Steiner *et al*, *supra* note 13 at 580-583.

[103] *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 at para 59 (CA). See also Benjamin Joshua Ong, "The Doctrine of Severability in Constitutional Review: A Perspective from Singapore" (2019) 40 Stat L Rev 150.

[104] For instance, in the law of negligence, courts generally only move "incrementally" when recognising new situations in which duties of care may be owed; see *James-Bowen v Commissioner of Police of the Metropolis* [2018] UKSC 40 at para 23.

[105] On this view, see Kumm, *supra* note 7 at 155-156; Yap Po Jen, "Defending Dialogue" [2012] Public L 527 at 541. It is of course a complex legal and factual question whether radical change is necessary and thus desirable in any given situation. The point here is not that such radical change through constitutional review is always desirable—only that it should not be considered *ipso facto* undesirable, because it is not so considered when it takes place in the common law.

[106] At the proper purposes and rational relation stages, respectively.

than condemned.[107] In proportionality review just as in ordinary non-constitutional adjudication, therefore, courts usually change law and policy by altering it only as much as necessary to resolve the case before it and future similar cases: by generally initiating only small changes, and by introducing sweeping changes only when truly necessary. So far from initiating "radical reform" in the sense of initiating policy changes in a manner alien to ordinary judicial practice, proportionality review would initiate such changes the same way that courts have always operated in the common law.

Finally, we must address one argument that does not, strictly speaking, relate to any institutional trait of the court, but is often raised in tandem with other objections concerning the courts' perceived lack of institutional competence: the *consequentialist objection*.[108] Thus, one might argue that courts should not, by virtue of their lack of institutional competence, engage in proportionality's enquiries, because if the court gets them "wrong", the negative effects will be more irreversible than with ordinary litigation.[109] However, whether made against proportionality review in particular or constitutional review in general, this consequentialist objection is simply untenable in Singapore's context, because constitutional review in Singapore is anything but irreversible. Since the People's Action Party ("PAP") has never held less than 90% of the seats in Parliament and is unlikely to lose its political dominance in the near future,[110] the Government will continue to have the ability to overturn judicial decisions enforcing the *Constitution* with the same ease as judicial decisions enforcing ordinary statutes or the common law. Thus, any argument that courts should not dabble in proportionality review for fear of getting things "wrong" and introducing irreparable negative consequences is, in Singapore's context, wholly unfounded—Parliament may reverse constitutional decisions and any truly unwanted consequences they might bring as easily as other judicial decisions.[111]

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[107] Again in the law of negligence, the Court of Appeal's introduction in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR (R) 100 (CA) of a single test to unite and structure the law "undoubtedly broke new ground" (see David Tan and Goh Yihan, "The Promise of Universality—The Spandeck Formulation Half a Decade On" (2013) 25 Sing Ac LJ 510 at 547). Yet, *Spandeck* has generally been heralded as a great legal leap forward rather than an unwarranted instance of judicial activism, with commentators typically lavishing it with praise even as they note how it may be refined (see *eg*, Kumaralingam Amirthalingam, "Lord Atkin and the Philosopher's Stone: The Search for a Universal Test for Duty" [2007] Sing JLS 350; David Tan, "The Salient Features of Proximity: Examining the Spandeck Formulation for Establishing a Duty of Care" [2010] Sing JLS 459; Colin Liew, "Keeping it Spick and Spandeck: A Singaporean Approach to the Duty of Care" (2012) 20 Torts L J 1; Andrew Phang, "Pure Economic Loss and Reproductive Negligence—The Singapore Experience" (2017) 24 Torts L J 95.

[108] See Jeff King, "Institutional Approaches to Judicial Restraint" (2008) 28 Oxford J Leg Stud 409 at 426.

[109] See Goldsworthy, *supra* note 79 at 1 for the argument stated.

[110] Ho Kwon Ping, *The Ocean in a Drop—Singapore: The Next 50 Years* (Singapore: World Scientific, 2016) at 9-11.

[111] One might counterargue that periodic constitutional change undermines the virtues of rigidity and certainty which are central to the ideal of constitutional supremacy and the rule of law (see Jaclyn Neo & Yvonne Lee, "Constitutional supremacy: Still a little dicey?" in Tan & Thio, *Evolution*, *supra* note 55 at 162-173, on the tension between such change and those ideals). This argument, however, only holds weight in those situations when the constitutional decision sought to be overturned through such amendments itself protected something important and worth protecting in the *Constitution*, which undercuts the consequentialist objection from the outset. In other situations, where the constitutional decisions sought to be overturned have odious consequences which should be countered, there is nothing untoward about the idea of constitutional change—rigidity and certainty are virtues only if the substantive

In sum, it is hard to sustain the argument that Singapore's courts, under principles of institutional competence that undergird the separation of powers, should be foreclosed from using proportionality review in constitutional adjudication. On the contrary, none of the four traits courts are said to lack—the courts' lack of democratic credentials, subject-matter expertise, fact-finding capabilities and policy-reforming capabilities—render courts any less institutionally competent to engage in proportionality's enquiries than ordinary non-constitutional adjudication. This therefore means that Singapore's courts are both constitutionally authorised and institutionally competent to adopt proportionality review in constitutional adjudication.

V. Proportionality's Consistency with Singapore's Political Culture of Justification

The third argument made in favour of proportionality's use is one of policy. It responds to an unspoken objection often implicitly made against proportionality: that in Singapore, there is "a constitutional culture that tends to emphasise trust in the government", which prioritises the abovementioned separation of powers-based paradigm of constitutional theory[112] and is therefore hostile to intrusive grounds of constitutional review like proportionality review. So, the argument would follow, proportionality review's use would be unsound as a matter of policy arising from Singapore's political culture. However, today, the opposite argument on grounds of policy may be made instead: that, as a matter of policy, the use of proportionality review would be desirable. This is because, today, Singapore has a burgeoning political culture of justification, under which the legitimacy of a legislative or executive act is assessed according to the cogency and rationality of reasons given for them, which proportionality can help uphold.

Arguments of policy generally operate at a more fundamental level than arguments of legal principle (such as those made in Part IV above), by relating directly to the normative value of those legal principles in the eyes of the wider community,[113] and this is no different for policy arguments in constitutional law. As Alison Young notes, all normative arguments (of principle) for or within a particular theory of constitutionalism are ultimately premised upon higher arguments (of policy) based on plausible accounts of the relevant state's political culture.[114] Thus, depending on which account of political culture one begins with, one may reach drastically different conclusions on the theory of constitutionalism and constitutional review which should be adopted.

In this regard, the debate on policy grounds for or against proportionality review in Singapore may likewise be mapped onto two different accounts of Singaporean political culture, which provide normative support for two different theories of constitutionalism. On one hand, a political culture could see political legitimacy in

norms they protect are themselves normatively weighty. For a discussion of when frequent amendments to the *Constitution* are justified and the role courts should play in facilitating or guarding against such amendments, see Marcus Teo, "Interpreting Frequently Amended Constitutions: Singapore's Dual Approach" (2020) 41 Stat L Rev (forthcoming).

112 See Neo, "Separation of Powers", *supra* note 47 at 480-483, identifying this constitutional culture.

113 John Bell, *Policy Arguments in Judicial Decisions* (Oxford: Oxford University Press, 1985) at 22-24.

114 Alison Young, *Democratic Dialogue and the Constitution* (Oxford: Oxford University Press, 2017) at 87-89.

terms of "authority". As Moshe Cohen-Eliya and Iddo Porat note, in such a "culture of authority", a legislative or executive act's legitimacy is determined solely by reference to some trait that gives the Government the authority to adopt that act (e.g. its democratic credentials or subject-matter expertise).[115] Consequently, such a culture of authority assumes "the existence of distinct institutions for distinct spheres of public life, each best equipped to act in its sphere, and accountable for its actions within that sphere". It also assumes that "the main task of judicial review is. . . [to] mak[e] sure that each institution is operating within its sphere".[116] In other words, a culture of authority provides normative support for a theory of constitutionalism and judicial review based on the separation of powers as defined by principles of constitutional authority and institutional competence. Conversely, it provides little support for a theory of constitutionalism and judicial review that accommodates proportionality review.

On the other hand, a political culture could also see political legitimacy in terms of "justifications". As Cohen-Eliya and Porat further note, in such a "culture of justification", "the crucial component in the legitimacy and legality of governmental action is that it is justified in terms of its *cogency* and its capacity for persuasion, that is, in terms of its *rationality* and *reasonableness*."[117] Hence, under a culture of justification, a legislative or executive act's political legitimacy depends on the cogency and rationality of the reasons given for it. It follows that *deliberative* democratic practices become important as well, since it is only through such discursive processes that the justifications for impugned acts are canvassed and assessed.[118] Importantly, however, a culture of justification need not require legislative or executive acts to be justified in line with any particular substantive political theory in the abstract (*eg.*, liberalism or rationalism).[119] According to Etienne Mureinik, to whom the concept of a "culture of justification" is often attributed, such a culture only requires that legislative or executive acts be accompanied by some justifications which must be persuasive to those affected by those acts.[120] Subsequently, expounding on Mureinik's work, David Dyzenhaus noted that Mureinik's idea of justification was context specific,[121] and that it eschewed the idea that justifications should always be sought to promote a "culture of neutrality" and "liberal principles of state neutrality" in government.[122] Instead, the only values that Mureinik's culture of justification espoused were procedural in nature: those of "participation and accountability" in government decision-making,[123] in favour of the relevant political community. Thus,

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115 Moshe Cohen-Eliya & Iddo Porat, "Proportionality and the Culture of Justification" (2011) 59 Am J Comp L 463 at 474-482.

116 *Ibid* at 476.

117 *Ibid* at 475.

118 *Ibid* at 481.

119 *Contra* Bradley Miller, "Proportionality's Blind Spot: "Neutrality" and Political Philosophy" in Huscroft *et al.* eds, *supra* note 75, ch 16 at 388-394; Mark Antaki, "The Rationalism of Proportionality's Culture of Justification" in Huscroft *et al.* eds, *supra* note 75, ch 13 at 287-294.

120 Etienne Mureinik, "A Bridge to Where? Introducing the Interim Bill of Rights" (1994) 10 SAJHR 31 at 32.

121 David Dyzenhaus, "Law as Justification: Etienne Mureinik's Conception of Legal Culture" (1998) 14 SAJHR 11 at 27-29.

122 *Ibid* at 33-34.

123 *Ibid* at 34-35.

a culture of justification, properly understood, only requires impugned acts to be accompanied with reasons that adhere to a given political community's localised notions of rationality and reasonableness.

A culture of justification provides normative support for a theory of constitutionalism and judicial review that prioritises proportionality review, which seeks to ensure "a proper balance between conflicting considerations and... appropriate means-ends rationality" in policymaking and governmental decision-making.[124] As Mattias Kumm has argued, proportionality review is a welcome method of judicial review in a society which believes that deliberative democratic practices and "socratic contestation", *ie*, "a public practice of critical reasoned examination of public claims relating to justice and the good", are foundational to political morality.[125] Moreover, just like the culture of justification it furthers, proportionality review is in principle agnostic to any particular value-system—as Thio Li-ann has noted, proportionality may be adopted in a form that requires legislative or executive acts to be justified in line with "local particularities" and "constitutional values... shaped by the political philosophy of a polity".[126] Proportionality's only necessary goal, then, is the furtherance of political accountability and deliberation in governance through justification-giving.

So there are two competing accounts of political culture that may be used in any discussion whether, on grounds of policy, Singapore's courts should apply or reject proportionality review in constitutional adjudication: a political culture of authority, which eschews proportionality review; and a political culture of justification, which supports proportionality review. The question then arises: which account of Singapore's political culture is more accurate today? Although a comprehensive account of Singapore's political culture is well beyond this article's scope, it suffices to note here that a shift in Singapore's political culture over time, from a culture of authority toward a culture of justification, is evident in both governmental and judicial discourse.

Within Singapore's governmental discourse, it is important that, despite it having always dominated politics and Government, the nature and bases of the PAP's political legitimacy have changed significantly over time and have become increasingly justification-based in recent years. Admittedly, the first generation of PAP leaders relied on their constitutional authority and their expertise in technocratic policymaking to buttress the legitimacy of their rule,[127] creating a stable political culture of authority. However, the second generation of PAP leaders tempered unqualified governmental authority with the beginnings of a culture of justification. While they emphasised the authority of a "government of hono[u]rable men" who "have the trust and respect of the population",[128] they also recognised the importance of deliberative methods of decision-making over unilateral prescription—of "resolving issues through consensus instead of contention" by "accommodating different

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124 Cohen-Eliya & Porat, *supra* note 115 at 481.

125 Kumm, *supra* note 7 at 156.

126 Thio, "Theory and Practice", *supra* note 51 at 49.

127 Cho-oon Khong, "Singapore: Political Legitimacy through Managing Conformity" in Muthiah Alagappa ed. *Political Legitimacy in Southeast Asia: The Quest for Moral Authority* (Stanford: Stanford University Press, 1995) ch 5 at 113-115.

128 *White Paper on Shared Values* (Paper Cmd No 1 of 1991) at para 40.

views of the way the society should develop" and "working hard to develop a consensus on particular courses of action. . . to bring as many people on board as possible".[129] Subsequently, the third generation of PAP leaders balanced justification- and authority-based notions of political legitimacy. They sought to elicit "more feedback and consultation" and promote "civic participation in Singapore", encouraging "fruitful public consultations" and the "debat[ing] [of] policies and national issues rigorously and robustly", while maintaining that "the Government [would] continue playing an active and leading role in taking Singapore forward".[130]

In recent years, justification-based notions of political legitimacy appear to have become central to governmental discourse in Singapore. Deputy Prime Minister Heng Swee Keat recently acknowledged the change in Singapore's political culture over time: from the PAP's first generation leaders' original style of "leading from the front", to a "more consultative" and "more inclusive" brand of politics under the second and third generation leaders respectively.[131] Going on to outline the ethos of government which the fourth generation of PAP leaders planned to adopt, Mr Heng emphasised the importance of deliberation and participation, "shift[ing] from a government that focuses primarily on working for [Singaporeans], to a government that works with [Singaporeans]", by creating "room to debate and deliberate, and establish partnerships with Singaporeans".[132] This ethos was more emphatically echoed by Prime Minister Lee Hsien Loong, in a speech given shortly after Singapore's 14th General Elections. There, he recognised "a strong desire amongst Singaporeans for greater diversity of views in politics" and for "more robust debate of policies and plans", calling this a "trend" which "is here to stay" and noting that the Government "ha[s] to give expression to it, and evolve our political system to accommodate it".[133] Thus, the current generation of PAP leaders appear to see themselves as leaders which should engage in deliberative democratic discourses and consensus-building instead of simply pronouncing hard truths to keep Singapore going: in other words, leaders which depend significantly on justification-based notions of political legitimacy.

Moreover, this shift in political culture has not simply occurred in governmental discourse, but also in judicial discourse. As mentioned above, Singapore's courts have long espoused only a culture of authority in constitutionalism and judicial review centred around the separation of powers, which led them to reject proportionality review.[134] However, in recent years, Singapore's courts have also begun developing justification-based notions of constitutionalism and judicial review, which today appear to stand side-by-side with older authority-based notions of the same, under the ever-evolving conceptual label of "good governance". While these developments have only taken place at the sub-constitutional realm (in administrative law), the

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[129] *Ibid* at para 14.

[130] See Lee Hsien Loong, "Building a Civic Society" (Speech delivered at the Harvard Club of Singapore's 35th Anniversary Dinner, 6 January 2004) (on file with the author).

[131] See Heng Swee Keat, "Building Our Future Singapore Together" (15 June 2019), online: Prime Minister's Office <https://www.pmo.gov.sg/Newsroom/DPM-Heng-Swee-Keat-Building-Our-Future-Singapore-Together-Dialogue>.

[132] *Ibid*.

[133] See Lee Hsien Loong, "Speech in English by PM Lee Hsien Loong at the Swearing-in Ceremony, 27 July 2020" (27 July 2020), online: Prime Minister's Office <https://www.pmo.gov.sg/Newsroom/Speech-by-PM-Lee-at-the-Swearing-In-Ceremony>.

[134] See *supra* notes 48-49 and accompanying text.

notions of constitutionalism they represent are never expressly limited thereto and may thus be taken to be of wider import.

This shift in judicial attitudes began with the now-famous speech of Chan Sek Keong CJ, titled "Judicial Review—From Angst to Empathy", which sought to "dispel" the "myth that the courts have contributed to the lack of an active judicial review culture in Singapore".[135] "Judicial review", noted Chan CJ, exists to ensure "good governance", and so courts should only "play a supporting role by articulating clear rules and principles by which the Government may abide by and conform to the rule of law".[136] Importantly, however, Chan CJ's idea of "good governance" was not solely authority-based and limited to strict separation of powers principles.[137] Instead, "good governance" also had a decidedly justification-based aspect, concerned with "institutional rules of procedure and decision-making processes",[138] "rationality in decision-making",[139] the provision of "guidance as to what the material considerations" are in governmental decisions[140] and the need to "reduce administrative inefficiencies in public administration".[141] Interestingly, then, Chan CJ also noted that prior decisions like *Colin Chan*[142] "did not foreclose the possibility of adopting the principle of proportionality in an appropriate case", and so should not be read as "necessarily demonstrat[ing] judicial apathy to the principle of proportionality".[143] Thus, Chan CJ set out a broad vision of constitutionalism and judicial review involving justification-based notions of "good governance", in which proportionality review was welcome in "appropriate" circumstances.

Chan CJ's broad vision would later bear fruit in the context of the administrative law doctrine of substantive legitimate expectations. In *SGB Starkstrom v Commissioner for Labour*, the Court of Appeal, led by Sundaresh Menon CJ, expressed reservations as to that doctrine's compatibility with the separation of powers.[144] Nevertheless, the Court noted *obiter* that the doctrine might potentially be defensible if, instead of ordering the Government to give effect to substantive legitimate expectations, courts merely required the Government to "give reasons for its assessment" that the public interest outweighed the expectation in the circumstances.[145] Later, in an extra-judicial speech, Menon CJ would defend this adaptation of the substantive legitimate expectations doctrine as consistent with Chan CJ's notion of "good governance", which should be understood as including values such as "dialogue, tolerance [and] compromise".[146] By upholding such an idea of "good governance", courts could "effectively shape the debate and ensure the legality of government actions by setting out its concerns openly and potentially obviating a binary clash

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135 Chan Sek Keong, "Judicial Review—From Angst to Empathy" (2010) 22 Sing Ac LJ 469 at 474.
136 *Ibid* at 479-480.
137 Interestingly, Chan CJ initially contemplated speaking about "the separation of powers and the basic structure of government as constitutional doctrines" but eventually decided against it (*ibid* at 469).
138 *Ibid* at 471.
139 *Ibid* at 474.
140 *Ibid* at 482.
141 *Ibid* at 483.
142 *Colin Chan*, *supra* note 26.
143 *Ibid* at 478-479.
144 *SGB Starkstrom v Commissioner for Labour* [2016] 3 SLR 598 at paras 58-59.
145 *Ibid* at para 63.
146 Sundaresh Menon, "The Rule of Law: The Path to Exceptionalism" (2016) 28 Sing Ac LJ 413 at 420-421.

between the Judiciary and the Executive."[147] Thus, courts should foster dialogue and constructively shape public debates—in short, promote justification-giving—to further "good governance".

Most recently, Chan CJ's vision of justification-based "good governance" seems to have materialised in remarkably precise form in the decision of *UKM v Attorney-General*.[148] There, the High Court, sitting as a three-judge appellate coram led by Menon CJ,[149] developed an "analytical framework" to determine the extent to which a "right" (there, a statutory right arising from the *Adoption of Children Act*[150] for a gay man to adopt his biological child) should be curtailed by a public policy (there, a policy against the formation of same-sex families).[151] I have argued elsewhere that this framework, which purports to resolve clashes between rights and public policies, bears striking similarities to proportionality review:[152] it assess the degree of "rational connection or proximity" between the policy and the impugned measure; the extent to which both the right and the policy "emanate[d] from the applicable statutory regime"; and "the degree to which any countervailing policy consideration would be violated and the degree to which any value underlying the claimed right...would be advanced".[153]

Importantly, in developing this framework, the High Court felt compelled to develop a novel conception of the judiciary's "proper role and function" within Singapore's constitutional order,[154] which in turn relied on a novel conception of constitutionalism therein. In Menon CJ's words, the court's "role" was to:

> "[S]earch in each case for the best reason to justify an outcome which prefers the common good to that of the individual. . . [through] a *rational, reasoned* judicial process. . . where [enforcing a right] would violate an established public policy or a fundamental purpose of the law itself, the court must have the right not to enable this. And the court must find a *rational method* of balancing its concerns in these circumstances against the need to allow the [right] to take its course as far as possible." [155]

Subsequently, reflecting on *UKM* in an extra-judicial speech delivered shortly thereafter, Menon CJ fleshed out this idea of "the proper relationship between the branches of Government" in greater detail.[156] The judiciary's role therein was to "encourage the [Government] to confront questions of policy when they arise", by fostering

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147 *Ibid* at 421.

148 *UKM v Attorney-General* [2019] 3 SLR 874 (HC) [*UKM*].

149 For the significance of this, see Lau Kwan Ho, "The High Court as De Facto Court of Appeal: A Revisitation of Leave Requirements in the Criminal and Family Court Jurisdictions" [2019] Sing JLS 108.

150 Cap 4, 2012 Rev Ed Sing.

151 *UKM*, *supra* note 148 at paras 129, 160.

152 Marcus Teo, "The Dawn of Proportionality in Singapore" [2020] Public L 631 [Teo, "Dawn of Proportionality"].

153 *UKM*, *supra* note 148 at paras 153-161, 243-248.

154 *Ibid* at para 153.

155 *Ibid* at paras 120-121 [emphasis added].

156 Sundaresh Menon, "Taming the Unruly Horse: the Treatment of Public Policy Arguments in the Courts" (19 February 2019), online: Supreme Court Singapore <https://www.supremecourt.gov.sg/Data/Editor/Documents/Public%20Policy%20Lecture%20-%2019Feb2019.pdf>.

a "constitutional dialogue" and "promot[ing] constructive interaction between" the courts and the Government.[157] In particular:

> "The fundamental conviction that underlies the dialogic approach is that all three branches of Government ought to cooperate with and complement each other for the sake of *good governance*. The unique contribution of the Judiciary to this process is the *transparency and rigour of its reasoning*, as well as its expertise as a fact-finding tribunal, which enables it *to identify and thoughtfully explicate the policy concerns implicated with clarity and purpose*."[158]

Thus, in both *UKM* and in his subsequent speech, Menon CJ emphasised a vision of "good governance" which required courts to further a "constitutional dialogue" that helps uphold rational and cogent decision-making in situations involving clashes between rights and public policies—in short, a culture of justification in constitutionalism—and opined that this could be achieved through an "analytical framework" which was, essentially, proportionality review.

The above discussion provides a plausible factual basis for us to make the claim that today, Singapore does have a burgeoning political culture of justification. If that claim is accurate, proportionality review, rather than being seen as an intrusion upon Government's policymaking authority under the separation of powers, may instead be seen as a tool to check and bolster the legitimacy of legislative or executive acts by assessing the cogency and rationality of the justifications provided therefor. This, then, is the policy argument in favour of proportionality's use in Singaporean constitutional adjudication: that it would help ensure and promote the legitimacy of legislative or executive acts, under a theory of constitutionalism and judicial review supported by Singapore's burgeoning political culture of justification.

VI. Conclusion

This article has made a case for the use of proportionality review in Singaporean constitutional adjudication. First, it has shown that there is precedent for the use of each of proportionality's four enquiries in Singapore's constitutional jurisprudence. Second, it has shown that, in principle, Singapore's courts have the constitutional authority to adopt proportionality as a ground of constitutional review and are not institutional incompetent to engage with its enquiries. Third, it has shown that proportionality is desirable as a matter of policy, since it helps ensure the cogency and rationality of legislative or executive acts within Singapore's burgeoning political culture of justification. By showing how proportionality's use can be justified on precedent, principle and policy, this article hopes to contribute to a more rigorous and sophisticated discussion on proportionality's role in Singaporean constitutional adjudication.

Finally, some thoughts on proportionality's future in Singapore law and legal scholarship may be useful. Since this article has endeavoured only to *start* a conversation about proportionality review's legal defensibility and normative desirability in

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[157] *Ibid* at paras 54, 57.

[158] *Ibid* at para 57 [emphasis added].

Singaporean constitutional adjudication, counterarguments to any of the three central arguments preferred here may be expected. However, even if these counterarguments bear weight, this does not necessarily condemn proportionality review to wholesale rejection once more. Courts may, instead, suitably balance the reasons for and against proportionality by adopting a middle-ground approach between full-blown proportionality review on the one hand and existing doctrines of constitutional review on the other. For instance, courts may employ some or all of proportionality's enquiries as overlapping sub-enquiries in a less structured test for constitutionality. By basing findings of unconstitutionality under several of proportionality's stages at the same time, courts may defray concerns that its conclusions under some of those stages may have been incorrect and/or insufficiently reasoned.[159] Interestingly, there are already indications that Singapore's courts are willing to considers proportionality's factors in this manner.[160] Alternatively, courts may adopt full-blown proportionality but also attempt to blunt the effects of using it, by canvassing reasons in favour of disproportionality when finding a *prima facie* violation of the applicant's right at the leave stage, prior to actually declaring the impugned acts unconstitutional at trial. This effectively gives the Government advance warning of a potential finding of unconstitutionality, which thus preserves some flexibility for the Government to react to the court's likely finding as it thinks best,[161] by re-justifying or replacing the impugned act in line with the broad outlines of the court's decision, or by amending the *Constitution* to protect that act. Again, there are already indications that Singapore's courts are willing to decide constitutional questions in considerable detail at the leave stage.[162] Optimally, a considered discussion of the pros and cons of proportionality, like that this article has sought to initiate, should lead to more nuanced and well-calibrated views on proportionality's role in Singaporean constitutional adjudication, rather than zero-sum conclusions in favour of or against its use.

VII. Post-Script: *Jolovan Wham* and Professor Stone Sweet's Observations

It will be apparent to any student of Singaporean constitutional law that the current Court of Appeal is set on leaving its mark in Singapore's constitutional jurisprudence.

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159 Steiner *et al*, *supra* note 13 at 593-595, 603-604.

160 For instance, *UKM*'s "analytical framework" employed proportionality's enquiries "in the round" rather than sequentially (see Teo, "Dawn of Proportionality", *supra* note 152). The Court of Appeal's decision in *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR (R) 525 at para 121 (CA), that "the 'principle of proportionality'. . . can be subsumed under 'irrationality"', may also be read as approximating such an approach.

161 In doing so, this approach effectively achieves the same effect as alternative remedies for findings of unconstitutionality, such as declarations of unconstitutionality without invalidity and delayed declarations of invalidity (see Yap Po Jen, "Constitutional Remedies in Asia: An Overview" in Yap Po Jen ed. *Constitutional Remedies in Asia* (New York: Routledge, 2019), ch 1; Swati Jhaveri, "Revisiting Taxonomies and Truisms in Administrative Law in Singapore" [2019] Sing JLS 351 at 375-376). However, this approach is preferable, since it is questionable whether courts have the power to grant those alternative remedies in constitutional adjudication, given that art 4 renders legislative or executive acts "inconsistent with [the] Constitution. . . *void*" [emphasis added], presumably *ab initio*.

162 See *eg*, *Colin Chan*, *supra* note 26. See also Benjamin Joshua Ong, "Standing up for Your Rights: A Review of the Law of Standing in Judicial Review in Singapore" [2019] Sing JLS 316 at 325-330.

Its recent judgment in *Wham Kwok Han Jolovan v Public Prosecutor*,[163] issued shortly after this article was accepted for publication, is a symptom of this. In his contribution to this issue,[164] Alec Stone Sweet argues that the Court in *Jolovan Wham* adopted a framework to assess the constitutionality of legislation under Article 14 which bears similarities to proportionality's four-step framework. However, that framework could only be called a "rudimentary, if incomplete, form of proportionality review":[165] while proper purpose and rational relation enquiries were undertaken in earnest, the Court's approach to the necessity and strict balancing enquiries was "casual" and "perfunctory at best".[166] Nevertheless, Stone Sweet concludes that *Jolovan Wham* may be considered a first step toward "institutionalizing the proportionality principle" in Singapore, and for that reason it could be "potentially the most important constitutional decision ever rendered by the Court of Appeal."[167]

Stone Sweet's general description of *Jolovan Wham*, that it is an equivocal introduction of proportionality review into Singaporean constitutional adjudication, is accurate. However, in my opinion that is so not because the Court introduced a half-baked form of proportionality review, but because it introduced proportionality review under Article 14, if at all, only for executive rather than legislative acts.

First, it is doubtful whether the Court truly did employ proportionality review to assess the constitutionality of *legislation* (here, the *Public Order Act*[168]) under Article 14, rather than a standard resembling that in *Associated Provincial Picture House Ltd v Wednesbury Corporation*.[169] While the Court did adopt a structured "three-step framework" under which "a balance must be found between the competing interests at stake",[170] it is now well-established that even *Wednesbury* unreasonableness requires the weighing and balancing of competing values and interests.[171] The difference between proportionality and *Wednesbury*, then, lies in the identity of the balancer: "[w]hereas under [proportionality] it is for the court to determine objectively, for itself, whether a rights-interference is justifiable. . . courts do not have such a role under *Wednesbury*, where they are exercising a supervisory jurisdiction."[172] Of course, the line between the two grounds of review may be blurry in practice, and one cannot discount the possibility that the Court simply introduced proportionality review in an imprecise manner. Yet, portions of *Jolovan Wham*, like the following statement, do suggest a largely supervisory *Wednesbury*-esque role for the judiciary when Article 14 is applied to legislation:

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163 [2020] SGCA 111 [*Jolovan Wham*].

164 Alec Stone Sweet, "Intimations of Proportionality? The Singapore Constitution and Rights Protection" [2021] Sing JLS 231.

165 *Ibid* at 5.

166 *Ibid* at 6-7.

167 *Ibid* at 10.

168 Cap 257A, Rev Ed Sing 2012.

169 [1948] 1 KB 223 [*Wednesbury*].

170 *Jolovan Wham*, *supra* note 163 at paras 33 and 39.

171 Paul Craig, "The Nature of Reasonableness Review" (2013) 66 Current Leg Probs 131 at 135-142; Hasan Dindjer, "What Makes an Administrative Decision Unreasonable?" (2020) 84 Modern L Rev 265.

172 Jason Varuhas, "Against Unification", in Hanna Wilberg & Mark Elliott eds. *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Oxford and Portland: Hart, 2015) ch 5 at 110.

> "[T]he court must proceed on the basis that the Constitution vests the *primary decision-making power* regarding whether a derogation from the right is necessary or expedient on Parliament. The court's role is therefore confined to reviewing the relevant legislation and legislative materials (including the speeches, explanatory notes and any other relevant material) to ascertain whether. . . *the statutory derogation is objectively something that Parliament thought was necessary or expedient in the interests of public order and whether Parliament could have objectively arrived at this conclusion*."[173]

Second, however, the Court did hint at its willingness to apply a stricter proportionality standard to *executive acts* (here, the decisions of the Commissioner of Police to grant or deny permits for public assemblies under the *Public Order Act*). The constitutionality of the Commissioner's decisions under Article 14 was not strictly before the Court, since Wham had not applied for a permit at all. Yet, in *dicta* the Court considered how the Commissioner could exercise his discretion: even when he finds that public order concerns are at stake, the Commissioner "is not *obliged* to refuse to grant an applicant a permit",[174] and indeed may "still allow the public assembly to carry on but with certain conditions attached",[175] or "grant the permit if in the overall circumstances he considers that public order will not be imperiled notwithstanding the existence of the listed circumstance."[176] These statements, while non-binding and phrased as permissive suggestions rather than mandatory guidelines, evince a concern that the Commissioner's decisions should be narrowly tailored and sensitive to the "overall circumstances", and so resemble proportionality's necessity and strict balancing enquiries. Thus, while the Court's test for the constitutionality of *legislation* under Article 14 may fall short of proportionality, the standards it suggested might apply to *executive acts* under Article 14 fit the bill.

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[173] *Jolovan Wham*, *supra* note 163 at para 24 [emphasis added]
[174] *Ibid* at para 48 [emphasis original].
[175] *Ibid* at para 52.
[176] *Ibid* at para 48.