

COUNTER CURRENTS TO THE GLOBALIZATION OF PROPORTIONALITY

SHILING XIAO*

ABSTRACT

There has been extensive literature on proportionality that praises its global spread and delves into its embedment in domestic contexts. Through a series of case studies from around the world, however, this Article shows judicial practices countering, explicitly or implicitly, the popular notion of globalization of proportionality. In Canada and the United Kingdom, the Supreme Courts have directed the courts to depart from proportionality and rely on unreasonableness as a default standard of judicial review of administrative decisions. Courts in Hong Kong and Taiwan have developed various levels of intensity of review associated with proportionality; the lowest of which transforms proportionality, a rights protective doctrine, into a form of weak reasonableness review or deferential rational-basis review. The Chinese courts have fashioned proportionality into a tool to justify illegal government actions and advance authoritarian projects. This Article describes these judicial practices as counter currents of proportionality and argues that they are not merely variations of proportionality used in local contexts; instead, they have either deserted the doctrine entirely or contradicted its core features: (1) structured analytical procedure and (2) high-level human rights protection. In response to these counter currents, this Article proposes that once a court adopts proportionality in its adjudication, it must adhere to the structured analytical framework and insist on a minimum rigor of this doctrine.

Abstract.....	145
Introduction	146
I. Core Features of Proportionality	149

* Shiling Xiao, Post-doctor Research Fellow, School of Law, City University of Hong Kong, Hong Kong, China. Email: shilxiao@cityu.edu.hk. I thank Ms. Hannah Klöber, Prof. Björn Ahl, Dr Xueji Su, Dr. Anna Dziedzic, Mr. Greg Wong, Ms. Yi Tang, Prof. Juliano Zaiden Benvindo, and Ms. Irene Parra Prieto for their comments and suggestions. An earlier version of this Article was presented at the ICON•S Conference 2023, Wellington, New Zealand, July 3-5, 2023. This Article is an output of the research project entitled “Implementation of the Hong Kong Basic Law: Chinese and Comparative Constitutional Law Perspectives” (No 9229081).

II. Abandoning Proportionality.....	153
A. The Case of Canada.....	153
B. The Case of the United Kingdom.....	159
III. Weakening of Proportionality	163
A. The Case of Hong Kong.....	163
B. The Case of Taiwan.....	168
IV. Abusing Proportionality: The Case of China	175
V. Response to Counter Currents of Proportionality	179
A. Counter Currents: What Prevailing Scholarship Does Not Show	179
B. Two Core Features: The Baseline Should be Observed.....	184
VI. Conclusion.....	186

INTRODUCTION

Proportionality is a legal construction,¹ and it is best known as “a public law doctrine for the constitutionality of infringement on human rights.”² The doctrine of proportionality, originating from Prussian administrative law, appears “in jurisdictions from all five continents, both national and international, and in civil and common law legal traditions.”³ In the contemporary legal landscape, proportionality has achieved remarkable prominence.⁴ It has been “the heart of constitutional rights adjudication” and one of “the most successful legal transplants in the second half of the twentieth century.”⁵

¹ AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 131 (2012).

² Iddo Porat, *Proportionality*, MAX PLANCK ENCYCLOPEDIA OF COMPAR. CONST. L. (Mar. 2018), <https://oxcon.ouplaw.com/display/10.1093/law-mpeccol/law-mpeccol-e38?rskey=JCYEK8&result=1&prd=MPECCOL> [https://perma.cc/GV5R-9WV2].

³ FRANCISCO J. URBINA, A CRITIQUE OF PROPORTIONALITY AND BALANCING 1 (2017).

⁴ See generally Robert Alexy, *Constitutional Rights and Proportionality*, 22 REVUS 51 (2014) (illustrating scholarly interest on the topic of proportionality); Vicki C. Jackson, *Constitutional Law in An Age of Proportionality*, 124 YALE L.J. 3094 (2015) (discussing arguments from American exceptionalism against the global spread of proportionality); Vicki C. Jackson & Mark Tushnet, *Introduction*, in PROPORTIONALITY: NEW FRONTIERS, NEW CHALLENGES 1 (Vicki C. Jackson & Mark Tushnet eds., 2017) (explaining proportionality’s presence in the legal landscape); ALEC STONE SWEET & JUD MATHEWS, PROPORTIONALITY BALANCING AND CONSTITUTIONAL GOVERNANCE: A COMPARATIVE AND GLOBAL APPROACH 60 (2019).

⁵ Matthias Kumm, *Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice*, 2 INT’L J. CONST. L. 574, 595 (2004).

The trajectory of the global spread of proportionality is detectable.⁶ Proportionality first flourished in Western Europe, where countries such as Austria, Portugal, Spain, Belgium, Switzerland, the Netherlands, and Greece embraced it.⁷ In the democratization wave after the Cold War,⁸ proportionality found its way to the former Eastern Bloc countries.⁹ Due to Spain and Portugal's influence, Latin American states such as Brazil, Colombia, Peru, Mexico, and Chile welcomed proportionality.¹⁰ The Supreme Court of Canada introduced proportionality into the Canadian legal system through *R. v. Oakes*¹¹ in 1986, which advanced the spread of proportionality in the common law world. Countries such as New Zealand, Australia, Ireland, the United Kingdom, India, and South Africa accepted this civil law-based doctrine.¹² Furthermore, several eastern Asian supreme or constitutional courts, such as those of South Korea, Taiwan, China, and Hong Kong, have used proportionality in their judicial review since the late 1980s.¹³ Besides domestic legal systems, international legal systems, including treaty-based regimes, have also widely adopted and applied proportionality; for instance, the European Union, the European Convention on Human Rights (ECHR), and the World Trade Organization have embraced the doctrine.¹⁴ The globalization of proportionality has resulted in widespread appreciation in academia. Scholars have praised the

⁶ Shiling Xiao, *State-Centric Proportionality in Chinese Administrative Litigation*, 21 INT'L J. CONST. L. 461, 462 (2023).

⁷ STONE SWEET & MATHEWS, *supra* note 4, at 69–80; BARAK, *supra* note 1, at 182, 186–99.

⁸ ERIC C. IP, HYBRID CONSTITUTIONALISM: THE POLITICS OF CONSTITUTIONAL REVIEW IN THE CHINESE SPECIAL ADMINISTRATIVE REGIONS 2 (2019).

⁹ WOJCIECH SADURSKI, RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POSTCOMMUNIST STATES OF CENTRAL AND EASTERN EUROPE 263–87 (2005).

¹⁰ BARAK, *supra* note 1, at 201.

¹¹ [1986] 1 S.C.R. 103, 106.

¹² Michael Taggart, *Proportionality, Deference, Wednesbury*, 2008 N.Z.L. REV. 423, 436 (2008); Margit Cohn, *Legal Transplant Chronicle: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom*, 58 AM. J. COMPAR. L. 583, 620 (2010); Caroline Henckels, *Proportionality and the Separation of Powers in Constitutional Review: Examining the Role of Judicial Deference*, 44 FED. L. REV. 181, 183 (2017); David Kenny, *Proportionality, the Burden of Proof, and Some Signs of Reconsideration*, 52 IRISH JURIST 141, 141 (2014); Aparna Chandra, *Proportionality in India: Bridge to Nowhere?*, 3 U. OXFORD HUM. RTS. HUB J. 55, 66 (2020).

¹³ Cheng-Yi Huang & David S. Law, *Proportionality Review of Administrative Action in Japan, Korea, Taiwan, and China*, in COMPARATIVE LAW AND REGULATION: UNDERSTANDING THE GLOBAL REGULATORY PROCESS 305 (Francesca Bignami & David Zaring eds., 2016); Cora Chan, *Rights, Proportionality and Deference: A Study of Post-Handover Judgments in Hong Kong*, 48 H.K.L.J. 51, 53–54 (2018).

¹⁴ Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72, 74 (2008); Thomas M. Franck, *Proportionality in International Law*, 4 L. & ETHICS HUM. RTS. 229, 232 (2010).

doctrine as a “dominant narrative” of “the global model of constitutional rights,”¹⁵ “an indispensable and inherent part of the culture of justification,” a “common language between constitutional systems,”¹⁶ a “defining doctrinal core of a transnational, rights-based constitutionalism,”¹⁷ and a “universal criterion of constitutionality.”¹⁸

Despite a wealth of research on proportionality’s globalization and widespread popularity, some judicial review practices countering the globalization of proportionality have gone unnoticed. This Article sheds light on three types of judicial practices that counter the globalization of proportionality: abandonment, weakening, and abuse of the doctrine. In Canada and the United Kingdom, the Supreme Courts have directed lower courts to depart from proportionality and in its place use unreasonableness as a default standard to review administrative decisions. In Hong Kong and Taiwan, courts have developed various levels of intensity associated with the proportionality test, resulting in a weakening of the doctrine. The reduced intensity recasts proportionality as akin to a weak, *Wednesbury*-like unreasonableness review or the deferential rational-basis review. In China, the courts have fashioned proportionality into a tool to justify illegal government actions and advance authoritarian projects. This contradicts the essence of proportionality, which is meant to protect human rights. This Article labels these judicial practices as “counter currents” to proportionality, as they are running opposite to widespread globalization of proportionality. Some of these counter currents have existed for some time in constitutional review and administrative review, while others are new but becoming viable. However, counter currents to proportionality are still invisible under the existing scholarship, which overlooks the very real threats proportionality is facing.

Through a series of case studies, this Article aims to supply a general and systematic analysis of the judicial practices countering the global spread of proportionality and calls for heightened attention from scholars and practitioners alike. This Article argues that judicial practices countering the globalization of proportionality have not been adequately noticed, and that they should not be regarded simply as contingent or local applications of proportionality. Because, in reality, these practices have either

¹⁵ KAI MÖLLER, THE GLOBAL MODEL OF CONSTITUTIONAL RIGHTS 13–15 (2012).

¹⁶ Moshe Cohen-Eliya & Iddo Porat, *Proportionality and the Culture of Justification*, 59 AM. J. COMPAR. L. 463, 473, 481 (2011).

¹⁷ Jud Mathews & Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 797, 797 (2010).

¹⁸ DAVID M. BEATTY, THE ULTIMATE RULE OF LAW 162 (2003).

blatantly deserted proportionality or contradicted its purpose, which is to provide high-level human rights protection through a structured analytical framework. From a practical point of view, proportionality may not be a doctrine for every court in every case. Nonetheless, this Article suggests that once courts employ this doctrine, they should adhere to its core features.

The remainder of this Article is divided into five parts. Part I will elaborate on the core features of proportionality: (1) the structured analytical procedure and (2) high-level human rights protection. Parts II to IV will unfold three counter currents to proportionality in five jurisdictions. Part V will elaborate upon the thesis of this Article and explore potential responses to the counter currents.

I. CORE FEATURES OF PROPORTIONALITY

This Article identifies different types of judicial practices countering the globalization of proportionality: abandoning, weakening, and abusing proportionality. In contrast to the abandonment of proportionality, which is direct and explicit, the weakening and abuse of proportionality are subtle, indirect, and more difficult to detect. Labeling some applications of proportionality as weakened, abused, or “astray” raises the obvious question of how to distinguish them from the authentic form of proportionality.

It is difficult to find a perfect definition for the doctrine of proportionality, despite being a popular public law doctrine for the constitutionality of infringements on human rights. Nevertheless, a template widely recognized by scholars and judges worldwide explains and justifies this doctrine.¹⁹ The template features two fundamentals: (1) the structured analytical framework and (2) high-level human rights protection.

¹⁹ See ROBERT ALEXI, *A THEORY OF CONSTITUTIONAL RIGHTS* 397 (Julian Rivers trans., 2002); Alec Stone Sweet, *The Necessity of Balancing: Hong Kong Flawed Approach to Proportionality, and Why It Matters*, 50 H.K.L.J. 541, 561 (2020); Po Jen Yap, *Proportionality in Asia: Joining the Global Choir*, in *PROPORTIONALITY IN ASIA* 9–13 (Po Jen Yap ed., 2020); MOSHE COHEN-ELIYA & IDDO PORAT, *PROPORTIONALITY AND CONSTITUTIONAL CULTURE* 123–24 (2013); David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652, 669 (2005); JACCO BOMHOFF, *BALANCING CONSTITUTIONAL RIGHTS: THE ORIGINS AND MEANINGS OF POSTWAR LEGAL DISCOURSE* 190–91 (2013); Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 U. TORONTO L.J. 383, 383 (2007); Grégoire C. N. Webber, *Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship*, 23 CAN. J.L. & JURIS. 179, 182 (2010); NIELS PETERSEN, *PROPORTIONALITY AND JUDICIAL ACTIVISM: FUNDAMENTAL RIGHTS ADJUDICATION IN CANADA, GERMANY AND SOUTH AFRICA* 80 (2017); STONE SWEET &

Over the last fifty years, the global reach of proportionality has been fueled by the widespread recognition of constitutionalism,²⁰ a notable expansion of judicial review,²¹ and the prevalence of the idea of human rights protection.²² Closely associated with these factors, proportionality's structured analytical framework and high-level human rights protection also explain the success of the doctrine's global reach.

The first core feature of proportionality is its structured analytical framework. Despite minor variations in the application of proportionality among a wide range of jurisdictions,²³ four subtests have been commonly used in courts' proportionality analyses.²⁴ They are: (1) the legitimate aim test, which asks whether the impugned legislative or administrative measure pursues a legitimate aim; (2) the suitability test, which asks whether the measure is capable of accomplishing the aim pursued; (3) the necessity test, which asks whether the measure is the least intrusive means possible; and (4) proportionality in the strict sense (a.k.a. the balancing test), which asks whether the benefit gained exceeds the harm caused to individual rights.²⁵

An impugned legislation or administrative action will only be considered valid after passing all subtests step-by-step. Each subtest is the threshold requirement for moving to the next.²⁶ An impugned legislative provision or governmental action that fails any subtest in this sequence is invalid.²⁷ The analytical framework of proportionality provides a consistent and stable approach to legal problems by guiding the parties to plead their cases and leading the courts to read contexts and make decisions.²⁸ Doing so enhances the transparency of rights review.²⁹ Such a

MATHEWS, *supra* note 4, at 60; Jackson, *supra* note 4; BARAK, *supra* note 1; MÖLLER, *supra* note 15.

²⁰ STONE SWEET & MATHEWS, *supra* note 4, at 191–94.

²¹ Tom Ginsberg, *The Global Spread of Constitutional Review*, in *THE OXFORD HANDBOOK OF LAW AND POLITICS* 82–84 (Keith E. Whittington et al. eds., 2008).

²² MÖLLER, *supra* note 15, at 1–15.

²³ For example, whereas the German Federal Constitutional Court divided proportionality into three subtests preceded by a legitimate aim test, the Court of Final Appeal of Hong Kong and the Taiwan Constitutional Court adopt a four-prong proportionality test. Chandra, *supra* note 12, at 56; Stone Sweet, *supra* note 19, at 542. Despite these variations, these courts determine cases after examining the subtests in sequence and their analysis is structured. Chandra, *supra* note 12, at 56; Stone Sweet, *supra* note 19, at 542.

²⁴ BARAK, *supra* note 1, at 131; Yap, *supra* note 19, at 9; Jackson, *supra* note 4, at 3099.

²⁵ BARAK, *supra* note 1, at 3.

²⁶ Stone Sweet, *supra* note 19, at 545.

²⁷ *Id.*

²⁸ Stone Sweet & Mathews, *supra* note 14, at 88–89.

²⁹ Mathews & Stone Sweet, *supra* note 17, at 804.

structured, stable, and forthright analytical framework³⁰ is a significant advantage of proportionality.³¹

More fundamentally, without such a structure, we lack a doctrine of proportionality.³² The four subtests of proportionality—namely, the legitimate aim test, the suitability test, the necessity test, and the proportionality in the strict sense—are pervasive in constitutional judicial review and are known under different headings of standards of review, such as unreasonableness and American tiers of scrutiny.³³ However, only the doctrine of proportionality organizes these tests in an orderly manner.³⁴ The structured framework of proportionality, which requires the parties and courts to conduct a step-by-step analysis, differentiates proportionality from other standards of review.³⁵ To illustrate, consider unreasonableness as a comparative example. This standard of review mandates that decisionmakers should take all relevant considerations into account and exclude all irrelevant ones.³⁶ Whenever making decisions, the legitimate aims, the suitability of the measure to be taken, and the availability of a less invasive alternative are relevant factors that the decisionmaker should consider.³⁷ If the decisionmaker fails to take these factors into account, they could hardly prove the rationality of their decisions. However, unreasonableness lacks a rigorously formulated analytical framework that could guide the parties and courts in presenting and assessing multiple considerations in a reliable and organized manner.³⁸

The second core feature of proportionality is high-level human rights protection. Most countries adopting proportionality expect subsequent heightened scrutiny in human rights violation cases.³⁹ This expectation is premised on the normative importance of human rights, which

³⁰ Jackson, *supra* note 4, at 3142; Vicki C. Jackson, *Being Proportional About Proportionality*, 24 CONST. COMMENT. 803, 809 (2004).

³¹ *Kennedy v. Charity Com'n* [2014] UKSC 20, [54] (appeal taken from Eng.).

³² Mark Tushnet, *Is there a Doctrine of Proportionality in Asia (or Anywhere)?*, in PROPORTIONALITY IN ASIA, *supra* note 19, at 274.

³³ Yossi Nehushtan, *The Non-Identical Twins in UK Public Law: Reasonableness and Proportionality*, 50 ISR. L. REV. 69, 75–77 (2017); HARRY WOOLF ET AL., *DE SMITH'S JUDICIAL REVIEW* 642 (8th ed. 2018); Jackson, *supra* note 4, at 3099.

³⁴ Shiling Xiao, *Proportionality, Unreasonableness, and A Unified Model: Reframing the Spectrum of Intensity of Judicial Review*, 51 H.K.L.J. 85, 100–02 (2021).

³⁵ Tushnet, *supra* note 32, at 270.

³⁶ *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.* [1948] 1 KB 223 at 229 (Eng.).

³⁷ Nehushtan, *supra* note 33, at 75.

³⁸ Xiao, *supra* note 34, at 102.

³⁹ Cora Chan, *Proportionality and Invariable Baseline Intensity of Review*, 33 LEG. STUD. 1, 8 (2013).

should be satisfied and realized to the maximum extent.⁴⁰ Human rights disputes lead to a consideration of alternatives so as to keep the intrusion of human rights to a minimum.⁴¹ Proportionality is meant to be “a highly intrusive standard of review,”⁴² providing a higher level of protection for human rights as compared to its rivals. Two subsets of proportionality, the necessity test and proportionality in the strict sense, are considered the most protective of human rights.⁴³ Proportionality precludes the adoption of formal deference doctrines.⁴⁴ If there is a spectrum of intensity of judicial review, then proportionality is meant to be located at the intense side and guide vigorous scrutiny.⁴⁵ If an apex court aims to build effective rights protection, then embracing proportionality is “the single most important doctrinal move a high court can make.”⁴⁶

While directing attention to a particular account of proportionality, it is worth addressing some potential misunderstandings. This Article does not advance a covert claim that the standard model is the only “correct” version, and that courts must use the four subtests and rigidly exert the most rigorous scrutiny in each case. Instead, as a doctrinal standard, proportionality is flexible and has the capability to adapt to diverse purposes and circumstances across jurisdictions.⁴⁷ However, regardless of variations, proportionality is meant to be a structured, strict approach to reviewing human rights violations, rejecting deference-infused inquiry.

The structured analytical framework and high-level human rights protection jointly distinguish proportionality from rival standards of review.⁴⁸ Moreover, these fundamentals serve as a benchmark against which the counter currents of proportionality can be identified. Any judicial application of this doctrine that lacks any of these fundamentals can be considered sham proportionality.

⁴⁰ ALEXY, *supra* note 19, at 51.

⁴¹ PAUL CRAIG, ADMINISTRATIVE LAW 628–29 (6th ed., 2010).

⁴² STONE SWEET & MATHEWS, *supra* note 4, at 4.

⁴³ Talya Steiner, et al., *Necessity or Balancing: The Protection of Rights Under Different Proportionality Tests—Experimental Evidence*, 20 INT’L J. CONST. L. 642, 642–43 (2022).

⁴⁴ Stone Sweet, *supra* note 19, at 550.

⁴⁵ Chan, *supra* note 39, at 6–7.

⁴⁶ Stone Sweet, *supra* note 19, at 542.

⁴⁷ Julian Rivers, *Proportionality and Variable Intensity of Review*, 65 CAMBRIDGE L.J. 174, 202–03, 207 (2006).

⁴⁸ AHARON BARAK, THE JUDGE IN A DEMOCRACY 69 (2006); Moshe Cohen-Eliya & Iddo Porat, *American Balancing and German Proportionality: The Historical Origins*, 8 INT’L J. CONST. L. 263, 263 (2010).

II. ABANDONING PROPORTIONALITY

Proportionality, an imported standard of judicial review, was successfully embedded in the Canadian and British common law systems and attained a status of general and essential principle in public law, especially in human rights adjudications.⁴⁹ Long before proportionality, unreasonableness was the orthodox common law standard for reviewing government actions in Canada and the United Kingdom.⁵⁰ A number of recent cases indicate that the Supreme Court of Canada (SCC) and the Supreme Court of the United Kingdom (UKSC) are directing the courts to move back to unreasonableness in place of proportionality in judicial review of government action, even when human rights and freedoms are involved.⁵¹

A. THE CASE OF CANADA

In Canadian administrative law, patent unreasonableness is the conventional standard of review.⁵² The notion of patent unreasonableness is difficult to define precisely.⁵³ A patently unreasonable decision has also been described as “clearly irrational” or “evidently not in accordance with reason.”⁵⁴ When employing this standard, Canadian courts usually intervene if an administrative decision is “so patently unreasonable that its construction cannot be rationally supported by the relevant legislation,”⁵⁵ if a decision’s defect is immediate and obvious,⁵⁶ or if a decision is “so flawed that no amount of curial deference can justify letting it stand.”⁵⁷ One can tell from these expressions that patent unreasonableness is a deferential standard of review that sets up a high threshold of judicial intervention.

In the late 1990s, a relatively stricter standard of review known as reasonableness *simpliciter* was introduced.⁵⁸ The difference between

⁴⁹ Lord Carnwath, *From Rationality to Proportionality in the Modern Law*, 44 H.K.L.J. 447, 454, 455 n.41, 456–57 (2014).

⁵⁰ WOOLF ET AL., *supra* note 33, at 597, 654.

⁵¹ See generally *Canada (Minister of Citizenship and Immigr.) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653; *Pham v. Sec’y of State for the Home Dep’t* [2015] UKSC 19 (appeal taken from Eng.).

⁵² Guy Régimbald, *Correctness, Reasonableness and Proportionality: A New Standard of Judicial Review*, 31 MAN. L.J. 239, 258–59 (2005).

⁵³ *Voice Const. Ltd. v. Const. & General Workers’ Union Local 92*, 2004 SCC 23, [2004] 1 S.C.R. 609, para. 18 (Can.).

⁵⁴ *Canada (Att’y General) v. Pub. Serv. All.*, [1993] 1 S.C.R. 941, 963–64.

⁵⁵ *C.U.P.E. v. N.B. Liquor Corp.*, [1979] 2 S.C.R. 227, 237.

⁵⁶ *C.U.P.E. v. Ontario (Minister of Lab.)*, 2003 SCC 29, [2003] 1 S.C.R. 539, para. 165.

⁵⁷ *L. Soc’y of N.B. v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, para. 52.

⁵⁸ *Canada (Dir. of Investigation and Rsch.) v. Southam Inc.*, [1997] 1 S.C.R. 748, 765.

patent unreasonableness and reasonableness *simpliciter* is the degree of intensity of judicial review.⁵⁹ In 2008, the SCC collapsed the two unreasonableness standards into one reasonableness standard in *Dunsmuir v. New Brunswick*.⁶⁰ The SCC pointed out that a single standard shifted the debate “from choosing between two standards of reasonableness that represent a different level of deference to a debate within a single standard of reasonableness to determine the appropriate level of deference.”⁶¹

In 1982, Canada adopted the Charter of Rights and Freedoms as part of its constitution.⁶² Section 1 of the Charter guarantees the rights and freedoms “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”⁶³ Although section 1 of the Charter does not mention the principle of proportionality, the SCC understood that this clause requires legislation that limits rights and freedoms to achieve sufficiently important government objectives and demands that the means to achieve this objective be reasonable and proportionate.⁶⁴

In *R. v. Oakes* in 1986, which involved the Narcotic Act that established a rebuttable presumption that a person found to possess drugs was trafficking the drugs, the SCC introduced proportionality.⁶⁵ Mr. Oakes argued that the act violated his right to be presumed innocent under section 11(d) of the Charter.⁶⁶ The SCC established a two-step approach to examine whether a limit on a Charter right is demonstrably justified in a free and democratic society.⁶⁷ First, the objective—which the measures limiting a Charter right or freedom are designed to serve—must be “of sufficient importance to warrant overriding a constitutionally protected right or

⁵⁹ *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, para. 34.

⁶⁰ *Id.*

⁶¹ *Id.* para. 139 (emphasis omitted).

⁶² Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

⁶³ *Id.* § 1.

⁶⁴ *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 351–52 (“At the outset, it should be noted that not every government interest or policy objective is entitled to s. 1 consideration. Principles will have to be developed for recognizing which government objectives are of sufficient importance to warrant overriding a constitutionally protected right or freedom. Once a sufficiently significant government interest is recognized then it must be decided if the means chosen to achieve this interest are reasonable—a form of proportionality test. The court may wish to ask whether the means adopted to achieve the end sought do so by impairing as little as possible the right or freedom in question.”).

⁶⁵ [1986] 1 S.C.R. 103, 116, 139.

⁶⁶ *Id.* at 111.

⁶⁷ *Id.* at 138.

freedom.”⁶⁸ Second, to show that the means chosen are reasonable and demonstrably justified, a three-step proportionality test is conducted: (1) the measures adopted must be carefully designed to achieve the objective in question, (2) the means should impair “as little as possible” the right or freedom in question, and (3) there must be a proportionality between the effects of the measures and the objective which has been identified as of “sufficient importance.”⁶⁹ Since *Oakes*, proportionality has played an essential and irreplaceable role in Canadian constitutional law and judicial review of rights limitation clauses.⁷⁰

When initially applying proportionality, the SCC intended to extend the reach of this doctrine to administrative law and judicial review of discretionary administrative decisions.⁷¹ After all, constitutional review of legislation and judicial review of administrative decisions sometimes share the same purpose of protecting individual rights against arbitrary state power.⁷² In *Slaight Communications Inc. v. Davidson* in 1989, the SCC for the first time applied proportionality to an administrative decision that raised Charter issues.⁷³ In this case, the respondent was dismissed by his employer, the applicant.⁷⁴ The respondent filed a complaint under the Canada Labor Code.⁷⁵ The adjudicator ordered that the applicant give the respondent a letter of recommendation and refrain from speaking further about the respondent.⁷⁶ The applicant challenged the adjudicator’s order on the grounds that it violated its freedom of expression under section 2(b) of the Charter.⁷⁷ Writing for the majority, Chief Justice Dickson concluded that unreasonableness is less onerous and precise than proportionality, and it “rests to a large extent on unarticulated and undeveloped values and lacks the same degree of structure and sophistication.”⁷⁸ In agreement, Justice Lamer stated that to determine whether a decision was consistent with

⁶⁸ *Id.* at 138 (quoting *Big M Drug Mart Ltd.*, 1 S.C.R. at 352).

⁶⁹ *Id.* at 139 (quoting *Big M Drug Mart Ltd.*, 1 S.C.R. at 352).

⁷⁰ See Lorian Hardcastle, *Proportionality Analysis by the Canadian Supreme Court*, in *PROPORTIONALITY IN ACTION: COMPARATIVE AND EMPIRICAL PERSPECTIVES ON THE JUDICIAL PRACTICE* 134, 134–35 (Mordechai Kremnitzer et al. eds., 2020).

⁷¹ Richard Stacey, *A Unified Model of Public Law: Charter Values and Reasonableness Review in Canada*, 71 U. TORONTO L.J. 338, 343 (2021).

⁷² WOOLF ET AL., *supra* note 33, at 11–12.

⁷³ [1989] 1 S.C.R. 1038, 1039.

⁷⁴ *Id.* at 1039.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 1048.

⁷⁸ *Id.* at 1049.

the Charter, “the test that must be applied in such an assessment has been defined by my brother Dickson C.J. in *Oakes*.”⁷⁹

The introduction of proportionality to judicial review of discretionary administrative actions was not without controversies. A debate on the roles of proportionality and unreasonableness in judicial review was once heated.⁸⁰ Some SCC judges, such as Justice Rosalie Abella and Justice Marie Deschamps, were skeptical about applying proportionality outside of the context of generally applicable legislative provisions, so they argued for retaining unreasonableness to scrutinize administrative decisions.⁸¹ A concern is that if courts bypass the common law and go straight to proportionality, “a rich source of thought and experience about law and government will be overlooked or lost together.”⁸² Another concern is that the application of proportionality downgrades the role of administrative law to the “formal determination of jurisdiction on the basis of statutory interpretation,” resulting in “an impoverished picture of administrative law.”⁸³ Since *Slaight*, there are two strands of opinion on which framework is appropriate in reviewing discretionary administrative acts that violate Charter rights.⁸⁴ The first favors proportionality, considering it an appropriate approach to reviewing administrative decisions. The second favors unreasonableness.

In *Doré v. Barreau du Québec* in 2012, the SCC rejected proportionality, moving toward making unreasonableness the default standard of

⁷⁹ *Id.* at 1081.

⁸⁰ This topic has drawn heated debates in the common law world, including the United Kingdom, Canada, New Zealand, and Hong Kong. The representative scholars and opinion in favour of the bifurcated model include: Taggart, *supra* note 12, at 452; Tom Hickman, *Problems for Proportionality*, 2010 N.Z.L. REV. 303, 308 (2010); Jeff King, *Proportionality: A Halfway House*, 2010 N.Z.L. REV. 327, 359 (2010); Jason Varuhas, *Against Unification, in THE SCOPE AND INTENSITY OF SUBSTANTIVE REVIEW: TRAVERSING TAGGART’S RAINBOW 91* (Hanna Wilberg & Mark Elliott eds., 2015). The leading scholars and arguments of the parallel model include: Paul Craig, *Proportionality, Rationality, and Review*, 2010 N.Z.L. REV. 265, 267 (2010); Johannes Chan, *Proportionality after Hysan: Fair Balance, Manifestly Without Reasonable Foundation and Wednesbury Unreasonableness*, 49 H.K.L.J. 265, 266 (2019); Murray Hunt, *Against Bifurcation, in A SIMPLE COMMON LAWYER: ESSAYS IN HONOUR OF MICHAEL TAGGART 99, 100* (David Dyzenhaus et al. eds., 2009).

⁸¹ *Multani v. Comm’n Scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256, para. 85.

⁸² John Evans, *The Principles of Fundamental Justice: The Constitution and the Common Law*, 29 OSGOODE HALL L.J. 51, 73 (1991).

⁸³ Geneviève Cartier, *The Baker Effect: A New Interface Between the Canadian Charter of Rights and Freedoms and Administrative Law—The Case of Discretion*, in *THE UNITY OF PUBLIC LAW* 61, 68–69 (David Dyzenhaus ed., 2004).

⁸⁴ Christopher D. Bredt & Ewa Krajewska, *Doré: All That Glitters is Not Gold*, 67 SUP. CT. L. REV. 339, 343 (2014).

review for administrative decisions.⁸⁵ In this case, Mr. Doré wrote a letter to a judge of a criminal proceeding in which he was the counsel.⁸⁶ The Disciplinary Council of the Barreau du Québec found the letter offensive, rude, and insulting, concluding that it violated art. 2.03 of the Code of Ethics of Advocates.⁸⁷ The Disciplinary Council decided to reprimand Mr. Doré and suspended his ability to practice law for twenty-one days.⁸⁸ Mr. Doré appealed the Disciplinary Council's decision, arguing that the decision infringed on his freedom of expression as protected by section 2(b) of the Charter.⁸⁹ Before the SCC, Mr. Doré did not challenge the constitutionality of the Code of Ethics of Advocates provision; rather, he challenged the Disciplinary Council's application of it.⁹⁰

This challenge raised two questions significant to Canadian public law: (1) What is the proper standard of review for scrutinizing an administrative decision alleged to violate a Charter right? And (2) Does the presence of a Charter issue result in the replacement of unreasonableness with proportionality?⁹¹ Writing for the court, Justice Abella held that to determine whether administrative decisionmakers have exercised their statutory discretion in accordance with the Charter protections, the review should adopt an administrative law approach, not a section 1 *Oakes* analysis.⁹²

In *Doré* and subsequent cases, the SCC elaborated on the difficulties of applying proportionality to review administrative decisions.⁹³ Under the first subtest of proportionality, the legitimate aim test, when reviewing a discretionary administrative decision under a statutory provision whose constitutionality is not impugned, "it is conceptually difficult to see what the 'pressing and substantial' objective of a decision is, or who would

⁸⁵ 2012 SCC 12, [2012] 1 S.C.R. 395, 397; David Mullan, *Unresolved Issues on Standard of Review in Canadian Judicial Review of Administrative Action—The Top Fifteen*, 42 *ADVOC. Q.* 1, 3 (2013); Stacey, *supra* note 72, at 340.

⁸⁶ *Doré*, 1 S.C.R. at 396.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* para. 2.

⁹¹ *Id.* para. 3.

⁹² *Id.* para. 37.

⁹³ *Id.* para. 39; *Loyola High Sch. v. Quebec (Att'y Gen.)*, 2015 SCC 12, [2015] 1 S.C.R. 613, para. 4; *Groia v. L. Soc'y of Upper Can.*, 2018 SCC 27, [2018] 1 S.C.R. 772, para. 43; *L. Soc'y of B.C. v. Trinity W. Univ.*, 2018 SCC 32, [2018] 2 S.C.R. 293, para. 57; *see also* Mark D. Walters, *Respecting Deference as Respect: Rights, Reasonableness and Proportionality in Canadian Administrative Law*, in *THE SCOPE AND INTENSITY OF SUBSTANTIVE REVIEW: TRAVERSING TAGGART'S RAINBOW*, *supra* note 80, at 395.

have the burden of defining and defending it.”⁹⁴ In *Law Society of British Columbia v. Trinity Western University*, where the SCC followed the *Doré* approach, Chief Justice McLachlin explained that the rational-connection and least-intrusive-means subtests were not useful to resolve administrative decision challenges either:

Proportionality requires that the state objective capable of overriding a right be rationally connected to the decision; in the administrative context, where the decision falls within the scope of an unchallenged law, usually this is the case. Minimal impairment—whether the administrative decision infringes a Charter right more than necessary or is broader than reasonably required—arises, but the question is not whether “the law” catches more conduct than it should, as under *Oakes*, but whether an alternative less-infringing decision was possible. Particularly where the decision is a choice between only two options (for example, to accredit or not), this step will also easily be met.⁹⁵

If the SCC framed a doorway for returning to the use of the unreasonableness standard to review administrative decisions in *Doré*, it later went through it by confirming that unreasonableness should be the default standard of judicial review whenever a court scrutinizes an administrative decision. In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, Mr. Vavilov tried to renew his Canadian passport and was rejected twice after officials asked him to prove he was Canadian.⁹⁶ The Registrar of Citizenship decided that Mr. Vavilov was not a Canadian citizen because his parents were undercover Russian spies.⁹⁷ Mr. Vavilov asked the Federal Court to review the Registrar’s decision, and the Federal Court upheld it.⁹⁸

The Federal Court of Appeal reversed the decision, saying it was unreasonable.⁹⁹ The SCC unanimously agreed. In its judgment, the SCC made a clear statement that the presumption of unreasonableness review is the “starting position” when courts scrutinize an administrative decision.¹⁰⁰ It also added that a derogation from this presumption would be warranted and the standard of correctness, a more intrusive standard, would only be applied in limited situations, such as those involving constitutional questions, general questions of law of central importance to the legal system, questions regarding the jurisdictional boundaries between

⁹⁴ *Doré*, 1 S.C.R., para. 38.

⁹⁵ 2 S.C.R., para. 114.

⁹⁶ 2019 SCC 65, [2019] S.C.R. 653, para. 150.

⁹⁷ *Id.* para. 146.

⁹⁸ *Id.*

⁹⁹ *Id.* para. 166.

¹⁰⁰ *Id.* para. 49.

two or more administrative bodies, questions of legislative intent, and strict review required by the rule of law.¹⁰¹ Eventually, unreasonableness prevailed again in Canadian administrative law.

B. THE CASE OF THE UNITED KINGDOM

Unreasonableness holds a place between illegality and procedural impropriety in the trilogy of British common law standard of judicial review.¹⁰² *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp*¹⁰³ is considered the origin of unreasonableness in modern law.¹⁰⁴ In this case, the applicant was granted a license by the Wednesbury Corporation in Staffordshire to operate a cinema on the condition that no children under fifteen, whether accompanied by an adult or not, be admitted on Sundays.¹⁰⁵ The applicant sought a declaration that the condition was ultra vires and unreasonable.¹⁰⁶ Lord Greene set out to articulate the standard of unreasonableness:

A person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably.' Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority.¹⁰⁷

The threshold of unreasonableness established in *Wednesbury* was very high. Lord Greene stated that the court could only intervene "if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it."¹⁰⁸ Paul Craig, emeritus professor at the University of Oxford, once contended that "there can be no pretense of any meaningful substantive oversight and it is difficult to think of a single real case in which the facts meet this standard."¹⁰⁹ This high threshold

¹⁰¹ *Id.* paras. 53, 69.

¹⁰² *Council of Civ. Serv. Union v. Minister for Civ. Serv.* [1985] AC (HL) 374, 410 (appeal taken from Eng.).

¹⁰³ [1948] 1 KB 223 at 229.

¹⁰⁴ Cohn, *supra* note 12, at 604.

¹⁰⁵ *Wednesbury* 1 KB at 234.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 229.

¹⁰⁸ *Id.* at 230.

¹⁰⁹ Paul Craig, *The Nature of Reasonableness Review*, 66 CURRENT LEGAL PROBS. 131, 161 (2013).

associated with unreasonableness is often criticized for being inadequate in protecting individual rights, and more intense scrutiny was called for when human rights and other important interests were involved.¹¹⁰

In the 1987 case, *R. v. Secretary of State for the Home Department, Ex p Bugdaycay*, wherein the claimants challenged a refusal to grant asylum, Lord Bridge introduced “anxious scrutiny” for the first time, holding that “when an administrative decision under challenge is said to be one which may put the applicant’s life at risk, the basis of the decision must surely call for the most anxious scrutiny.”¹¹¹ Anxious scrutiny does not contain any methodological innovation. It takes the *Wednesbury* unreasonableness approach, asking whether a decision-maker considers all relevant factors and excludes all irrelevant ones.¹¹² Therefore, anxious scrutiny is no more than a stronger version of the unreasonableness review.¹¹³ However, this heightened scrutiny quickly spread beyond the right to life to human rights in general.¹¹⁴ One of the reasons for its popularity is its ability to bridge the gap between the strong proportionality test under the European Convention on Human Rights (ECHR) and the weak *Wednesbury* unreasonableness standard.¹¹⁵

Nevertheless, the European Court of Human Rights (ECtHR) still determined that anxious scrutiny failed to provide enough protection for the rights under the ECHR. In *Smith and Grady v. United Kingdom*, the ECtHR held that anxious scrutiny was inadequate to address the question of whether the interference with the applicants’ right to private life achieved a pressing social need or was proportionate to the national security and public order aims pursued.¹¹⁶

The Human Rights Act (HRA) of 1998 provided a solution to the divergence between the ECtHR and British courts by establishing a statutory framework for domestic courts to enforce ECHR and proportionality.¹¹⁷ In *R. v. Secretary of State for the Home Department, Ex p Daly*, a case concerning whether cell searches contravened a prisoner’s right to private correspondence with their solicitor, Lord Steyn praised

¹¹⁰ Carnwath, *supra* note 49, at 449; WOOLF ET AL., *supra* note 33, at 646.

¹¹¹ [1987] AC (HL) 514, 522–23 (appeal taken from Eng.).

¹¹² Carnwath, *supra* note 49, at 453.

¹¹³ Xiao, *supra* note 34, at 91.

¹¹⁴ *R. v. Sec’y of State for the Home Dep’t, ex p. Brind* [1991] 1 AC 696 (HL) 697 (appeal taken from Eng.); *R. v. Ministry of Def., ex p. Smith* [1996] QB 517 at 556.

¹¹⁵ Carnwath, *supra* note 49, at 454.

¹¹⁶ (1999) 29 EHRR 493 [137].

¹¹⁷ Human Rights Act 1998, c. 42, § 2 (UK), <https://www.legislation.gov.uk/ukpga/1998/42/section/2> [<https://perma.cc/2EVL-6KHE>].

proportionality for being “more precise and more sophisticated than the traditional grounds of review” and stated that proportionality was the correct standard of review when considering whether interference with individual rights was necessary to achieve the legitimate aims recognized by the ECHR.¹¹⁸ Since *Daly*, proportionality has continued gaining popularity and expanding its application territory in the United Kingdom beyond the ECHR to a broader public law sphere.¹¹⁹

Like in Canada, proportionality and unreasonableness represented two “gateways” for judicial review in the United Kingdom.¹²⁰ Courts had no guidance on how to choose between them, which resulted in a problem of legal uncertainty.¹²¹ It has been difficult for the Supreme Court of the United Kingdom (UKSC) to establish a consistent approach to the review of administrative decisions.¹²²

In its recent decisions, the UKSC took the same approach as the SCC to tackle the two-gateways issue in British judicial review—a series of cases since 2014 has demonstrated a movement toward unreasonableness as a default standard of judicial review.¹²³ In *Kennedy v. Charity Commission*, the applicant, Mr. Kennedy, made a request to the Charity Commission for disclosure of information related to three inquiries into the “Mariam Appeal.”¹²⁴ The Charity Commission refused the request on the grounds of section 32 of the Freedom of Information Act of 2000 (FOIA). Mr. Kennedy challenged the Charity Commission’s refusal to disclose information about the inquiry, arguing it infringed upon his freedom of expression under Article 10 of the ECHR. The UKSC did not accept Mr. Kennedy’s argument. Instead, it started with domestic laws and interpreted section 32 of the FOIA in the way of ordinary common law construction.¹²⁵ The UKSC emphasized that domestic laws provided the same favorable protections to Mr. Kennedy regarding disclosure as that which

¹¹⁸ [2001] UKHL 26, [27] (appeal taken from Eng.).

¹¹⁹ *R. v. Sec’y of State for Def., ex p. Association of British Civilian Internees (Far East Region)* [2003] 3 WLR 80, [34].

¹²⁰ *Kay v. LBC* [2006] UKHL 10, [9] (appeal taken from Eng.); *Doherty v. Birmingham City Council* [2008] UKHL 57, [10] (appeal taken from Eng.).

¹²¹ Cohn, *supra* note 12, at 626.

¹²² *Id.* at 626–27.

¹²³ *E.g.* *Kennedy v. Charity Comm’n* [2014] UKSC 20, [38] (appeal taken from Eng.); *Pham v. Sec’y State for Home Dep’t* [2015] UKSC 19 [94], [96]–[98] (appeal taken from Eng.); *Keyu v. SOS for Foreign and Commonwealth Affs.* [2015] UKSC 69, [133] (appeal taken from Eng.).

¹²⁴ [2014] UKSC 20, [4]. “Mariam Appeal” was a political campaign established in the UK between 1998 and 2003 that aimed to provide medicines, medical equipment, and medical care to the people in Iraq. *Id.* [160].

¹²⁵ *Id.* [24]–[34].

should be provided under Article 10 of the ECHR.¹²⁶ The UKSC did not conduct the proportionality test, although the appellant invited the court to do so. The UKSC asserted that both proportionality and unreasonableness involved considerations of weight and balance, with variable intensity of review.¹²⁷ It held that “the natural starting point in any dispute is to start with domestic law, and it is certainly not to focus exclusively on the Convention rights, without surveying the wider common law scene.”¹²⁸ The UKSC continued stating that unreasonableness has been developed over the last decades, stressing that

the common law no longer insists on the uniform application of the rigid test of irrationality once thought applicable under the so-called *Wednesbury* principle. The nature of judicial review in every case depends upon the context The courts have developed an issue-sensitive scale of intervention to enable them to perform their constitutional function in an increasingly complex polity . . . at one end of the spectrum, a ‘low intensity’ of review is applied to cases involving issues ‘depending essentially on political judgment,’ where the decisions related to a matter of national economic policy, and the court would not intervene outside of ‘the extremes of bad faith, improper motive or manifest absurdity.’ At the other end of the spectrum are decisions infringing fundamental rights where unreasonableness is not equated with ‘absurdity’ or ‘perversity,’ and a ‘lower’ threshold of unreasonableness is used.¹²⁹

The UKSC’s opinion clearly states that unreasonableness is a capable and applicable standard of review for scrutinizing administrative decisions, even if the convention rights and freedoms are involved. This position has been repeated and reinforced in later decisions. In *Keyu and others v. Secretary of State for Foreign and Commonwealth Affairs and another*, a case concerning judicial review of the refusal to hold a public inquiry into events in which twenty-four unarmed civilians were killed during the Malaya emergency in 1948, the appellants raised an argument that the court should replace the traditional unreasonableness standard with proportionality.¹³⁰ However, the UKSC rejected this argument and reiterated its commitment to common law unreasonableness as the approach to the review of administrative action.¹³¹

¹²⁶ *Id.* [35].

¹²⁷ *Id.* [54].

¹²⁸ *Id.* [46].

¹²⁹ *Id.* [53].

¹³⁰ [2015] UKSC 69, [6] (appeal taken from Eng.).

¹³¹ *Id.* [143], [273]–[274].

To sum up, the SCC and the UKSC, two influential common law supreme courts, made a U-turn back to unreasonableness, directing the lower courts to depart from proportionality and rely on unreasonableness when reviewing administrative actions, including those that impact rights, freedom, and human rights values. Proportionality is losing the terrain it conquered in Canada and the United Kingdom, while reasonableness is recovering the lost land and prevailing again.

III. WEAKENING OF PROPORTIONALITY

This section examines the second type of counter current as evidenced by the practice of the Court of Final Appeal of Hong Kong (CFA) and the Taiwan Constitutional Court (TCC). Both courts invoked proportionality with low intensity of review, thereby recasting this right-protective doctrine as a form of deference-infused *Wednesbury* unreasonableness review or rational-basis test. The CFA and the TCC are substantively departing from one of the core features of proportionality—a highly intrusive standard of review that provides a high level of protection for human rights against state power. In contrast to the SCC and the UKSC, which eschew proportionality and rely on common law unreasonableness in their judicial review of administrative actions, the CFA and TCC’s weakening of proportionality is hidden, because they still claim they use proportionality and its subtests. However, a weakened proportionality is no longer protective of human rights and is not proportionality in the true sense.

A. THE CASE OF HONG KONG

British colonization profoundly informed the legal system of Hong Kong. This is seen in the modelling of its legal system on British law and legal traditions.¹³² Hong Kong courts have from time to time applied *Wednesbury* unreasonableness in their judicial review practice before the import of proportionality.¹³³

The Court of Appeal introduced proportionality to Hong Kong in *R. v. Sin Yau Ming* in 1992, before the transfer of sovereignty from the United Kingdom to China on July 1, 1997.¹³⁴ The issue in the *Sin Yau*

¹³² STEPHEN THOMSON, *ADMINISTRATIVE LAW IN HONG KONG* 25 (2018).

¹³³ Michael Ramsden, *The Future of Wednesbury Unreasonableness in the Substantive Review of Administrative Discretion: A Hong Kong Perspective*, *CHINESE J. COMPAR. L.* 1, 4 (2020).

¹³⁴ [1992] 1 H.K.C.L.R. 127, 140–41 (C.F.A.); Rehan Abeyratne, *More Structure, More Deference: Proportionality in Hong Kong*, in *PROPORTIONALITY IN ASIA*, *supra* note 19, at 28–29; Alec Stone

Ming case was whether a mandatory presumption of guilt contained in sections 46 and 47 of the Dangerous Drugs Ordinance (Cap. 134) violated the right of the presumption of innocence enshrined in the Hong Kong Bill of Rights Ordinance (BORO). The BORO was enacted in 1991 to make the International Covenant on Civil and Political Rights (ICCPR) enforceable in Hong Kong.¹³⁵ The Court of Appeal asserted that to interpret the BORO, the Hong Kong courts would no longer employ the ordinary canon of construction of law nor the dicta of the common law.¹³⁶ Instead, the courts would look to the purposes of the ICCPR and ensure the legislation was consistent with the Covenant.¹³⁷ The Court of Appeal cited the leading Canadian *Oakes* case, asserting that although the BORO contained no “justification” provision, reference to a “free and democratic society” implied such a proportionality test was applicable to Hong Kong.

After the British handover of Hong Kong to China, the CFA, the newly established apex court of this region, continued to rely on proportionality to adjudicate human rights cases.¹³⁸ *HKSAR v. Ng Kung Siu and Another* was the first landmark case in which the CFA applied proportionality.¹³⁹ Nonetheless, the application of proportionality was neither complete nor structured in that case.¹⁴⁰ The CFA only applied the legitimate aim test and necessity test. In 2005, the CFA added the suitability test to the formula of proportionality in *Leung Kwok Hung and Others v. HKSAR*,¹⁴¹ in which it articulated the formula that was used for the next decade. After examining the aims pursued, the court has to find that: “(i) the restriction [is] rationally connected with one or more of the legitimate purposes; (ii) the means used to impair the right . . . [are] no more than necessary to accomplish the legitimate purpose in question.”¹⁴² In 2016, the CFA eventually added the balancing test to proportionality in *Hysan Development Co Ltd v. Town Planning Board*.¹⁴³

Sweet & Jud Mathews, *Proportionality and Rights Protection in Asia: Hong Kong, Malaysia, South Korea, Taiwan – Whither Singapore?*, 29 SING. ACAD. L. J. 774, 789 (2017); DANNY GITTINGS, INTRODUCTION TO THE HONG KONG BASIC LAW 291 (2d ed. 2016).

¹³⁵ YASH GHAI, HONG KONG’S NEW CONSTITUTIONAL ORDER: THE RESUMPTION OF CHINESE SOVEREIGNTY AND THE BASIC LAW 250–51 (2d ed. 1999).

¹³⁶ *Sin Yau Ming*, 1 H.K.C.L.R. at 141.

¹³⁷ *Id.* at 140.

¹³⁸ See Abeyratne, *supra* note 134, at 30–31.

¹³⁹ [1999] 2 H.K.C.F.A.R. 442 (C.F.A.).

¹⁴⁰ See Abeyratne, *supra* note 134, at 32.

¹⁴¹ [2005] 8 H.K.C.F.A.R. 229 (C.F.A.).

¹⁴² *Id.* at 253; Abeyratne, *supra* note 134, at 34–35.

¹⁴³ [2016] 19 H.K.C.F.A.R. 372, 406 (C.F.A.).

In the past two decades after the handover, proportionality played a role of a pillar standard in the CFA's judicial review, evidenced by the wide application in a large number of cases pertaining to the Legislative Council election,¹⁴⁴ freedom of expression,¹⁴⁵ freedom of assembly,¹⁴⁶ rights in criminal procedure,¹⁴⁷ equal treatment,¹⁴⁸ right to travel,¹⁴⁹ socio-economic rights,¹⁵⁰ and other topics.

In the CFA's course of applying and developing proportionality, one of the salient features is sophisticating the proportionality test by introducing a sliding scale of review to the third subtest—the necessity test.¹⁵¹ According to orthodox wisdom, the core of the necessity test is the least-intrusive-means test or a requirement of “minimum impairment.”¹⁵² Legislatures and executive authorities must adopt the least intrusive means among all viable means that promote legitimate aims.¹⁵³ Nonetheless, the CFA does not take this rigid and strict reading of the necessity test. Instead, it holds that the courts should not invalidate legislation or quash an executive act just because there are alternative, potentially less intrusive means. The court states, “A judge would be unimaginative indeed if he could not come up with something a little less ‘drastic’ or a little less ‘restrictive’ in almost any situation, and thereby enable himself to vote to strike legislation down.”¹⁵⁴ The courts should allow the government to consider a wide range of alternative means, and it should intervene if the authority fails to consider and adopt significantly less intrusive means.¹⁵⁵ The CFA calls this a test of “reasonable necessity.”¹⁵⁶

¹⁴⁴ See generally *Mok Charles v. Tam Wai Ho*, [2010] 13 H.K.C.F.A.R. 762 (C.F.A.); *Kwok Cheuk Kin v. Sec'y for Const. and Mainland Affs.*, [2017] 5 H.K.L.R.D. 353 (C.A.).

¹⁴⁵ *HKSAR v. Fong Kwok Shan Christine*, [2017] 20 H.K.C.F.A.R. 425, 451 (C.F.A.).

¹⁴⁶ *Leung Kwok Hung v. HKSAR*, [2005] 8 H.K.C.F.A.R. 229, 230 (C.F.A.).

¹⁴⁷ *Koon Wing Yee v. Insider Dealing Tribunal*, [2008] 11 H.K.C.F.A.R. 170, 172 (C.F.A.).

¹⁴⁸ *Sec'y for Just. v. Yau Yuk Lung*, [2007] 10 H.K.C.F.A.R. 335, 336 (C.F.A.); *QT v. Dir. of Immigr.*, [2018] 21 H.K.C.F.A.R. 324, 328 (C.F.A.); *Leung Chun Kwong v. Sec'y for Civ. Serv.*, [2019] 22 H.K.C.F.A.R. 127, 141 (C.F.A.); *W v. Registrar of Marriages*, [2013] 16 H.K.C.F.A.R. 112, 113 (C.F.A.).

¹⁴⁹ *Off. Receiver v. Zhi Charles*, [2015] 18 H.K.C.F.A.R. 467, 479–80 (C.F.A.).

¹⁵⁰ *Kong Yunming v. Dir. of Soc. Welfare*, [2013] 16 H.K.C.F.A.R. 950, 951 (C.F.A.).

¹⁵¹ *Abeyratne*, *supra* note 134, at 37–30.

¹⁵² See *BARAK*, *supra* note 1, at 317, 321 n.13.

¹⁵³ *Alexy*, *supra* note 4, at 52.

¹⁵⁴ *Hysan Dev. Co. Ltd. v. Town Plan. Bd.*, [2016] 19 H.K.C.F.A.R. 372, 411 (C.F.A.) (quoting *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 188–89 (1979) (Blackmun, J., concurring)).

¹⁵⁵ *Id.* at 421.

¹⁵⁶ *Id.* at 409. The CFA referred to the ECtHR's opinion that necessity test requires “a reasonable relationship of proportionality between the means employed and the aim sought to be realised”

The CFA further diluted the intensity of the proportionality test by introducing a novel standard for carrying out the necessity test: the manifestly-without-reasonable-foundation test, which is a far more deferential standard than reasonable necessity.¹⁵⁷ The CFA first articulated the standard of manifestly without reasonable foundation in *Fok Chun Wa v. Hospital Authority* in 2012,¹⁵⁸ and then it reinforced the relationship between reasonable necessity, manifestly without reasonable foundation, and proportionality in *Hysan* in 2016.¹⁵⁹ In *Fok Chun Wa*, the applicant represented Mainland women who marry Hong Kong residents and hold a Two-Way Permit issued by Mainland authorities allowing them to stay in Hong Kong for up to 90 days.¹⁶⁰ She gave birth to a child at a Hong Kong public hospital, and she was asked to pay more fees for obstetric services than Hong Kong resident women. She thought this was discriminatory and challenged this arrangement on the grounds that it violated Article 25 of the Basic Law of Hong Kong and Article 22 of the BORO.

The CFA took a two-step approach to address discriminatory issues: (1) identify relevant comparators, and (2) examine whether the different treatments can be justified by the proportionality test.¹⁶¹ Before applying proportionality, the CFA stated its deferential position that “in the socio-economic context . . . considerations are best left to the executive, legislative and other authority . . . unless the solution or alternative is manifestly beyond the spectrum of reasonableness (or manifestly without reasonable foundation) the court will not interfere.”¹⁶² Chief Justice Ma articulated the standard of manifestly without reasonable foundation:

Where a number of alternatives, but reasonable, solutions to a problem exist, the court will not put itself in a place of the executive or legislature or other authority to decide which is the best option. That is not its role. The court will only interfere where the option chosen is clearly beyond the spectrum of reasonable options; in other words, the option has clearly gone too far (or further than necessary) to deal with the

and asserted that “...the words ‘no more than necessary’ do not lay down a strict, bright line test. They lay down a test of reasonable, not strict, necessity.” *Id.* at 410.

¹⁵⁷ Xiao, *supra* note 34, at 111.

¹⁵⁸ [2012] 15 H.K.C.F.A.R. 409, 441–42 (C.F.A.).

¹⁵⁹ See *Hysan Dev. Co. Ltd.*, 19 H.K.C.F.A.R. at 421 (explaining that reasonable necessity and the “manifest” standard were not independent concepts; instead, they were distinguished merely by the degree of intensity of review and located on the same continuous spectrum of the intensity of the proportionality test).

¹⁶⁰ *Fok Chun Wa*, 15 H.K.C.F.A.R. at 417.

¹⁶¹ *Id.* at 434.

¹⁶² *Id.* at 440–41.

problem. In this situation, the court will not have been satisfied under the third limb of the justification test.¹⁶³

This articulation of manifestly without reasonable foundation sounds akin to that of *Wednesbury* unreasonableness. In fact, many legal scholars criticized that by deploying manifestly without reasonable foundation, the court virtually exerts an unreasonableness test in the *Wednesbury* sense.¹⁶⁴ A close comparison between the manifestly-without-reasonable-foundation test and *Wednesbury* unreasonableness reveals that they are almost identical.¹⁶⁵ First, *Wednesbury* unreasonableness is a traditional standard employed by the British courts to demarcate the roles of the judiciary, executive, and legislature.¹⁶⁶ The Court of Appeal stated in *Wednesbury* that the court could interfere “if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it.”¹⁶⁷ By applying the manifestly-without-reasonable-foundation test, the CFA emphasized that it was not the court’s role to make decisions in place of the executive and legislature, but the court could “only interfere where the option chosen is clearly beyond the spectrum of reasonable options.”¹⁶⁸ Both standards of review require a very high threshold for judicial intervention.

Second, manifestly without unreasonable foundation and *Wednesbury* unreasonableness usually produce the same results. Permanent Justice Ribeiro commented that

in general terms, where the Board reaches decisions which are not flawed on traditional judicially reviewable grounds, any imposed restrictions which encroach upon a landowner’s property rights should be subject to constitutional review applying the “manifestly without reasonable foundation” standard. It is considered to be highly unlikely that Board decisions imposing planning restrictions arrived at lawfully and in conformity with the principles of traditional judicial review would be susceptible to constitutional review unless the measures are exceptionally unreasonable.¹⁶⁹

¹⁶³ *Id.* at 440.

¹⁶⁴ See, e.g., Stone Sweet, *supra* note 19, at 558; Chan, *supra* note 80, at 285–86; Eric Ip, *Kong Yun-ming Manifest Unreasonableness: The Doctrinal Future of Constitutional Review of Welfare Policy in Hong Kong*, 44 H.K.L.J. 55, 56–59 (2014).

¹⁶⁵ Xiao, *supra* note 34, at 105–08.

¹⁶⁶ Chan, *supra* note 80, at 285–86.

¹⁶⁷ *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.* [1948] 1 KB 223, at 230.

¹⁶⁸ *Fok Chun Wa*, 15 H.K.C.F.A.R. at 440.

¹⁶⁹ *Hysan Dev. Co. Ltd. v. Town Plan. Bd.*, [2016] 19 H.K.C.F.A.R. 372, 425 (C.F.A.).

The comparison reveals that proportionality in association with manifestly without reasonable foundation is no more than a weak standard of review, like *Wednesbury* unreasonableness. This is contrary to the core features of proportionality that are meant to enable courts to probe into governmental action more rigorously than they can using *Wednesbury* unreasonableness. Proportionality initially required “least intrusive means” or “minimum impairment.” But now, manifestly without reasonable foundation renders proportionality deviant from such requirement and *de facto* recasts of proportionality as a form of weak *Wednesbury* unreasonableness inquiry.

B. THE CASE OF TAIWAN

In Taiwan, proportionality was first applied in administrative adjudications in the 1980s and then migrated to constitutional review in the 1990s.¹⁷⁰ In 1994, the Taiwan Administrative Court declared that proportionality was a general principle of constitutional status.¹⁷¹ Two years later, the TCC first used the term “proportionality” in its reasoning for Interpretation No. 414 (1996).¹⁷²

In Interpretation No. 476 (1999), the TCC elaborated on the subtests of proportionality for the first time.¹⁷³ In this case, the TCC was

¹⁷⁰ Huang & Law, *supra* note 13, at 317.

¹⁷¹ Judgment No. 2291 of 1994 (Taiwan Admin. Ct.).

¹⁷² In J.Y. Interpretation No. 414, proportionality emerged in the TCC’s reasoning for the first time. J.Y. Interpretation No. 414 (1996), <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310595> [<https://perma.cc/5V5S5-RLBV>]. But the TCC already used the term “proportionality” in its holding of J.Y. Interpretation No. 409. See J.Y. Interpretation No. 409 (1996), <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310590> [<https://perma.cc/6UST-65JS>]. Some Taiwan scholars considered J.Y. Interpretation No. 414 as the first case where the TCC invoked proportionality. See, e.g., Chien-Chih Lin, *Proportionality in Taiwan: American-German Fusion*, in *PROPORTIONALITY IN ASIA*, *supra* note 19, at 63; Jau-Yuan Hwang (黃昭元), *Dafaguan Jieshi Shencha Biaozhun Zhi Fazhan (1996-2011): Bili Yuanze De Jishou Yu Zaidihua* (大法官解釋審查標準之發展 (1996-2011):比例原則的繼受與在地化) [Development of Standards of Review by the Constitutional Court (1996–2011): Reception and Localisation of the Proportionality Principle] 42 TAIDA FALV LUNCONG (台大法律論叢) [N.T.U. L. J.] 215, 218 (2013).

¹⁷³ Between J.Y. Interpretation No. 414 (1996) and J.Y. Interpretation No. 476 (1999), there are nine other cases in which proportionality emerged. Five out of the nine cases are constitutional reviews over statutes. See J.Y. Interpretation No. 428 (1997), <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310609> [<https://perma.cc/BB32-RSYH>]; J.Y. Interpretation No. 428 (1997), <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310609> [<https://perma.cc/U6HU-C8UH>]; J.Y. Interpretation No. 436 (1997), <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310617> [<https://perma.cc/FN7H-TY7T>]; J.Y. Interpretation No. 445 (1998), <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310626> [<https://perma.cc/4QGE-24PT>]; J.Y. Interpretation No. 452 (1998),

confronted with a thorny issue of whether the life sentence and death penalty prescribed by the Narcotics Elimination Act and Drug Control Act were constitutional. The TCC held that impugned statutes would pass the proportionality test required by Article 23 of the Taiwan Constitution if they (1) pursue legitimate purposes, (2) take necessary means, and (3) impose proper restrictions.¹⁷⁴ The TCC used the term “proper restriction,” which some scholars consider equivalent to the balancing test.¹⁷⁵ In regards to the suitability test, the TCC added it to proportionality in Interpretation No. 542 (2002).¹⁷⁶ In the last twenty-odd years, proportionality was a pillar standard of the TCC’s constitutional review. According to Chien-Chih Lin’s statistics, the TCC used proportionality in nearly one-third of its decisions (113 out of 360) between 1996 and 2018.¹⁷⁷

Like the CFA, the TCC also introduced variable intensity of review associated with proportionality. The rigor of the proportionality test has been weakened by combining proportionality with the American tiers of scrutiny.¹⁷⁸ Although Taiwan is not a common law jurisdiction and has never been occupied by the United States, the impact of American constitutional jurisprudence is evident and a part of constitutional development in Taiwan.¹⁷⁹ One crucial factor amplifying American influence in Taiwan is the education of grand justices.¹⁸⁰ Approximately 80 percent of grand justices appointed after 2003 have obtained German or American doctoral degrees.¹⁸¹ They brought what they learned overseas back to Taiwan, both in classrooms and in courtrooms.¹⁸²

<https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310633> [https://perma.cc/H9YN-QFQM]; J.Y. Interpretation No. 471 (1998), <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310652> [https://perma.cc/5RPJ-5PXD].

¹⁷⁴ J.Y. Interpretation No. 476 (1999), <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310657> [https://perma.cc/GN4E-KD87].

¹⁷⁵ Stone Sweet & Mathews, *supra* note 134, at 786; Huang & Law, *supra* note 13, at 320.

¹⁷⁶ J.Y. Interpretation No. 542 (2002), <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310723> [https://perma.cc/CR7V-GJC5].

¹⁷⁷ Lin, *supra* note 172, at 67–68.

¹⁷⁸ Shu-Peng Hwang (黃舒芃), *Bili Yuanze Jiqi Jiechenghua Caozuo: Yige Zhuoyanyu Sifayuan Shixian Shiwu Fazhan Qushi De Fansi* (比例原則及其階層化操作：一個著眼於司法院釋憲實務發展趨勢的反思) [The Principle of Proportionality in the Trend of “Hierarchicalization”: Critical Remarks on the Current Developments in Constitutional Review] 19 ZHONGYANYUAN FAXUE QIAKAN (中研院法學期刊) [Academia Sinica L. J.] 1, 29 (2016).

¹⁷⁹ Chien-Chih Lin, *Global Constitutionalism in Taiwan*, 10 GLOB. CONSTITUTIONALISM 275, 285 (2021).

¹⁸⁰ *Id.*

¹⁸¹ See *Current Members*, CONST. CT. R.O.C., <https://cons.judicial.gov.tw/en/docdata.aspx?fid=2147> [https://perma.cc/U73C-UDX2] (last visited Oct. 9, 2023).

¹⁸² Lin, *supra* note 172, at 66.

As its name indicates, tiered scrutiny embraces more than one standard of review, and the tiers function on a graduated approach. The first standard is the rational-basis review, which requires legislative and executive measures to be rationally related to legitimate governmental interest.¹⁸³ The second standard is intermediate scrutiny, which demands legislative and executive measures to be substantially related to important governmental objectives.¹⁸⁴ The third standard is strict scrutiny, which requires legislative and executive measures to be narrowly tailored to further compelling public interest.¹⁸⁵

Among the three scrutiny standards, only strict scrutiny has the intensity of review equivalent to the original proportionality.¹⁸⁶ From the history of strict scrutiny, it was meant to provide heightened protection for favored rights.¹⁸⁷ It is far more intrusive than intermediate scrutiny and the rational-basis review. Strict scrutiny requires the government to take a narrowly tailored action.¹⁸⁸ This requirement is akin to the minimum impairment requirement of proportionality. Additionally, strict scrutiny negates the presumption that government action is treated as constitutional and valid unless the action fails basic rationality requirements,¹⁸⁹ similar to the proportionality test.¹⁹⁰ Once citizens prove their constitutional rights have been violated, then the burden shifts to the government to prove its actions are proportionate.¹⁹¹

The TCC first applied tiered scrutiny along with the two-track theory for freedom of speech in Interpretation No. 414 (1996).¹⁹² The two-track theory classifies the restrictions on freedom of speech into two categories: content-based and content-neutral restrictions.¹⁹³ Generally

¹⁸³ See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 423 (1982) (Blackmun, J., dissenting); *U.S. Dep't. of Agric. v. Moreno*, 413 U.S. 528, 528 (1973); Thomas B. Nachbar, *The Rationality of Rational Basis Review*, 102 VA. L. REV. 1627, 1629 (2016).

¹⁸⁴ *Craig v. Boren*, 429 U.S. 190, 197 (1976); *United States v. Virginia*, 518 U.S. 515, 516–17 (1996).

¹⁸⁵ *Korematsu v. United States*, 323 U.S. 214, 214 (1944); *Johnson v. California*, 543 U.S. 499, 505 (2005).

¹⁸⁶ STONE SWEET & MATHEWS, *supra* note 4, at 98; Mathews & Stone Sweet, *supra* note 17, at 804.

¹⁸⁷ Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 358 (2006).

¹⁸⁸ ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 645 (2d ed. 2002).

¹⁸⁹ *Id.* at 811.

¹⁹⁰ See Chan, *supra* note 39, at 12–16.

¹⁹¹ *Id.* at 7.

¹⁹² J.Y. Interpretation No. 414 (1996), <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310595> [<https://perma.cc/5V55-RLBV>].

¹⁹³ Since it was first articulated in *Chicago Police Department v. Mosley*, 408 U.S. 92 (1972), it has been widely applied by the Supreme Courts of the United States in adjudications that pertain to

speaking, content-based restrictions are examined more intensively than content-neutral restrictions.¹⁹⁴ The content of speech is further distinguished into high-value content and low-value content.¹⁹⁵ For these restrictions on high-value speeches, such as political speech and religious speech, the courts review them more intensively and exert strict scrutiny.¹⁹⁶ By contrast, the courts usually review restrictions on low-value speeches more leniently and apply the rational-basis test or intermediate scrutiny.¹⁹⁷ In Interpretation No. 414, the issue at stake was whether the prior censorship of pharmaceutical advertisements unconstitutionally restricted speech.¹⁹⁸ Before reviewing the impugned law, the TCC first determined to apply intermediate scrutiny.¹⁹⁹ It considered that commercials normally did not enjoy as high a degree of protection as other types of speech because they are irrelevant to the formation of public opinion, fact-finding, and expression of beliefs.²⁰⁰ Drug advertisements, for example, were commercial speeches closely related to the health of nationals.²⁰¹ Therefore, drug advertisements must be strictly regulated by law to protect public interest.²⁰² After Interpretation 414, the American tiered scrutiny

restrictions on freedom of speech. TZU-YI LIN (林子儀), YANLUN ZIYOU YU XINWEN ZIYOU (言論自由與新聞自由) [Freedom of Speech and Freedom of Press] 141 (1999).

¹⁹⁴ *Mosley*, 408 U.S. at 99.

¹⁹⁵ See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

¹⁹⁶ *Id.* at 570–71.

¹⁹⁷ Lin, *supra* note 193, at 157–60.

¹⁹⁸ J.Y. Interpretation No. 414 (1996), <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310595> [<https://perma.cc/5V5S-RLBV>].

¹⁹⁹ Hwang, *supra* note 172, at 228.

²⁰⁰ J.Y. Interpretation No. 414 (1996), <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310595> [<https://perma.cc/5V5S-RLBV>].

²⁰¹ *Id.*

²⁰² *Id.*

took root in the interpretations of the TCC, which consistently applied them in cases concerning freedom of speech²⁰³ and equal protection.²⁰⁴

The coexistence of the proportionality test and the American tiered scrutiny resulted in debate among the TCC grand justices.²⁰⁵ Many grand justices consistently and systematically articulated the intensity of review in their opinions.²⁰⁶ Although most grand justices defended the

²⁰³ See, e.g., J.Y. Interpretation No. 509 (2000), <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310690> [<https://perma.cc/QCP8-79BP>]; J.Y. Interpretation No. 577 (2004), <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310758> [<https://perma.cc/N984-XAXT>]; J.Y. Interpretation No. 617 (2006), <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310798> [<https://perma.cc/9HN2-WM3L>]; J.Y. Interpretation No. 623 (2007), <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310804> [<https://perma.cc/T5T2-YSZE>]; J.Y. Interpretation No. 634 (2007), <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310815> [<https://perma.cc/9YW7-NFNB>]; J.Y. Interpretation No. 644 (2008), <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310825> [<https://perma.cc/AA22-52AV>]; J.Y. Interpretation No. 656 (2009), <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310837> [<https://perma.cc/RWE8-98LX>]; J.Y. Interpretation No. 678 (2010), <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310859> [<https://perma.cc/V378-WH4R>]; J.Y. Interpretation No. 689 (2011), <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310870> [<https://perma.cc/82TT-774E>]; J.Y. Interpretation No. 733 (2015), <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310914> [<https://perma.cc/J3N3-4LZ3>]; J.Y. Interpretation No. 744 (2017), <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310925> [<https://perma.cc/C7PW-KX4Z>]; J.Y. Interpretation No. 756 (2017), <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310937> [<https://perma.cc/VP99-UHZF>].

²⁰⁴ See, e.g., J.Y. Interpretation No. 618 (2006), <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310799> [<https://perma.cc/992X-BKJB>]; J.Y. Interpretation No. 626 (2007), <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310807> [<https://perma.cc/8WCX-8GST>]; J.Y. Interpretation No. 649 (2008), <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310830> [<https://perma.cc/2YBC-S6T8>].

²⁰⁵ Hwang, *supra* note 178, at 19–20.

²⁰⁶ E.g., J.Y. Interpretation No. 571 (2002) (Grand Justice Tzu-Yi Lin), <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310752> [<https://perma.cc/WN4T-DBPE>]; J.Y. Interpretation No. 577 (2007) (Grand Justice Syue-Ming Yu), <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310758> [<https://perma.cc/N984-XAXT>]; J.Y. Interpretation No. 604 (2005) (Grand Justice Tzong-Li Hsu), <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310785> [<https://perma.cc/JKP5-NBQU>]; J.Y. Interpretation No. 690 (2011) (Grand Justice Yu-Hsiu Hsu), <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310871> [<https://perma.cc/Y4WE-A639>]; J.Y. Interpretation No. 638 (2008) (Grand Justice Feng-Zhi Peng), <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310819> [<https://perma.cc/WRB6-4P9J>]; J.Y. Interpretation No. 659 (2009) (Grand Justice Chun-Sheng Chen), <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310840> [<https://perma.cc/99PK-P3AE>]; J.Y. Interpretation No. 682 (2010) (Grand Justice Chen-Shan Li), <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310863> [<https://perma.cc/AW6R-EQZE>]; J.Y. Interpretation No. 710 (2013) (Grand Justice Ching-You Tsay), <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310891> [<https://perma.cc/Q9FQ-RPM5>]; J.Y. Interpretation No. 712 (2013) (Grand Justice Shin-Min Chen), <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310893> [<https://perma.cc/99T5-NXVD>]; J.Y. Interpretation No. 688 (2011) (Grand Justice Yeong-Chin Su), <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310869> [<https://perma.cc/QN95-RSMJ>]; J.Y.

standards they were familiar with,²⁰⁷ some supported a unified intensity system for the proportionality test.²⁰⁸ Grand Justice Pai-Hsiu Yeh stressed in his separate opinion to Interpretation No. 712 that “the systems of review standards from the United States and Germany are not clearly distinguished by the Court. Instead, the Court perceived them to be parallel and exchangeable.”²⁰⁹ Grand Justice Yeong-Chin Su also opined that “the methodological question of how to localize the [proportionality and American tiered standards of scrutiny] standards of review and integrate them is inevitable when the Court learns from different jurisdictions.”²¹⁰

Over time, although contention continues, the grand justices have reached partial consensus on a fusion of proportionality and the American tiered scrutiny. Grand Justice Jau-Yuan Hwang called this fusion “One Proportionality and Three Levels of Intensity.”²¹¹ The four subtests of proportionality are necessary steps and constitute a basic framework of constitutional review of the TCC, and at the same time, proportionality is applied with three levels of intensity of review²¹²:

1. Low level: the aims pursued must be legitimate public interest and the means chosen shall be rationally connected with the aims pursued.²¹³
2. Intermediate level: the aims pursued must be important and substantial public interest and the means chosen shall be substantially related to the aims pursued.²¹⁴

Interpretation No. 689 (2011) (Grand Justice Pai-Hsiu Yeh), <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310870> [<https://perma.cc/8Y63-JVFS>]; J.Y. Interpretation No. 715 (2013) (Grand Justice Te-Chung Tang), <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310896> [<https://perma.cc/KWB5-DNLK>]; J.Y. Interpretation No. 733 (2015) (Grand Justice Chang-Fa Lo), <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310914> [<https://perma.cc/ZQ78-NGZD>]; J.Y. Interpretation No. 738 (2016) (Grand Justice Jiun-Yi Lin), <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310919> [<https://perma.cc/BSY8-T4XZ>]; J.Y. Interpretation No. 767 (2018) (Grand Justice Jau-Yuan Hwang), <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310948> [<https://perma.cc/2N5H-AMZS>].

²⁰⁷ Lin, *supra* note 172, at 66.

²⁰⁸ *Id.*

²⁰⁹ J.Y. Interpretation No. 712 (2013) (Grand Justice Pai-Hsiu Yeh, concurring), <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310893> [<https://perma.cc/V2TV-CHBB>].

²¹⁰ J.Y. Interpretation No. 719 (2014) (Grand Justice Yeong-Chin Su, concurring), <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310369> [<https://perma.cc/A5N5-GTDE>].

²¹¹ Hwang, *supra* note 172, at 238.

²¹² *Id.* at 242.

²¹³ See, e.g., J.Y. Interpretation No. 768 (2018), <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310949> [<https://perma.cc/4H7U-QKPF>].

²¹⁴ See, e.g., J.Y. Interpretation No. 702 (2012), <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310883> [<https://perma.cc/78YB-4BB9>].

3. High level: the aims pursued must be compelling/extraordinarily important public interest and the means chosen shall be directly related to the aims pursued or narrowly tailored for the ends.²¹⁵

This unified intensity system of proportionality absorbs American tiered scrutiny.²¹⁶ Consequently, the rigor of the proportionality test in protecting human rights is seriously weakened especially when applied with a low level of intensity of review akin to the rational-basis review.²¹⁷ As compared above, only strict scrutiny has the equivalent rigor to proportionality.²¹⁸ In contrast, intermediate scrutiny and the rational-basis review are more deferential and allow the courts to grant the government broad leeway.²¹⁹ When proportionality is applied with intermediate and low levels of intensity, an impugned measure can pass the test more easily.²²⁰ By doing so, judges abdicate their duty to protect public rights.²²¹ When deciding to apply proportionality with the low level of intensity of review, the TCC virtually gave up weighing and balancing, let alone making a detailed comparison between detriments to rights and gains to public interest.²²² The TCC considers an impugned means reasonable if it is not “clearly and materially defective.”²²³ In those cases, proportionality has little to do with a high level of human rights protection and no longer optimizes constitutional rights to the “greatest extent possible.”²²⁴

²¹⁵ See, e.g., J.Y. Interpretation No. 649 (2008), <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310830> [<https://perma.cc/ZWX3-FY37>].

²¹⁶ Hwang, *supra* note 178, at 18.

²¹⁷ *Id.* at 29.

²¹⁸ STONE SWEET & MATHEWS, *supra* note 4, at 98; Mathews & Stone Sweet, *supra* note 17, at 804.

²¹⁹ Mathews & Stone Sweet, *supra* note 17, at 838.

²²⁰ Hwang, *supra* note 178, at 29.

²²¹ Mathews & Stone Sweet, *supra* note 17, at 838.

²²² Hwang, *supra* note 178, at 29.

²²³ *Id.*; J.Y. Interpretation No. 617 (2006), <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310798> [<https://perma.cc/395X-UBXF>]; J.Y. Interpretation No. 618 (2006), <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310799> [<https://perma.cc/VA4Q-5YMX>]; J.Y. Interpretation No. 699 (2012), <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310880> [<https://perma.cc/9SPJ-LLSL>]; J.Y. Interpretation No. 719 (2014), <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310900> [<https://perma.cc/BY5D-ZYQK>].

²²⁴ ALEXI, *supra* note 19, at 47.

IV. ABUSING PROPORTIONALITY: THE CASE OF CHINA²²⁵

After a global spread, it is not surprising that proportionality is seen in numerous countries that are not constitutionally democratic.²²⁶ These semi-authoritarian or authoritarian countries deploy liberal and democratic doctrines to conceal, legitimize, or justify antidemocratic actions and human rights violations.²²⁷ In China, one of the largest authoritarian countries, courts employ proportionality to justify illegal administrative decisions and support authoritarian projects in some cases.²²⁸ In these cases, proportionality is no longer a standard protective of human rights but a tool of the courts to uphold authoritarian governance.²²⁹ Such use of proportionality substantively contradicts its core features, resulting in an “assault on human rights.”²³⁰ This Article does not claim proportionality plays no role in protecting human rights and freedom in China. On the contrary, citizens sometimes successfully defended their rights and interests by invoking proportionality in administrative litigations, including the first case where proportionality was applied: *The Planning Bureau of Harbin Municipality, Heilongjiang Province v. Huifeng Industrial Development Co. Ltd.* in 1999.²³¹

In the *Huifeng* case, the Supreme People’s Court of the People’s Republic of China (SPC) applied proportionality and struck down the administrative penalty decision the Harbin Planning Bureau had made.²³²

²²⁵ This subtitle is inspired by ROSALIND DIXON & DAVID LANDAU, *ABUSIVE CONSTITUTIONAL BORROWING: LEGAL GLOBALIZATION AND THE SUBVERSION OF LIBERAL DEMOCRACY* (2021).

²²⁶ See generally Benjamin Joshua Ong, *Proportionality in Malaysia*, in *PROPORTIONALITY IN ASIA*, *supra* note 19; Stefanus Hendrianto, *The Indonesian Constitutional Court in an Age of Proportionality*, in *PROPORTIONALITY IN ASIA*, *supra* note 19; Narongdech Srukhsosit, *Manifest Disproportionality and the Constitutional Court of Thailand*, in *PROPORTIONALITY IN ASIA*, *supra* note 19; Rizwanul Islam, *Reasonableness as Proportionality: More Intrusive Scrutiny in Civil-Political Matters than Socioeconomic Ones?*, in *PROPORTIONALITY IN ASIA*, *supra* note 19; Bryan Dennis Gabito Tiojanco & Ronald Ray Katigbak San Juan, *Importing Proportionality Through Legislation: A Philippine Experiment*, in *PROPORTIONALITY IN ASIA*, *supra* note 19.

²²⁷ DIXON & LANDAU, *supra* note **Error! Bookmark not defined.**, at 36.

²²⁸ See, e.g., Liu Chunhong Su Yunansheng Kunmingshi Xishanqu Renmin Zhengfu Tudi Zhengshou Jiufen Zaishen An (劉春洪訴雲南省昆明市西山區人民政府土地徵收糾紛再審案) [Liu Chunhong v. The People’s Gov’t of Xishan Dist., Kunming Mun., Yunnan Province] (Sup. People’s Ct. May 8, 2018).

²²⁹ Xiao, *supra* note 6, at 485–86.

²³⁰ Stavros Tsakyrakis, *Proportionality: An Assault on Human Rights?*, 7 INT’L J. CONST. L. 468, 492 (2009).

²³¹ Huang & Law, *supra* note 13, at 323.

²³² Hēilóngjiāng Shěng Hǎ’ěrbīn Shì Guīhuà Jú Sù Hēilóngjiāng Huifēng Shíyè Fāzhǎn Yōuxiàn Gōngsī Xíngzhèng Chǔ Fēn Jiūfēn An (黑龍江省哈爾濱市規劃局訴黑龍江匯豐實業發展有限

Huifeng Company reconstructed two buildings located in a historic area of Harbin without obtaining construction permission from the appellant.²³³ The appellant ordered the Huifeng Company to tear down four stories of one building and two stories of the other building and imposed a fine of nearly 400,000 RMB.²³⁴ On appeal, the appellant argued that it made the penalty decision in accordance with the Central Avenue plan, which sought to preserve the authenticity and integrity of the historic areas of Harbin.²³⁵ The SPC accepted that the respondent pursued a legitimate purpose.²³⁶ However, it decided that the administrative penalty was manifestly unfair, as the amount of demolition ordered by the applicant was more than necessary to preserve the integrity of the historic area:

When the Planning Bureau ordered Huifeng Company to take relevant corrective acts [to restore the buildings], its decision should reflect the degree of damage [to the view of Central Avenue]. [The Planning Bureau] ought to fulfill the purpose of administrative management and at the same time, respect the plaintiff's rights and interests. [The corrective acts] should be limited to the accomplishment of the administrative purposes and goals, and should cause the least harm to the people's rights and interests.²³⁷

While rich literature has acknowledged the positive and protective function of proportionality in Chinese administrative litigation,²³⁸ this Article tries to unveil the abuse of proportionality by Chinese courts to justify and maintain illegal administrative decisions that infringe upon people's rights and violate the laws.

公司行政處罰糾紛案) [Plan. Bureau of Harbin Mun., Heilongjiang Province v. Huifeng Indus. Dev. Co. Ltd.] (Sup. People's Ct. 2000).

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ See, e.g., Quan Liu (劉權), *Xingzheng Panjue Zhong Bili Yuanze De Shiyong* (行政判決中比例原則的適用) [The Application of Proportionality in Administrative Litigation Judgments], 3 ZHONGGUO FAXUE (中國法學) [China Legal Sci.] 83, 85–86 (2019); Hongzhen Jiang (蔣紅珍), *Bili Yuanze Shiyong De Fanshi Zhuaxing* (比例原則適用的範式轉型) [Paradigm Shifts in the Application of the Proportionality Principle], 4 ZHONGGUO SHEHUI KEXUE (中國社會科學) [Soc. Sci. China] 125 (2021); Chao Ma (馬超) & Xiaohong Yu (於曉虹), *Xingzheng Shenpan Zhong Bili Yuanze De Shiyong – Jiyu Gongkai Caipan Wenshu De Shizheng Yanjiu* (行政審判中比例原則的適用—基於公開裁判文書的實證研究) [Application of Principle of Proportionality in Administrative Litigation: An Empirical Study Based in Published Judicial Decisions], 4 SHANDONG DAXUE XUEBAO (山東大學學報) [J. Shandong U.] 58, 62 (2022).

Liu Chunhong v. The People's Government of Xishan District, Kunming Municipality, Yunnan Province stands as an illustrative case.²³⁹ In this case, the respondent sought to acquire land that encompassed the plaintiff's factory.²⁴⁰ On appeal, the SPC confirmed that the land requisition decision was unlawful due to procedural violations, specifically the absence of approval from a higher-level people's government as mandated by law.²⁴¹ Rather than outright nullifying the land requisition decision, the SPC shifted its focus to the central issue at hand: whether striking down that decision would result in severe damage to public interest.²⁴² Before answering this question, it asserted that

“public interest” is an imprecise legal concept. The realization of public interest is frequently at the expense of individual rights. Hence, to delimit public interest, [the courts] must comply with the principle of proportionality: balancing derogations from individual rights and potential benefits to public interest. Through balancing, [the courts] should try their best to avoid risking big things for the sake of small ones (yinxiao shida). At the same time, [the courts] should award necessary, fair and reasonable reparation and compensation to aggrieved individuals, whose interests are derogated.²⁴³

This passage is revealing in multiple ways. First, in the views of the SPC, individual rights can be sacrificed in favor of the public interest, and this is a frequent occurrence. Second, the ultimate objective of a balanced analysis is to ensure the realization of the public interest when it is significant. In the *Liu Chunhong* case, the SPC pointed out that once it overturned the land requisition decision, the public interest would suffer severe damage.²⁴⁴ First, quashing the decision would cause a waste of social resources, as the government had carried out the land requisition decision and invested substantial resources.²⁴⁵ Second, since the land had been granted to other companies, revoking the impugned decision would undermine the government's credibility and infringe upon the third party's right

²³⁹ See generally Liu Chunhong Su Yunansheng Kunmingshi Xishanqu Renmin Zhengfu Tudi Zhengshou Jiufen Zaishen An (劉春洪訴雲南省昆明市西山區人民政府土地徵收糾紛再審案) [*Liu Chunhong v. The People's Gov't of Xishan Dist., Kunming Mun., Yunnan Province*] (Sup. People's Ct. 2018).

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

to use the land.²⁴⁶ The SPC eventually upheld the impugned land requisition decision.²⁴⁷

Administrative law and proportionality are supposed to correct unlawful administrative actions and protect people's rights and interests.²⁴⁸ But the reality is the contrary in *Liu Chunhong* and subsequent cases. The courts share an efficiency-centered logic with the government, wherein as long as the land-taking and eviction serve the purpose of development, they are justified.²⁴⁹ This efficient-development-oriented account contradicts the right-centered account of proportionality. The courts transform the balance analysis of proportionality into a cost-benefit analysis. This already entails a weakening of rights. Beyond that, the courts fail to show equal concern and weight to human rights and public interest involved in their balance analysis.²⁵⁰ The courts' consideration of the former greater outweighs that given to the latter.

When the Chinese courts invoked proportionality to maintain those unlawful administrative actions, they simultaneously referred to Article 74 of the Administrative Litigation Law.²⁵¹ Article 74 expresses a doctrine that the courts cannot strike down an illegal executive act if overturning that act would significantly damage national security and public interest.²⁵² This reflects China's socialist understanding of the relationship between public interest and individual rights. From early Chinese thoughts to contemporary human rights beliefs, "individualism" has strong negative

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ Article 1 of the Administrative Litigation Law of the People's Republic of China stipulates that "[t]his Law is enacted in accordance with the Constitution in order to ensure that the people's courts hear administrative cases in a fair and timely manner, resolve administrative disputes, protect the lawful rights and interests of citizens, legal persons and other organizations, and supervise the exercise of powers by administrative organs in accordance with the law." Zhōnghuá Rénmín Gònghéguó Xíngzhèng Sùsòng Fǎ (中华人民共和国行政诉讼法) [Administrative Litigation Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 4, 1989, rev'd by the Standing Comm. Nat'l People's Cong., June 27, 2017, effective July 1, 1990), art. 1, CLI.1.4274(EN) (PKULaw.com).

²⁴⁹ Eva Pils, *Assessing Evictions and Expropriation in China: Efficiency, Credibility and Rights*, 79 LAND USE POL'Y 952, 958 (2018).

²⁵⁰ Xiao, *supra* note 6, at 480–81.

²⁵¹ Liu Chunhong Su Yunansheng Kunmingshi Xishanqu Renmin Zhengfu Tudi Zhengshou Jiufen Zaishen An (劉春洪訴雲南省昆明市西山區人民政府土地徵收糾紛再審案) [*Liu Chunhong v. The People's Gov't of Xishan Dist., Kunming Mun., Yunnan Province*] (Sup. People's Ct. 2018).

²⁵² Zhōnghuá Rénmín Gònghéguó Xíngzhèng Sùsòng Fǎ (中华人民共和国行政诉讼法) [Administrative Litigation Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 4, 1989, rev'd by the Standing Comm. Nat'l People's Cong., June 27, 2017, effective July 1, 1990), CLI.1.4274(EN) (PKULaw.com).

connotations in China.²⁵³ When public interest and individual rights emerge in a pair, the former remains superior to the latter. The term “*gongyi youxian*,” which literally means prioritizing public interest over individual rights, is widely seen in government propaganda, textbooks, and scholarship.²⁵⁴ Article 74 prioritizes public interest over individual rights by requiring the courts to maintain illegal decisions if reversing the decisions could lead to excessive costs to the public purse. The purpose of Article 74 contradicts that of proportionality. The former prioritizes public interest, even at the cost of individual rights, while the latter is associated with a high level of human rights protection. The doctrines enshrined in Article 74 and proportionality are so different that they should not have been used together.

The courts could have and should have relied on Article 74 to support their government. It is unnecessary to employ proportionality to maintain these illegal administrative actions, because proportionality is neither neutral with respect to human rights nor indifferent to their limitations, and it is grounded in the need to realize human rights.²⁵⁵ Chinese courts have abused proportionality to justify and maintain illegal administrative decisions that infringe on individual rights. The abuse of proportionality strips rights of their priori normative status as “shields” against government decisions. In this circumstance, proportionality becomes “a genuine assault on the very concept of human rights.”²⁵⁶

V. **RESPONSE TO COUNTER CURRENTS OF PROPORTIONALITY**

A. COUNTER CURRENTS: WHAT PREVAILING SCHOLARSHIP DOES NOT SHOW

The above case studies provide a snapshot of a range of judicial practices countering proportionality that are taking place in common law

²⁵³ See Erica Brindley, *The Polarization of the Concepts “Si” (Private Interest) and “Gong” (Public Interest) in Early Chinese Thought*, 2 *ASIA MAJOR* 1, 2, 14–16 (2013); Xiangchen Sun (孫向晨), *Xiandai Geti Quanli Yu Rujia Chuantong Zhongde Geti* (現代個體權利與儒家傳統中的“個體”) [Individual Rights in Modern Time and “Individual” in Confucian Tradition], 3 *WENSHIZHE* (文史哲) [J. Chinese Human.] 90, 98 (2017).

²⁵⁴ Xiao, *supra* note 6, at 481.

²⁵⁵ Aharon Barak, *Judges as Guardians of the Constitution*, in 10 *XIANFA JIESHI ZHI LILUN YU SHIWI DISHUI* (憲法解釋之理論與實務第十輯) [Constitutional Interpretation: Theory and Practice] 10 (Yen-Tu Su ed., 2020).

²⁵⁶ Tsakyrakis, *supra* note 230, at 491.

and civil law systems, western and eastern jurisdictions, as well as democratic and authoritarian governments. The literature on proportionality is extensive, exploring the theoretical basis of proportionality and its relationship with global constitutionalism and human dignity by taking comparative and in-depth single jurisdiction analysis approaches.²⁵⁷ However, its focal point is either the global spread or local application of proportionality. The counter currents to the globalization of proportionality are largely ignored.

This part first responds to a possible objection to the “counter currents” account based on the discourse concerning the localization of proportionality. Recent proportionality studies show an increasing interest in the variability and application of proportionality in local contexts.²⁵⁸ For instance, Canada and Ireland, which have a linguistically identical definition of proportionality, use this doctrine in drastically different ways.²⁵⁹ Proportionality has evolved differently in France, England, and Greece, showing that it has unique meanings in different jurisdictions.²⁶⁰ The recent “comparativist turn” in proportionality suggests that there is not a coherent, global model of proportionality. From the general questions about proportionality’s applicability in certain issues to the technical questions of how the subtests are applied in adjudication, local and contingent factors about constitutional text, legal culture, judicial practice, and political environment shape the application of proportionality.²⁶¹

However, is it still proper to treat the judicial practices—which forgo proportionality in reviewing administrative actions, weaken the intensity of proportionality, and abuse proportionality—as localizations of proportionality? This Article contends that these judicial practices should not simply be regarded as mere contingent applications of proportionality in a local context. They are judicial practices deserting proportionality or contradicting the purpose and significance of its origin. The global spread of proportionality entails localized and varying applications. The flexibility of proportionality can accommodate this.²⁶² However, any variations

²⁵⁷ See sources cited *supra* note 4.

²⁵⁸ See, e.g., David Kenny, *Proportionality and the Inevitability of the Local: A Comparative Localist Analyst of Canada and Ireland*, 66 AM. J. COMP. L. 537, 537 (2018); MORDECHAI KREMNITZER ET AL., PROPORTIONALITY IN ACTION: COMPARATIVE AND EMPIRICAL PERSPECTIVES ON THE JUDICIAL PRACTICE, at xv (2020); AFRODITI MARKETOU, LOCAL MEANINGS OF PROPORTIONALITY, at i (2021); Yap, *supra* note 19, at 3.

²⁵⁹ Kenny, *supra* note 12, at 148.

²⁶⁰ MARKETOU, *supra* note 258, at 254, 362.

²⁶¹ Kenny, *supra* note 258, at 568–70; BOMHOFF, *supra* note 19, at 238–43.

²⁶² Stone Sweet, *supra* note 19, at 543.

of proportionality must adhere to the template that justifies this doctrinal standard. This Article has demonstrated two core features: the structured analytical framework and a high level of human rights protection. However, the counter currents demonstrated above abandon either proportionality or its core features.

According to the comparative localism accounts,²⁶³ some might argue that the SCC and the UKSC were redrawing the boundaries of proportionality's application terrain. This argument, however, ignores the essential fact that proportionality, an imported standard of judicial review, has been accepted by two apex courts and has attained a status of a general and essential standard in public law.²⁶⁴ But now, the two supreme courts are departing from this and moving to the common law standard of judicial review, blatantly abandoning proportionality, starting with administrative decisions.²⁶⁵

Some might also argue that the SCC and the UKSC are not making a U-turn back to unreasonableness—or at least not a full return—as both courts claim that reasonableness is inherently consistent with proportionality in the strong protection of fundamental rights.²⁶⁶ The SCC claimed that replacing proportionality with unreasonableness did not disregard the Charter values:

Though this judicial review is conducted within the administrative framework, there is nonetheless conceptual harmony between a reasonableness review and *Oakes* framework. . . In the charter context, the reasonableness analysis is one that centers on proportionality, that is, on ensuring that the decision interferes with the relevant charter guarantees no more than is necessary given the statutory objectives.²⁶⁷

The UKSC has also stressed that the assessment of unreasonableness is an elastic and holistic exercise, which recognizes that administrative decisionmakers should be bound by the constitutional rules and that decisions must be made in light of constitutional guarantees.²⁶⁸ Both courts believe that unreasonableness encompasses varying amounts of judicial

²⁶³ Kenny, *supra* note 258, at 568.

²⁶⁴ Porat, *supra* note 2.

²⁶⁵ See, e.g., *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, para. 5; *Kennedy v. Charity Comm'n* [2014] UKSC 20, [52]–[53] (appeal taken from Eng.).

²⁶⁶ *Doré*, 1 S.C.R. para. 5; *Kennedy* [2014] UKSC 20, [52]–[53].

²⁶⁷ *Doré*, 1 S.C.R. para. 5.

²⁶⁸ *Kennedy* [2014] UKSC 20, [52]–[53].

deference and levels of intensity of review, the highest of which could offer the same protection to human rights as proportionality.²⁶⁹

However, even if the courts believe that relying on unreasonableness would not reduce judicial protection of rights and freedoms,²⁷⁰ an unreasonableness review—which they claim centers proportionality—is still an all-things-considered balancing framework, which is unstructured, imprecise, and untransparent. The analytical framework of unreasonableness is far from stringently formulated.²⁷¹ Requiring decision-makers to take all relevant factors into consideration and exclude all irrelevant factors from consideration does not have helpful guidance with any degree of certainty to the parties and courts.²⁷² In comparison, proportionality’s structured analytical framework instructs parties and courts to present and decide their cases step-by-step. It “forces judges to give an open and reasoned justification for intervention.”²⁷³ Blending proportionality with other approaches would “substantially reduce the distinctive virtue of proportionality in promoting transparency.”²⁷⁴ Despite the harmony between reasonableness and proportionality in their intensity of review, abandoning the structured analytical framework means proportionality ceases to exist.

Likewise, recasting this rights-protection doctrine as a form of deference-infused *Wednesbury* unreasonableness or a weak rationality review and abusing proportionality to justify illegal government actions are not technical issues concerning how to apply proportionality locally. These practices have fundamentally departed from one core feature of proportionality—affording high-level human rights protection. Applying proportionality with a low level of intensity of review is far removed from the high level of protection found in the normal application of proportionality. Using proportionality for authoritarian purposes seriously betrays the spirit of proportionality.

As a consequence of introducing the low level of intensity of review to proportionality, the CFA and the TCC have developed an infirm

²⁶⁹ *Id.*; Ron Goltz, “Patent Unreasonableness Is Dead. And We Have Killed It.” *A Critique of the Supreme Court of Canada’s Decision in Dunsmuir*, 46 ALTA. L. REV. 253, 256 (2008).

²⁷⁰ STONE SWEET & MATHEWS, *supra* note 4, at 148.

²⁷¹ Jeffrey Jowell, *Proportionality and Unreasonableness: Neither Merger nor Takeover*, in THE SCOPE AND INTENSITY OF SUBSTANTIVE REVIEW: TRAVERSING TAGGART’S RAINBOW, *supra* note 80, at 47.

²⁷² Associated Provincial Picture Houses Ltd. v. *Wednesbury Corp.* [1948] 1 KB 223 at 229; WOOLF ET AL., *supra* note 33, at 597–98.

²⁷³ Régimbald, *supra* note 52, at 268.

²⁷⁴ Tushnet, *supra* note 32, at 275.

approach to rights protection that has nothing to do with proportionality.²⁷⁵ In Hong Kong, the manifestly-without-reasonable-foundation standard has gone beyond the socioeconomic-right context and has been extended to review violations of the right to elections and equal protection. A commonality among these cases is the greater leeway granted to the legislature and executive branch; and in most cases, the judgments were in favor of the government.²⁷⁶ Proportionality in Hong Kong “is characterized by liberal rhetoric paired with limited judicial intervention in practice.”²⁷⁷ In the last two decades, the TCC has conducted a weak rationality review in many decisions.²⁷⁸ According to the statistics compiled by Grand Justice Jau-Yuan Hwang, the low level of intensity of review was invoked in approximately 40 percent of cases decided between 2003 and 2011.²⁷⁹ In contrast, the intermediate was conducted in approximately 30 percent of cases, and the high level was conducted in approximately 9.1 percent of cases during that same period.²⁸⁰ Taiwan’s constitutional scholars have criticized that the low level of intensity of review provided the TCC with justification for forgoing the proportionality test and not even challenging the system’s public power.²⁸¹ In China, applying proportionality to justify illegal administrative decisions is becoming a stable approach in land requisition cases.²⁸² The abuse of proportionality potentially accounts for the bizarre situation in which the proliferation of proportionality in some semi-authoritarian and authoritarian regimes does not change the judicial

²⁷⁵ Stone Sweet, *supra* note 19, at 561.

²⁷⁶ Abeyratne, *supra* note 134, at 45.

²⁷⁷ Eric Ip & Po Jen Yap, *Substantive Review of Administrative Discretion in Hong Kong: Divergence Between Judicial Rhetoric and Practice*, 7 CHINESE J. COM. L. 190, 211 (2019).

²⁷⁸ Hwang, *supra* note 172, at 227–28, 243.

²⁷⁹ *Id.* at 243.

²⁸⁰ *Id.*

²⁸¹ See, e.g., Hwang, *supra* note 178, at 30.

²⁸² See, e.g., Wang Zhongwu Su Mulei Hasake Zizhixian Renmin Zhengfu Fangwu Zhengshou Jiufen Zaishen An (王忠武訴木壘哈薩克自治縣人民政府房屋徵收糾紛再審案) [Wang Zhongwu v. The People’s Gov’t of Mulei Kazakh Autonomous Cty.] (Sup. People’s Ct. Dec. 27, 2018); Zhang Jinbao Su Yuzhongxian Renmin Zhengfu Fangwu Xingzheng Buchang Ershen Xingzheng Pan-jueshu (張進寶訴榆中縣人民政府房屋行政補償二審行政判決書) [Zhang Jinbao v. The People’s Government of Yuzhong County] (Gansu High People’s Ct. Jan. 21, 2019); Baochuan Shuini Zhipingchang Su Hengshuishi Budongchan Dengjiju (寶川水泥製品廠訴衡水市不動產登記局) [Baochuan Cement Product Factory v. The Real Est. Registration Bureau of Hengshui Mun.] (Hengshui Intern. People’s Ct. Aug. 5, 2019); Yizhoushi Jinlong Fangdichan Kaifa Youxian Gongsi Su Bama Yaozu Zizhixian Zhufang He Chengxiang Jiansheju (宜州市金龍房地產開發有限公司訴巴馬瑤族自治縣住房和城鄉建設局) [Yizhou Mun. Jinlong Real Est. Dev. Co. Ltd. v. The Bureau of Housing and Urban-Rural Dev. of Bama Yao Autonomous Cnty.] (Hechi Intern. People’s Ct. May. 29, 2020).

protection of human rights—a trend that proportionality scholars seem to have ignored.

B. TWO CORE FEATURES: THE BASELINE SHOULD BE OBSERVED

From a doctrinal perspective, this Article has emphasized that adhering to the two core features of proportionality serves as a crucial criterion to distinguish between variations of proportionality and the counter currents to the globalization of proportionality. In a practical sense, as a response to these counter currents, it is recommended that once a court adopts proportionality, any variation contingent upon local and contextual factors should still maintain the structured analytical framework and uphold minimum rigor in applying this test.

Before delving into the discussion, this Article must clear away some potential misunderstandings. First, the reasons behind judicial practices countering proportionality can vary significantly and are often complex and multifaceted. In the United Kingdom, it is perhaps the common law obsession at work. In Hong Kong, perhaps, the CFA gives too much deference to highly politically sensitive issues.²⁸³ In China, it might be the courts' constrained position in the politico-legal system.²⁸⁴ The reasons remain to be further explored. This Article does not seek to tackle the root causes of the courts' departure from their commitment to proportionality; instead, it is intended to set the baseline for the application of this doctrine. Second, and relatedly, this Article aligns with pragmatic views expressed by some judges and eschews an overly idealistic approach. This Article agrees with Aharon Barak and Grand Justice Yeong-Chin SU, who opined that proportionality is not the only standard available to courts. Aharon Barak contended that “proportionality is not a must”; instead, it is one of the methodologies to balance.²⁸⁵ Yeong-Chin Su stated, “Proportionality is a good tool, a very important method, but not for every court at every time.”²⁸⁶

Each country and court may choose proportionality to solve disputes if they think it is a suitable tool for them. This Article defends and

²⁸³ Julius Yam, *Approaching the Legitimacy Paradox in Hong Kong: Lessons for Hybrid Regime Courts* 46 LAW & SOC. INQUIRY 153, 162–67 (2021).

²⁸⁴ Xiao, *supra* note 6, at 477–79.

²⁸⁵ Yeong-Chin Su et al., *Forum: Constitutional Adjudication in Comparative Perspectives*, in 10 XIANFA JIESHI ZHI LILUN YU SHIWU DISHUI (憲法解釋之理論與實務第十輯) [Constitutional Interpretation: Theory and Practice] 31 (Yen-Tu Su ed., 2020).

²⁸⁶ *Id.* at 34.

emphasizes that once courts adopt and apply proportionality in adjudication, they should follow the structured analytical framework and the minimum intensity of judicial review. Local factors and their influence on the application of proportionality should not sacrifice the two core features of proportionality. This Article echoes Cora Chan's opinion that the application of proportionality cannot be lax.²⁸⁷ The courts should not rely on proportionality when they give broad leeway to the legislature or executive authorities or aim to justify illegal government actions, because proportionality is meant to be nondeferential. To maintain the minimalist and fundamental requirements of proportionality, the foregoing exhibited use of proportionality is not desirable:

1. Giving up the structured four-step test and merging the steps into a general unreasonableness inquiry into whether the impugned measures strike a balance between public interest and individual rights or whether they are reasonable or proper.
2. Diluting the intensity of the proportionality test and intervening when the impugned measures are manifestly without reasonable foundations.
3. Merely asking whether the measure is rationally connected with the aims pursued.
4. Flouting proportionality by using it to justify unlawful government action.

To give proportionality "full weight" in rights cases,²⁸⁸ courts should first insist on the structured framework. The first subtest excludes illegal legislative and administrative aims. The second and third subtests examine the feasibility and suitability of the means.²⁸⁹ The fourth test, the balancing stage, then provides extra scrutiny in human rights review.²⁹⁰ Each subtest provides human rights protection in different ways but jointly constitutes an overarching shield against arbitrary power exercise.

Additionally, the framework of proportionality is filled with expectations to provide robust human rights protection, constrain government powers, and safeguard the rule of law.²⁹¹ Without these contents, the subtests and framework of proportionality are no more empty than symbols of judicial reasoning. Proportionality requires a higher level of intensity of judicial review than *Wednesbury* unreasonableness and rationality

²⁸⁷ Chan, *supra* note 39, at 8–18.

²⁸⁸ Mark Elliot, *The HRA 1998 and the Standard of Substantive Review*, 7 JUD. REV. 97, 99 (2002).

²⁸⁹ Robert Alexy, *Constitutional Rights, Balancing, and Rationality*, 16 RATIO JURIS 131, 135 (2003).

²⁹⁰ Chan, *supra* note 39, at 9.

²⁹¹ BEATTY, *supra* note 18.

review. A reasonable right-limiting measure is not sufficient when there is a less intrusive alternative measure. Proportionality is not a doctrine that can be applied with any rigor in judicial review, so courts must insist on the minimum intensity of the proportionality test.²⁹²

VI. CONCLUSION

While there is extensive literature on proportionality, the star doctrine in public law, most of it has focused on its globalization and popularity. This Article has shed light on certain judicial practices countering the globalization of proportionality: the abandonment of proportionality in reviewing administrative actions by Canadian and British Supreme Courts, the weakening of the rigor of this doctrine by the apex courts in Hong Kong and Taiwan, and the abuse of proportionality by Chinese courts in favor of their authoritarian government. This Article emphasizes that these counter currents are not merely contingent, local applications of proportionality. Instead, they fundamentally depart from the core features of proportionality.

As a response to the counter currents, this Article proposes that once courts adopt proportionality in their adjudication, they must adhere to a structured analytical framework and a minimal level of intensity of review. Any abandonment of these key qualities would recast proportionality as a general examination of the reasonableness of a measure, transforming proportionality into a deferential judicial inquiry.

Judicial practices countering the global wave of proportionality are likely taking place in more places and in other forms beyond the three forms of counter currents in the five jurisdictions mentioned in this Article. This is worth further exploration. If courts are to be held accountable for protecting human rights, scholarship surrounding the globalization of proportionality must stop turning a blind eye to the doctrine's very real counter currents.

²⁹² Chan, *supra* note 39, at 9.