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INTIMATIONS OF PROPORTIONALITY? RIGHTS PROTECTION AND THE SINGAPORE CONSTITUTION

Wham Kwok Han Jolovan v Public Prosecutor

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Wham Kwok Han Jolovan v Public Prosecutor is potentially the most important constitutional decision ever rendered by the Singapore Court of Appeal, insofar as it heralds a new and more intrusive approach to the judicial review of rights claims in Singapore. The ruling expressly overturned deference postures associated with the "presumption of constitutionality," at least with respect to Article 14 of the Constitution; it consolidated *dicta* announcing the reconfiguration of separation of powers doctrines; and it developed and deployed a rudimentary, if yet incomplete, form of proportionality review to assess the legality of legislation adopted under Article 14's limitation clause. The note analyses these changes from a comparative perspective, in light of the difficulties foreign apex courts have had in fully transitioning to a more balancing-friendly approach to rights adjudication.

I. INTRODUCTION

In *Wham Kwok Han Jolovan v Public Prosecutor*,[1] the Court of Appeal—in a unanimous judgment delivered by a full bench of five judges—established a "three-step framework" for adjudicating constitutional claims under Article 14 of the Constitution: "Freedom of speech, assembly and association."[2] These rights are famously "qualified" by a series of limitation clauses, Article 14(2) stipulating that "Parliament may by law impose. . . *restrictions as it considers necessary or expedient*" to safeguard "security", "public order", and "morality".[3] Although the Court of Appeal would reject the applicant's constitutional challenge to the *Public Order Act*,[4] the ruling is potentially of landmark significance, insofar as it heralds a new and more intrusive approach to the judicial review of rights claims in Singapore. *Jolovan* expressly rejects previous case law to the effect that the courts will afford Parliament an expansive "presumption of legislative constitutionality" when it legislates within the confines of Article 14(2). Instead, the new three-part inquiry requires the Court to assess the constitutional *bona fides* of Parliament's purposes, the nexus between means and ends, and the balance struck by Parliament between the constitutional

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1 [2020] SGCA 111 [*Jolovan*].

2 *Constitution of the Republic of Singapore* (1999 Rev Ed) [*Constitution*], art 14.

3 *Ibid*, art 14(2).

4 *Public Order Act* (Cap 257A, 2012 Rev Ed Sing) [*POA*].

right and the public interests in the case being adjudicated. From the standpoint of comparative law, this approach resembles a type of proportionality test, albeit more primitive than the versions found, for example, in Canada, across Europe, and Hong Kong, Taiwan, and South Korea.[5]

A. *Legal Background and Facts of the Case*

Prior to *Jolovan*, the Singapore judiciary treated Article 14(2) as commanding judicial deference to parliamentary decisions that would limit the enjoyment of rights.[6] Save for in *Public Prosecutor v Taw Cheng Kong*,[7] a decision of the Singapore High Court which was reversed on appeal,[8] no court has ever struck down a statutory provision, or administrative act, on grounds that it violated a constitutional right. At the same time, the Court of Appeal has pointedly rejected the adoption of proportionality analysis ("PA") as an approach to rights protection. In *Chee Siok Chin*, a freedom of assembly case settled by the High Court in 2006, VK Rajah J emphasised that:

> Needless to say, the notion of proportionality has never been part of the common law in relation to the judicial review of the exercise of a legislative and/or an administrative power or discretion. Nor has it ever been part of Singapore law.[9]

For their part, legal scholars have intensively discussed the separation of powers concerns of a case law that reduces the effectiveness of constitutional rights and judicial review to nil, while debating the prospects for, and desirability of, change.[10]

The present case involved a challenge to the constitutionality of s 16(1)(*a*) of the *POA*.[11] The applicant had announced, through Facebook, a public event to be held in Singapore in November 2016, entitled "Civil Disobedience and Social Movements." The assembly's purpose was to discuss the role of dissent in effecting positive social change. Because the event was to feature a non-Singaporean speaker, Joshua Wong (a political activist based in Hong Kong), the *POA* required a permit for it to proceed, to be issued (or refused) by the Commissioner of Police. The applicant, however, made no effort to obtain the permit, leading to criminal charges being filed after Mr Wong addressed the assembly through video link. In the District Court, Mr Wham

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5 Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Constitutional Governance: A Comparative and Global Approach* (Oxford University Press, 2019) [Stone Sweet & Matthews, *Proportionality Balancing*]; Yap Po Jen, ed, *Proportionality in Asia* (Cambridge University Press, 2020) [Yap, *Asia*].

6 *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582 (HC) [*Chee Siok Chin*] at para 49.

7 [1998] 1 SLR(R) 78 (HC).

8 *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 (CA) [*Taw Cheng Kong (CA)*].

9 *Chee Siok Chin, supra* note 6 at para 87. See also Jack Tsen-Ta Lee, "According to the Spirit and Not to the Letter: Proportionality and the Singapore Constitution" (2014) 8:3 Vienna J Intl & Const L 276.

10 Jaclyn L Neo, "Autonomy, Deference and Control: Judicial Doctrine and Facets of Separation of Powers in Singapore" (2018) 5:2 J Intl & Comp L 461; Jaclyn L Neo, "'All Power Has Legal Limits'—The Principle of Legality as a Constitutional Principle of Judicial Review" (2017) 29 Sing Acad LJ 667; Eugene KB Tan, "Curial Deference in Singapore Public Law: Autochtonous Evolution to Buttress Good Governance and the Rule of Law" (2017) 29 Sing Acad LJ 800; Jack Tsen-Ta Lee, "Rethinking the Presumption of Constitutionality" in Jaclyn L Neo, ed, *Constitutional Interpretation in Singapore: Theory and Practice* (Routledge, 2016) 139.

11 *POA*, *supra* note 4.

"contended that the requirement to obtain a permit [was] unconstitutional *vis-à-vis* Art 14 of the Constitution,"[12] a defence dismissed by the District Judge.

B. *The Court of Appeal's Decision on the Merits*

The Court of Appeal upheld the applicant's conviction, after substantive review of the *POA*'s constitutionality. The Court based its ruling on three findings, each of which weighed heavily in favour of the legislature. First, the Government had built, within the legislative process, a record of why it considered the *POA* to be both "necessary and expedient," notably as a means of "*preserving* ***public order*** *and the safety of individuals* at special event areas," as announced in the statute's full title.[13] In Parliament, the Second Minister of Home Affairs declared that "the key philosophy underpinning the [*POA*] was to give adequate space for an individual's rights of political expression without compromising society's needs for order and stability."[14] Second, the Court of Appeal concluded that the discretionary powers conferred on the Commissioner of Police to grant or refuse permits to assemble were reasonable,[15] even if they could tilt against foreigners:

> The balance between public space for political expression and social order and stability is really different when it comes to foreigners. . . It is, unfortunately, an inescapable fact of modern life that national politics anywhere are often the target of interference by foreign entities or individuals who are promoting their own agendas.[16]

Third, the Court noted, approvingly, that appropriate safeguards had been built into the *POA*. The statute established binding guidelines for processing permits; the decisions of the Commissioner of Police to refuse requests for permits were subject to appeal to the Minister of Home Affairs; and the resulting decision of that Minister could itself be appealed to the courts, subsequently quashed, and then reconsidered in light of the judge's ruling.[17]

C. *The "Three-Step Framework"*

These findings issued from the deployment of a new "three-step framework to assist courts in determining whether a law impermissibly derogates from Art 14 of the Constitution."[18] In the first step, judges assess "whether the legislation restricts the constitutional rights in the first place."[19] If the legislation does not limit the enjoyment of a right, the judge does not move to the next stage of analysis. In the second step,

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12 *Jolovan*, *supra* note 1 at para 7.
13 *Ibid* at para 39 [emphasis in original].
14 *Ibid*.
15 *Ibid* at para 46.
16 *Ibid* at para 47.
17 *Ibid* at paras 53, 56.
18 *Ibid* at para 29.
19 *Ibid* at para 30.

the judge examines whether Parliament "considered it 'necessary or expedient' to restrict the constitutional right in question." The second-part analysis thus scrutinises "*the purposes for which Parliament passed the*. . . *legislation*,"[20] *eg*, securing public safety and order. In the third step:

> [T]he court must analyse whether, objectively, the derogation from or restriction of the constitutional right falls within the relevant and permitted purpose for which, under the Constitution, Parliament may derogate from that right. This must be established by showing a nexus between the purpose of the legislation in question and one of the permitted purposes identified under Art 14(2)(*b*) of the Constitution.[21]
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> . . .
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> In the final analysis, it is imperative to appreciate that a balance must be found between the competing interests at stake. In the present case, the balance required was between the constitutional right to peaceably assemble and the interest of public order, which is a constitutionally permitted derogation from the right to peaceably assemble.[22]

As described by the Court of Appeal, this third stage mixes elements of each of the four sub-tests that comprise PA, which standard PA takes pains to keep separate: (i) "proper purpose" (also known as "legitimacy) (ii) "suitability" (or "rational nexus analysis"), (iii) "necessity," operationalised by a least-restrictive means test, and (iv) balancing in the strict sense. This point is taken up in detail in Part II.C, and Part III.

II. Discussion

That the Court of Appeal upheld the constitutionality of the *POA* is not a surprising outcome. The major implication of *Jolovan* is, nonetheless, striking: It is the duty of the courts to scrutinise closely the justifications proffered by Parliament for derogating from an Article 14 right, an authority claim that openly conflicts with precedent long considered to be stable. Pre-*Jolovan*, strict judicial deference to parliamentary discretion was a taken-for-granted component of separation of powers in Singapore, if controversial. *Jolovan*, however, points to a reconfigured separation of powers, one that promises a more intrusive, balancing-friendly approach, to rights adjudication and judicial review.

A. *Separation of Powers and Judicial Review*

In its ruling, the Court of Appeal emphasises that certain constitutional principles bind all branches of government in Singapore. First, "each branch of Government has its own role and space," within a separation of powers that undergirds "the basic

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[20] *Ibid* at para 31 [emphasis in original].
[21] *Ibid* at para 32.
[22] *Ibid* at para 33.

structure of the Westminster constitutional model that Singapore has adopted."[23] A second principle follows: "while it is undeniably Parliament that acts to derogate from the constitutional right for one of the purposes under Art 14(2)(*b*), *it is unequivocally for the judiciary to determine whether that derogation falls within the relevant purpose.*"[24] Pushing further, the Court reiterated *dicta* pronounced in the opening paragraph of *Tan Seet Eng v Attorney-General*,[25] in which Sundaresh Menon CJ characterised the relationship between rule of law and judicial authority as follows:

> The rule of law is the bedrock on which our society was founded and on which it has thrived. [O]ne of its core ideas is that the notion that the power of the State is vested in the various arms of government and that such power is subject to legal limits. But it would be meaningless to speak of power being limited were there no recourse to determine whether, how, and in what circumstances those limits had been exceeded. *Under our system of government, which is based on the Westminster model,* ***that task falls upon the Judiciary. Judges are entrusted with the task of ensuring that any exercise of state power is done within legal limits*** *. . .* ***[T]he ultimate responsibility for maintaining a system which abides by the rule of law lies with the Judiciary*** *. . .*[26]

These reflections frame the introduction of the "three-step framework" for adjudicating the limitation clauses of Article 14.[27] They also comprise an unambiguous move to discard the "old" separation of powers, while preserving elements of the pre-*Jolovan* case law that are compatible with the new approach.

B. *Negating the "Presumption of Constitutionality"*

The most stunning aspect of *Jolovan* is the Court's disavowal of what had been an entrenched "presumption of legislative constitutionality" and, by extension, administrative acts taken pursuant to legislation. The Court does so in broad terms, invoking a 2020 criminal sentencing case, *Saravanan Chandaram v Public Prosecutor and another matter*,[28] which raised equal protection concerns under Article 12 of the Constitution:

> It has previously been held [in *Chee Siok Chin*[29]] that legislation attracts a presumption of constitutionality. . . In our judgment, such a presumption of constitutionality. . . can be no more than a starting point [meaning only] that legislation will not presumptively be treated as. . . unconstitutional; ***otherwise, relying on a presumption of constitutionality to meet an objection of unconstitutionality***

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23 *Ibid* at para 27.
24 *Ibid* at para 28 [emphasis in original].
25 [2016] 1 SLR 779 (CA) [*Tan Seet Eng*].
26 *Jolovan, supra* note 1 at para 28, citing *Tan Seet Eng*, *ibid* at para 1 [emphasis added in italics and bold by the Court of Appeal in *Jolovan*].
27 *Jolovan*, *ibid* at para 29.
28 [2020] SGCA 43 [*Saravanan*].
29 *Supra* note 6.

> ***would entail presuming the very issue which is being challenged.*** The enactment of laws undoubtedly lies within the competence of Parliament; but *the determination of whether a law that is challenged is or not constitutional lies exclusively within the ambit and competence of the courts, and this task must be undertaken in accordance with the applicable principles*.[30]

In the reconfigured separation of powers, the Court suggests, formal doctrines of judicial deference have no place. Accordingly, it rejects a "subjective approach" to Art 14(2)(*b*), wherein Parliament alone assesses whether a statute is "necessary or expedient." To do otherwise would render the rights "purely symbolic," and "without any real force or effect."[31] Given that this reasoning is rooted in general principles of Singapore constitutional law, and that the Court's conclusions apply to a limitation clause (Art 14(2)(*b*)) that is, inarguably, one of the most permissive in the world, the same conclusions must cover all of the qualified rights enumerated in the Singapore Constitution.

It is important to recall just how important the "presumption of constitutionality" has been to the historical evolution of the Singapore legal system. Judicial adherence to the doctrine has stunted the development of judicial review, providing a sweeping justification for judicial abdication when it comes to the protection of constitutional rights. As a pleading matter, the presumption generates a burden of proof that virtually no applicant could meet. To prevail, for example, the applicant must demonstrate that the impugned statute "is plainly arbitrary on its face."[32] This latter standard is a close cousin of "Wednesbury Unreasonableness", which holds sway with regard to suits to quash an administrative act for exceeding the bounds of common law legality. As a systemic matter, the courts acknowledged the "intimate" connection between a presumption of constitutionality and the "idea of separation of powers,"[33] while casting deference in a positive light. Indeed, courts have declared that they proceed under supposition that the "legislature would have fully considered all views before enacting the. . . laws concerned."[34] Yet, as Lee has demonstrated in his analysis of the scant empirical evidence in support of this optimistic view, the Singapore Parliament has virtually never debated the constitutionality of legislation in any sustained or meaningful sense.[35]

C. *Toward a Singapore Version of Proportionality Analysis?*

In its ruling, the Court of Appeal does not mention proportionality by name, nor does it address the *dicta* in *Chee Siok Chin* pointedly rejecting PA as foreign to Singapore law, and inappropriate for adoption by its courts.[36] However, *Jolovan* explicitly

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30 *Jolovan, supra* note 1 at para 26, citing *Saravanan*, *supra* note 28 at para 154 [emphasis added in italics and bold by the Court of Appeal in *Jolovan*].

31 *Jolovan*, *ibid* at para 22.

32 *Taw Cheng Kong (CA)*, *supra* note 8 at para 80, cited in *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 (HC) [*Lim Meng Suang (HC)*] at para 105. Discussed by Lee, *supra* note 10 at 141, 142.

33 *Taw Cheng Kong (CA), ibid* at para 143, citing *Lim Meng Suang (HC)*, *ibid* at para 110.

34 *Lim Meng Suang (HC)*, *ibid* at para 107.

35 Lee, *supra* note 10 at 143-148.

36 *Chee Siok Chin, supra* note 6 at para 87.

overrules *Chee Siok Chin* with regard to the "presumption of constitutionality," and develops a rudimentary, if incomplete, form of proportionality review to adjudicate the limitation clause of Art 14 of the Singapore Constitution. To illustrate, it is useful to compare the "standard approach" to enforcing the proportionality principle, as expounded most notably by Aharon Barak, to how the Court proceeds in *Jolovan*. Barak, a former Chief Justice of the Supreme Court of Israel, is the author of *Proportionality: Constitutional Rights and Their Limitations*,[37] a treatise that has powerfully influenced how courts use proportionality around the globe.[38]

The standard approach rests on a number of dogmatic foundations. First, PA does not accommodate *formal* deference doctrines, such as "political questions," "national security" exceptions to jurisdiction, the "presumption of legislative constitutionality," and so on. Such doctrines are considered *per se* illegitimate under the separation of powers requirements, since they would leave officials unaccountable to rights holders that inhere in modern rights-based constitutionalism.[39] Second, the proportionality principle comprises a criterion of constitutional validity: all state officials are bound by the principle whenever they make and enforce law; officials are under a duty to justify acts that would limit the scope of a right; and judges are responsible for assessing the adequacy of these reasons. Among other things, PA furnishes an analytical framework for adjudicating limitation clauses, that is, for ensuring that the legislature in fact restricted the enjoyment of a right for some sufficiently important, constitutionally-recognised, public interest. Third, PA subsumes all other approaches to the adjudication of qualified constitutional rights, including tests for "reasonableness,"[40] "irrationality," "arbitrariness," and "*ultra vires*" review.

As discussed, the *Jolovan* ruling insists that "each branch of government" occupies its own domain of authority,[41] and that the judiciary is "*entrusted with the task of ensuring that any exercise of state power is done within legal limits*."[42] These associated doctrines are predicates for a court to enforce the proportionality principle in the first place. Further, the Court of Appeal must reject a "subjective approach" to the lawfulness of the statute being challenged; and it must treat limitation clauses as a constitutional command to engage in proportionality review of those same measures.

Standard PA proceeds upon a showing that the scope of a right has been limited by the law being challenged.[43] Thus activated, PA proceeds in a sequence of four stages, each of which is defined by a sub-test. These tests are designed to ensure,

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37 Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Oxford University Press, 2010) [Barak, *Limitations*].

38 Alec Stone Sweet, "The Necessity of Balancing: Hong Kong's Flawed Approach to Proportionality, and Why It Matters" (2020) 50:1 Hong Kong LJ 541 [Stone Sweet, "Balancing"]; Stone Sweet & Mathews, *Proportionality Balancing*, *supra* note 5.

39 Barak, *Limitations*, *supra* note 37 at 396-399. For a discussion of the "problem of accountability" and its relationship to judicial review in "modern constitutional law", see Jacob Weinrib, *Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law* (Cambridge University Press, 2016), especially 139-160; and Stone Sweet & Mathews, *Proportionality Balancing*, *ibid* at ch 2.

40 Barak, *Limitations*, *ibid* at ch 13.

41 *Jolovan*, *supra* note 1 at para 27.

42 *Ibid* at para 28 [emphasis in original].

43 Barak, *Limitations*, *supra* note 37 at ch 6.

respectively:

(i) that the legislator was authorised by the Constitution to restrict the enjoyment of a right for some public interest (the "legitimacy," or "proper purpose," test);[44]
(ii) that the means chosen by Parliament were logically connected to the ends being pursued ("suitability," a "rational connection" test);[45]
(iii) that the legislature has not limited the scope of the right more than is necessary to achieve its declared purposes ("necessity," typically operationalised by a "least-restrictive means" test);[46] and
(iv) that the marginal benefits of the law to society are not out-weighed by—or disproportionate to—the marginal harm to rights-holders of the law under review ("balancing in the strict sense," or "proportionality in the narrow sense").[47]

The Court of Appeal's methodology in *Jolovan*—as embodied in the "three-step framework"[48]—evokes elements of PA. The first step comprises the same threshold inquiry that triggers PA: Does the challenged law in restrict the enjoyment of a constitutional right, at least in a *prima facie* sense? Having found that the *POA* does as much, the Court moved to the second step, wherein the Court checks "whether Parliament had considered it 'necessary or expedient' to restrict the right in question." In line with standard PA (the "proper purpose" prong), the Court finds it sufficient to verify that Parliament did indeed legislate "in the interests of one of the enumerated purposes under Art 14(2)(*b*)."[49] To this point, observers versed in the niceties of PA would be on familiar territory. In contrast, the "third step" of the Court's framework blends elements of three separate sub-tests found in PA: The means-ends nexus analysis of "suitability"; the concern for narrow tailoring (least-restrictive means) in "necessity"; and the simultaneous examination of harms and benefits in "balancing in the strict sense." In *Jolovan*, the nexus analysis is broadly congruent with what takes place in orthodox PA under suitability. But the Court's approach to issues that are typically at the heart of necessity analysis and balancing is casual at best.

At the "necessity" stage of PA, Parliament must demonstrate that it has not limited the scope of the right more than is necessary to achieve its aims. In the standard model, legislators are free to choose the level of protection of the public good at hand—*eg*, *public safety and order*—even if maximising these interests would entail drastically curtailing the right to assembly.[50] In *Jolovan*, the Court did not promise standard necessity analysis in the discussion of its "three-step framework." Nonetheless, the ruling displays a concern for the logics of least-restrictive means assessment. Implicitly praising Parliament, the Court stresses that: (i) the impugned statute did

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44 *Ibid* at ch 9.
45 *Ibid* at ch 10.
46 *Ibid* at ch 11.
47 *Ibid* at ch 12.
48 *Jolovan*, *supra* note 1 at para 29.
49 *Ibid* at para 31.
50 Barak, *Limitations*, *supra* note 37 at ch 11.

not "prohibit the right to peaceably assemble," but makes that the latter "exercisable with the permission of the Commissioner";[51] (ii) "certain categories of public assemblies were entirely exempted from the permit regime";[52] and (iii) a decision by the Commission to deny a permit to assemble were subject to appeal to the Minister of Home Affairs[53] and, ultimately, to review by the Court.[54]

Only once an impugned statute has passed the necessity test does the judge move to the final stage of PA: Balancing. In *Jolovan*, the Court describes the third step of its framework as a requirement "to [strike] a balance... between the competing interests at stake.[55] But the discussion of balancing in the ruling is perfunctory at best, consisting of the Court restating findings reached under rational nexus analysis (suitability).

> In our judgment, s 7(2) of the POA achieves a careful balance between the constitutional right to peaceably assemble and the delineation of the restriction imposed on that right. All of the circumstances listed are situations in which threats to the interests of public order or its maintenance could conceivably arise.[56]

The second sentence of this passage, which merely states a finding of reasonableness, tells us nothing of relevance to the ultimate balancing question: Does the *POA* restrict the right to peaceful assembly more than is tolerable under the Singapore Constitution?

III. The Comparative Context

The proportionality principle is "the single most successful legal transplant in history,"[57] as well as "a core component of global constitutionalism."[58] Yet, observed comparatively and across time, the process through which it has diffused appears piecemeal and fraught with separation of powers anxieties.[59] After all, when judges embrace PA, they commit themselves to prioritising rights protection, in a very public and intrusive manner. Moreover, doing so will typically entail major structural reforms of the legal system. Separation of powers, for example, will need to be reformulated, through the development of new presumptions and standards of review, for example. These changes are often difficult to achieve, even over many decades.

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51 *Jolovan*, *supra* note 1 at para 36.
52 *Ibid* at para 36.
53 *Ibid* at para 53.
54 *Ibid* at para 56.
55 *Ibid* at para 33.
56 *Ibid* at para 48.
57 Mattias Kumm, "Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice. A Review Essay on a Theory of Constitutional Rights by Robert Alexy" (2004) 2:3 Intl J Const L 574 at 574, 575.
58 Alec Stone Sweet & Jud Mathews, "Proportionality and Rights Protection in Asia: Hong Kong, Malaysia, South Korea, Taiwan—Whither Singapore?" (2017) 29 Sing Acad LJ 774 at 774, 775 [Stone Sweet & Matthews, "Rights Protection"].
59 Stone Sweet & Mathews, *Proportionality Balancing*, *supra* note 5 at ch 3.

A. *Proportionality: Variation and Convergence*

The process through which courts have adopted and apply PA varies greatly, reflecting distinct historical, colonial, cultural, and politico-legal legacies. Despite these differences, PA has become the unrivalled, "best-practice" standard of rights protection in the world today, a status that exerts enormous pressure on hold-outs to join the club.[60] While important variation remains—in particular, with respect to the question of whether and how courts incorporate deference to officials who make and enforce the law—PA has gradually been standardised, most importantly, through inter-judicial dialogue, and the influence of Barak's treatise.[61]

B. *The Problem of Balancing*

Even after adopting PA, most courts struggled to fully commit to the final stage of inquiry: Balancing in the strict sense. Prussian courts first developed proportionality in the late-19th century, but they concluded the analysis with the necessity phase. In the 1950s, under the sway of important professors of constitutional law, the German Federal Constitutional Court recognised proportionality as an unwritten constitutional principle, while adding a final balancing phase to the procedure. Nevertheless, as Petersen has documented,[62] it was not until the late 1970s that the German Court began to invalidate legislation expressly on the basis of the balancing sub-test. Petersen's broader comparative claim, strongly supported by systematic analyses of the Canadian, German, and South African case law, is that judges become comfortable with openly balancing only once their own political legitimacy as the authoritative interpreter of the constitution has been consolidated.[63] The reason will not surprise Singaporeans: Moving to the balancing stage subverts classical distinctions between "legislators" (who are expected to balance interests in the course of legislating) and "judges" (who are expected to enforce the parliament's balancing decisions in the course of settling legal disputes). As noted above, the viability of PA depends upon rejecting these distinctions.

What Petersen noticed was that German, Canadian, and South African judges did not actually dispense with balancing in hard cases. Rather, they camouflaged balancing, "smuggling" it into prior sub-tests. In the context of the necessity test, this "smuggling" occurs whenever judges evaluate the proportionality of *a less-restrictive* (on the pleaded right) *but also less-effective* (in achieving the legislator's aim) alternative (compared to the statutory provisions under review). Doing so is forbidden under standard PA, precisely because it collapses the distinction between necessity and balancing. Recall that, under necessity analysis, the legislature is free to choose the most effective means to realise its aims, even if that choice severely limits the right in question.[64] But prevailing at necessity simply pushes proportionality

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60 *Ibid* at ch 3.

61 Barak, *Limitations, supra* note 37.

62 Niels Petersen, *Proportionality and Judicial Activism: Fundamental Rights Adjudication in Canada, Germany, and South Africa* (Cambridge University Press, 2017) at 83-95.

63 *Ibid* at 93.

64 Barak, *Limitations*, *supra* note 37 at 317-323.

review to the balancing stage, where the presumption, or "the rule of balancing," holds sway: the more the legislature limits the scope of a right, the weightier must be the justification for doing so.[65]

For more than two decades, the Supreme Court of Canada declined to move to the balancing stage, although it recognised the obligation to do so, once the "minimal impairment" requirement had been satisfied under necessity. From 1986 (when it adopted PA)[66] until 2009, the Supreme Court balanced within the necessity prong. In *Hutterian Brethren*,[67] the Court harmonised its approach to the standard model. Relying heavily on Barak's treatise, McLachlin CJ stressed that necessity analysis would, henceforth, be strictly limited to determining whether there existed an equally effective but "less drastic means of achieving the objective in a real and substantial manner."

> It may be questioned how a law which has passed the rigours of the first three stages of the proportionality analysis. . . could fail at the final inquiry of [balancing in the strict sense]. The answer lies in the fact that. . . [o]nly the fourth [step] takes full account of the 'severity of the deleterious effects of a measure on individuals or groups' [Discusses and approves the views of Barak]. . . Although the minimal impairment stage [least-restrictive means] of the proportionality test necessarily takes into account the extent to which a *Charter* value is infringed, [only balancing] provides an opportunity to assess [directly]. . . whether the benefits which accrue from the limitation are proportional to its deleterious effects as measured by the values underlying the *Charter*."[68]

Abella J (dissenting on the merits) agreed, echoing Barak: "most of the heavy conceptual lifting and balancing ought to be done at the final step. . . Proportionality [balancing] is, after all, what [the Charter of Rights] is about."[69]

In the UK, the highest courts staunchly resisted adopting PA to adjudicate the *Human Rights Act (1998)*—precisely because it would involve the courts in a legislative function that of balancing—until they were forced to do so by the European Court of Human Rights. In a series of confrontations between the so-called "Wednesbury Unreasonableness" standard and PA, the European Court held that domestic judges must use PA to adjudicate the qualified rights found in Arts 8–12 of the *ECHR*.[70]

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65 *Tzemach v. Minister of Defense* [1999] 53(5) Isr SC 241, 273 ("The more important the limited right and the more severe the restriction on that right, the more robust a public interest consideration is required. . . to justify the limitation"). Barak has formalised this approach as the "Rule of Balancing": see his chapter "Proportionality" in M Rosenfeld & A Sajó, eds, *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 739-753 at 746.

66 *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200.

67 *Alberta v Hutterian Brethren of Wilson Colony*, [2009] 2 SCR 567, 310 DLR (4th) 193 (SCC) [*Hutterian Brethren*].

68 *Ibid* at paras 76-78, citations omitted [emphasis in original].

69 *Ibid* at para 149, Abella J, dissenting. In a subsequent ruling, *R v KRJ*, [2016] 1 SCR 906 at paras 78-79, the Court fully embraced Barak's view to the effect that the final phase of PA comprises "the very heart of proportionality".

70 *European Convention on Human Rights*, 4 November 1950, ETS No. 005 [*ECHR*]

Failure to do so, the Strasbourg Court would add, constitutes a violation of the right to an "effective judicial remedy" enshrined by Art 13 of the *ECHR*.[71]

C. *Proportionality in Asia*

In Asia, the diffusion of PA has accelerated with the emergence of competitive democracy (South Korea, Taiwan), the weakening of one-party rule (Malaysia), and doctrinal "isomorphism"—the mimetic process through which a court "copies" best-practice standards that have been developed by foreign courts.[72] For reasons that are well-understood, one does not expect robust systems of rights protection to develop in authoritarian regimes, or those ruled by a single party.[73] In China, forms of proportionality review have emerged within administrative law, although Chinese courts are prohibited from citing the Constitution as a source of law.[74] In Hong Kong, where a justiciable Bill of Rights (1990) exists in the form of an Ordinance,[75] the highest courts have developed their own form of PA;[76] further, Hong Kong judges regularly invoke, as persuasive authority, the case law of the Supreme Court of Canada, the European Court of Human Rights, and the UK Supreme Court when they enforce the proportionality principle. But as critics have observed, the Hong Kong version of PA starkly contrasts with crucial precepts of the standard model, the courts having incorporated formal deference into necessity and balancing, in an attempt to recast PA as a form of reasonableness review.[77] To date, Hong Kong judges have never moved to the balancing stage when reviewing the lawfulness of legislation under the Bill of Rights.[78]

IV. Conclusion

In *Proportionality in Asia*, Yap observes that the Singapore Supreme Court "cuts a lonely figure." Although "vested with the power of constitutional review," it neither uses PA nor invalidates legislation.[79] With *Jolovan*, the Court of Appeal has opened a path toward ending this situation. But, since *Marbury v Madison*,[80] the history of judicial review is replete with examples of courts that, first, assert extensive powers of judicial review only to wait years (or decades in the case of the US

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71 Alec Stone Sweet & Claire Ryan, *A Cosmopolitan Legal Order: Kant, Constitutional Justice, and the European Convention on Human Rights* (Oxford University Press, 2018) at 103-108.

72 Stone Sweet & Mathews, *Proportionality Balancing*, *supra* note 5 at 16, 80-87, 94, 95.

73 Stone Sweet & Mathews, "Rights Protection", *supra* note 58; Yap Po Jen, *Courts and Democracies in Asia* (Cambridge University Press, 2017) at 3, 4.

74 Stone Sweet & Mathews, *Proportionality Balancing*, *supra* note 5 at 145, 146.

75 *Hong Kong Bill of Rights Ordinance, 1991*, c 383 [*Bill of Rights*].

76 *Hysan Development Co Ltd v Town Planning Board*, 19 HKCFAR 372 [2016]; *Leung Kwok Hung v Secretary for Justice* [2020] HKCA 192 (Prohibition on Face Covering Regulation).

77 Johannes Chan, "Proportionality After *Hysan*: Fair Balance, Manifestly Without Reasonable Foundation, and Wednesbury Unreasonableness" (2019) 49:1 Hong Kong LJ 265; Stone Sweet, "Balancing", *supra* note 38.

78 Rehan Abeyratne, "More Structure, More Deference" in Yap Po Jen, ed, *Proportionality in Asia* (Cambridge University Press, 2020) 25 at 57, 58.

79 Yap, *Asia*, *supra* note 5 at 21, 22.

80 5 US 137.

Supreme Court), to actually deploy them. The fate of rights review in Singapore is not at all certain. Similarly, the Court's commitment to a proportionality-style approach to rights adjudication, while modestly implied, remains imperfect. Whether the Court would be willing to engage in open balancing, for instance, is an open question. What is certain is that any court that succeeds in institutionalising the proportionality principle—as a constitutional criterion of legality—fundamentally alters the legal system. In this respect, *Jolovan* is potentially the most important constitutional decision ever rendered by the Court of Appeal.