

PROPORTIONALITY AND RIGHTS PROTECTION IN ASIA:

Hong Kong, Malaysia, South Korea, Taiwan – Whither Singapore?

Over the past 50 years, the principle of proportionality has become a core component of global constitutionalism. Asia is proportionality's new frontier, and courts in jurisdictions as diverse as South Korea, Taiwan, Hong Kong and now Malaysia have adopted proportional analysis as their basic approach to adjudicating constitutional rights. Underlying these developments are transitions away from single-party rule. The article considers the anomalous situation in Singapore, and argues that Singapore's judges ought to reconsider their doctrinal approach to rights protection.

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1 Over the past 50 years, the most powerful supreme and constitutional courts in the world have converged on a doctrinal procedure for adjudicating rights claims: proportionality analysis ("PA"). The proportionality principle evolved in Germany, first, as a matter of 18th century legal philosophy, and then as an unwritten principle of public law.¹ Today, PA has been fully constitutionalised, as a centrepiece of rights protection across Europe, parts of Latin America including Colombia and Mexico, and in common law systems as diverse as Canada, South Africa, Israel and the UK. For their part, scholars have identified the proportionality principle as probably the "most

1 For an account of the global diffusion of PA, see Alec Stone Sweet & Jud Mathews, "Proportionality Balancing and Global Constitutionalism" (2008) 47 Colum J Transnat'l L 73.

successful”² legal transplant in history, and a core component of global constitutionalism more generally.³

2 Asia is proportionality’s new frontier. Since the 1990s, a number of Asian countries not only began to develop effective systems of rights protection, their courts began to deploy PA in politically sensitive domains, including cases that challenge the regulation of political parties and elections by rulers in power.⁴ The process poses a challenge to the view that Asian states do not need, or have the capacity to sustain, robust judicial review and rights protection.⁵ In Singapore, the so-called “Asian values” claim has, at times, promoted the idea that robust rights protection is not only alien to the region’s culture, but would hinder economic development.⁶

3 PA is a highly intrusive standard of judicial review which, once adopted, typically displaces or absorbs rival standards. In much of the world, PA has replaced deference doctrines, such as those expressed by reasonableness standards of the so-called “Wednesbury” variety. When an apex court moves from a posture of (a) institutionalised deference to legislatures and executives to (b) the enforcement of the proportionality principle, that court creates the conditions for adjudicating rights more effectively. Further, where judges deploy PA consistently and in good faith, they construct a new discursive interface between themselves and ruling officials. This paper examines the use of PA by the courts of South Korea, Taiwan, Hong Kong and Malaysia, and assesses the extent to which they have successfully renegotiated their relationship with officials of ruling parties. In particular, the case studies show that courts can help to consolidate the conditions under which constitutional democracy and rights protection can take root and flourish in tandem.

4 The paper proceeds as follows. Part I surveys the basic theories, concepts and doctrinal materials that inform the cases studies. One of

2 Mattias Kumm, “Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice” (2004) 2(3) *International Journal of Constitutional Law* 574 at 595.

3 Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012); Jud Mathews & Alec Stone Sweet, “All Things in Proportion? American Rights Review and the Problem of Balancing” (2012) 60 *Emory LJ* 102.

4 Po Jen Yap, *Courts and Democracies in Asia* (Cambridge University Press, 2017).

5 The view has been debunked by, among others, Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asia* (Cambridge University Press, 2002).

6 For critical discussions of Asian values discourse, see Simon S C Tay, “Human Rights, Culture, and the Singapore Example” (1995–1996) 41 *McGill Law Journal* 743 and Li-Ann Thio, “An ‘I’ for an ‘I’? Singapore’s Communitarian Model of Constitutional Adjudication” (1997) 27 *HKLJ* 152.

the most important findings of comparative constitutional law scholarship is that, in the absence of a competitive party system, judges will not protect rights robustly or effectively. In contrast, the most powerful rights-protecting courts in the world are embedded in competitive party systems; and, through resolving legal conflicts involving rights, they routinely participate in the making of public policy. We then introduce PA, and discuss its general importance to systems of rights protection. Part II considers the development of constitutional judicial review in South Korea, Taiwan, Hong Kong and Malaysia. Courts in these countries have turned to PA to help them build, or consolidate, pluralist democracy. They do so, in part, to enhance the centrality of the constitution as an instrument of governance which, in turn, will enhance their own effectiveness as rights protectors. In part III, we draw out some of the implications of the case studies for our understanding of Singapore, and of the persuasiveness of the “AsianValues” claim.

I. Constitutionalism, judicial review and proportionality

5 The so-called “new constitutionalism”,⁷ which has come to dominate modern constitutional design since the 1950s, purports to ground the legitimacy of government in two types of arrangements: (a) democratic accountability through elections; and (b) the protection of rights against unnecessary (disproportionate) government intrusion. As an empirical matter, virtually every new constitution adopted over the past three decades established a system of judicial rights protection.⁸ Of course, many domestic charters of rights are “sham” documents, and have little impact on rulers; and the courts of most states protect rights weakly, if at all.⁹ Given these facts, how is it that some systems (an increasing number) have developed effective judicial review and rights protection? And why has the adoption of PA been so important to this process? This section responds to these questions from the perspective of existing scholarship in the field of comparative constitutional law.

7 The “new constitutionalism” rests on the following precepts: (a) state organs are established by, and derive their authority from, a written constitution; (b) the constitution assigns ultimate power to the people by way of elections or referenda; (c) the exercise of public authority, including legislative, is lawful only in so far as it conforms with the constitutional law; (d) the constitution provides for a catalogue of rights and a mode of judicial review to defend those rights; and (e) the constitution is entrenched through procedures that constrain how it may be revised.

8 Data on constitutions adopted since 1985 is reported in Alec Stone Sweet, “Constitutions, Rights, and Judicial Power” in *Comparative Politics* (Daniele Caramani gen ed) (Oxford University Press, 4th Ed, 2017).

9 David Law & Mila Versteeg, “Sham Constitutions” (2013) 100 Cal L Rev 863.

A. *Logics of delegation*

6 A first-order puzzle concerns why political elites would seek to constrain themselves by establishing rights and review. Rights lay down substantive and procedural constraints on the exercise of public authority. And, “rights review” means giving to judges the power to control the decisions of these same officials. Scholars largely agree on the basics of a solution to this puzzle; at the same time, they recognise that explaining any particular case will require close attention to facts (historical, socio-economic, politico-legal and so on) that are specific to that national system. The general account stresses the importance of a competitive party system, as a necessary background condition, and the common interest of each party to constrain its opponents when out of power.¹⁰ Put as simply as possible: when two or more major parties: (a) know that they will compete with one another in elections for power; and (b) believe that they could lose to one of their opponents, then each will have an interest in investing in constitutional arrangements that will constrain opponents after losing an election.

7 Although, virtually, all modern constitutions proclaim that sovereignty rests with the people, constitutions are typically drafted by different groups of elites in the course of complex negotiations. In such contexts, two overlapping logics broadly explain why these groups choose to delegate control powers to constitutional judges. The first, the so-called “insurance model of judicial review” directs analytical attention to the degree to which political authority is centralised or fragmented.¹¹ In systems dominated by one person or one political party, rulers will have little incentive to share their power with courts. In contrast, where a competitive party system exists or can be foreseen by the founders, each party will see the benefits of protecting its interests when out of power, and constraining officials through judicial review is a means of doing so.

8 A second and related logic – one of “incomplete contracting” – focuses on rights as a specific form of insurance.¹² Constitutions are conceived as contracts between groups of political elites (likely to organise as future political parties) who jointly negotiate the legal framework under which they will govern. In establishing a democracy,

10 Alec Stone Sweet, “Constitutional Courts” in *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) ch 39.

11 Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asia* (Cambridge University Press, 2002), chs 1–2.

12 Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Western Europe* (Oxford University Press, 2000) ch 2; Alec Stone Sweet, “Constitutional Courts” in *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) at pp 820–822.

each contracting party knows that they will compete with one another for office, through elections. At the same time, each wants to constrain opponents when the latter are in power, in part, through rights and review. The constitution, thus, contracts two common goods: (a) a set of enabling governmental institutions, tied to elections; and (b) a set of constraints, tied to rights.

9 Rights will only constrain one's opponent if there is an effective enforcement mechanism available, hence delegation to a constitutional court. Delegation also resolves deep problems of incomplete contracting. All contracts are "incomplete" to the extent that meaningful uncertainty exists as to the precise nature of the contract's terms. Modern rights provisions are famously incomplete, in that rights are typically expressed in abstract, general terms *ex ante*, leaving it to an interpreter to clarify their scope and content in the light of the concrete cases that will emerge *ex post*. One reason for this textual indeterminacy is rights disagreements among the negotiating parties. To avoid bargaining stalemates, multi-party founders of new constitutions typically rely on broadly worded rights provisions, or they simply copy the incomplete formulations found in other rights documents, domestic or international, into their own.

10 The constitutional court can neither provide insurance to the parties, nor "complete" rights provisions in an authoritative way, if rulers can easily override its decisions and precedents. By definition, a rights-based constitution is entrenched in ways that make it impossible for either the Legislature or Executive, on its own, to revise the constitution to reverse the court. Delegation, nonetheless, entails costs, in so far as elites, conceived as future rulers, give lawmaking authority to judges. Under conditions of relatively effective judicial review, each party can expect to lose some important cases, which means that all will be required to accept some rights interpretations that they would not have found acceptable at the contracting moment.

11 The more judicial review increases in effectiveness over time, the more central apex courts will be to the development of the constitution, the making of public policy, inter-branch (separation of powers) conflicts and electoral competition. We can be more precise.¹³ Constitutional judicial review is *effective* to the extent that: (a) important constitutional disputes arising in the polity are brought to the review authority on a regular basis;¹⁴ (b) the judges who resolve these disputes

13 Alec Stone Sweet, "Constitutional Courts" *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) at pp 825–826.

14 The force of this factor that will depend upon procedural rules, including of standing.

give reasons for their rulings; and (c) those who are governed by the constitutional law accept that the court's rulings have some binding effect as precedent. Effectiveness varies across systems, and across time within the same country. Historically, most systems of rights protection have been relatively ineffective, even irrelevant. Important disputes may not be sent to judges; judges may restrict standing, or adopt deference postures; and officials might ignore decisions that are taken, or punish judges for taking them. Elites may care much more about staying in power, enriching themselves, rewarding their friends and punishing their foes, and achieving ethnic dominance, than they do about building constitutional democracy. In any event, the success of any effort to build an effective system of rights protection cannot be presumed.

B. Proportionality analysis

12 Notwithstanding the challenges, constitutional courts in many new and emerging democracies have managed to establish effective rights review, and PA has played an important role in the jurisprudence these courts have produced.

13 PA has not only diffused globally, it has become the dominant, best-practice standard for adjudicating “qualified” rights.¹⁵ Most rights provisions in modern constitutions contain a limitation clause, which permits the Government to restrict the exercise of a right for some sufficiently important public purpose. PA, with its distinctive series of tests, is tailor-made for determining whether public officials have abused their authority under a limitation clause, or whose acts hinder the enjoyment of rights more than is tolerable under the constitution.

14 In its most developed form, PA proceeds through a sequence of four tests: (i) “legitimacy” or “proper purpose”; (ii) “suitability”; (iii) “necessity”; and (iv) balancing in the strict sense. A government measure that fails any one of these tests violates the proportionality principle and is, therefore, unconstitutional.

15 The first stage of PA mandates inquiry into the “legitimacy” of the measure under review: the judge confirms that the constitution authorises the Government to take such a measure. In most jurisdictions, judges effectively treat the proper purpose prong of PA in the style of a threshold inquiry: if the constitution has not authorised the State to pursue such a purpose, then the rights claimant must prevail. In

15 This section is based on Alec Stone Sweet & Jud Mathews, “Proportionality Balancing and Global Constitutionalism” (2008) 47 Colum J Transnat'l L 73 and Jud Mathews & Alec Stone Sweet, “All Things in Proportion? American Rights Review and the Problem of Balancing” (2012) 60 Emory LJ 102.

the second step – “suitability” – the Government must show that a rational relationship exists between the *means chosen* and the *ends pursued*, such that the former is “suitable” to achieving the end. In most systems, few laws are struck down on grounds that the stated official purpose is illicit (*per se* illegitimate), or that the act is irrational or arbitrary (the means being unsuitable).¹⁶

16 The third phase – “necessity” – has far more bite. At its core is a least-restrictive-means test – also called a requirement of “minimal impairment” (in Canada) or “narrow tailoring” (in the US) – through which the judge ensures that the measure under review does not impair a right more than is necessary for the Government to achieve its declared purpose. In practice, judges skilled in PA rarely invalidate a measure simply because they can imagine one less restrictive alternative. Instead, they insist that policymakers have a duty to consider a range of reasonably available alternatives, and to refrain from selecting the most restrictive among them. They also commonly require, as a pleading matter, that the rights claimant identify less restrictive alternatives. Judges rarely strike down a law as unnecessary without reference to an alternative that is reasonably available to lawmakers.

17 In the proportionality world, the analysis cannot end with necessity. If it did, a law that imposed a heavy and heretofore unjustified burden on the rights holder would prevail, so long as the measure is narrowly tailored relative to alternatives. A fourth stage, called “balancing in the strict sense”, is required. In it, the court assesses, in light of the facts or policy context, the act’s marginal addition to the realisation of an important public purpose against the marginal injury incurred by infringement of the right. Thus, one core function of balancing is to ensure that a relatively small or even trivial addition to the public weal does not, say, curtail a right in a significant way. Judges that rely heavily on this stage, most prominently, members of the German Federal Constitutional Court and the Israeli Supreme Court, also emphasise that balancing allows them to “complete” the analysis, in order to check that no factor of significance to either side has been overlooked in previous stages.¹⁷

16 Some versions of PA collapse legitimacy and suitability into one stage.

17 Dieter Grimm, “Proportionality in Canadian and German Constitutional Jurisprudence” (2007) 57(2) UTLJ 383 at 393–395; Aharon Barak, “Proportionality” in *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) ch 34.

C. *Proportionality and effectiveness*

18 We can now highlight some of the reasons why a court will adopt PA, and apply it in a consistent, principled way, if it wishes to enhance the effectiveness of rights and review over time. First, as noted, PA is a standard of review that positions judges to evaluate the decisions of government officials (rather than screening those decisions from review). Adopting PA creates an implied reason-giving requirement that binds all officials when they take rights-regarding decisions; and PA is a ready-made analytical procedure for assessing these justifications. Second, PA authoritatively organises: (a) how litigants will argue their cases; and (b) how courts will frame their decisions. It is easy to learn and to teach, and courts typically apply PA to all qualified rights, rather than evolving complex *sui generis* doctrines for each permutation of each right. Third, PA enhances the flexibility of judges to manage hard cases. While PA is decidedly not a deference doctrine, judges can and do build deference into necessity analysis and balancing in the strict sense; even powerful courts do so, for a host of pragmatic reasons. Fourth, and relatedly, PA constitutes a fixed, determinate procedure for rights adjudication, against the backdrop of outcome indeterminacy. While placing a justificatory burden on officials, it is otherwise substantively neutral. PA does not, for example, tell judges how to weigh the values and interests in tension. Because, in balancing situations, it is the context and not the law that varies, it will be the court's reading of context (the fact patterns, circumstances and policy considerations at play in any specific case) that will determine outcomes.

19 We do not wish to be misunderstood on a crucial point. Deploying PA will expose constitutional judges as lawmakers. At the same time, PA enables courts to defend – in a transparent way – why they have made the legal and policy choices they do, in the constitutional vocabulary of rights protection. The framework is not a jurisprudential magic wand that judges wave to make the political dilemmas of rights review disappear. Indeed, waving it will make it clear that rights adjudication results in constitutionally based policy interventions.

20 Nonetheless, PA is a best-practice standard or rights adjudication because it provides a tested means for courts to render rights effective. PA has the innate capacity to enhance the salience of rights considerations to policy deliberations throughout the greater political system. Rights-protecting courts have powerful reasons to induce legislatures and executives to use modes of deliberation, such as PA, that make protecting rights a participatory process. In so far as they do, political rulers will help to legitimise the court and PA itself, despite or because of the controversies that judicial review engenders.

21 We now turn to the diffusion of PA in Asia.

II. Rights and proportionality in Asia

22 In a trend of enormous significance, the apex courts of South Korea, Taiwan, Hong Kong and Malaysia have turned toward PA to adjudicate constitutional rights claims. To be sure, there is wide variance in the consistency and intensity in which they have enforced the proportionality principle, in the timing of the crucial moves, and in the impact of PA on policymaking and the development of the constitutional law. Each operates within the horizon of political possibility, which is radically reduced when power is concentrated in a single, dominant group. But judicial decisions can provoke change to the political environment over time, by establishing new norms, and opening new channels for contestation. We can observe these dynamics in all four cases, if to different degrees.

A. South Korea

23 South Korea arguably presents Asia's strongest example of how a constitutional court in a new democracy can be at the centre of a rights revolution, while reinforcing norms of democratic governance. From the start, the Constitutional Court of Korea ("KCC") has distinguished itself as one of Asia's most active and effective constitutional tribunals. The court has handed down thousands of decisions, including hundreds of rulings of unconstitutionality,¹⁸ and enjoys broad public approval.¹⁹ For nearly three decades, the court has made extensive use of PA, both to adjudicate constitutional rights and to oversee the operation of Korea's democratic institutions.

24 The court's independence and standing are all the more notable given South Korea's political history. Until the mid-1980s, the country was led by a succession of military governments that showed little tolerance for political opposition or judicial oversight. When judges insisted that the South Korean government compensate injured servicemen in the 1970s, the president responded by initiating constitutional reforms that bolstered his own power while limiting that of the courts.²⁰ The fundamentals of the situation changed only in 1987, once public pressure led the regime to adopt sweeping amendments paving the way for competitive, multi-party democracy and the creation

18 Youngjoon Kwon, "Bridging the Gap between Korean Substance and Western Form" in *Law and Legal Institutions of Asia* (Ann E Black & Gary F Bell gen eds) (Cambridge University Press, 2011) at p 166.

19 Tom Ginsburg, "The Constitutional Court and the Judicialization of Korean Politics" in *New Courts in Asia* (Andrew Harding & Penelope (Pip) Nicholson gen eds) (Routledge, 2010) at p 145.

20 Tom Ginsburg, "Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan" (2002) 27 *Law & Society Inquiry* 763 at 779.

of the Constitutional Court. Chapter II of the Constitution of the Sixth Republic features both a roster of liberal rights and a general limitations clause, which provides that rights may be restricted by statute only “when necessary for national security, the maintenance of law and order, or for public welfare” so long as “no essential aspect of the freedom or right” is violated.”²¹

25 KCC wasted little time in consolidating PA, which had appeared in South Korean public law well before the Constitutional Court came online. The Police Duties Act of 1953 required exercises of police power to be proportional,²² and the South Korean Supreme Court began to use a form of PA in reviewing administrative acts in the 1960s.²³ Building on this legacy, KCC quickly adopted a version of the familiar four-part test developed in Germany, expanding PA’s reach to all rights contexts. In making PA the doctrinal core of rights adjudication, KCC has also fuelled competition with the South Korean Supreme Court, a rival for power and influence.²⁴ The 1987 South Korean Constitution²⁵ establishes the South Korean Supreme Court as the final authority on administrative action, including with respect to constitutional challenges.²⁶ While the South Korean Supreme Court has used PA to review administrative action, it has done so with less consistency and conviction than KCC.²⁷ With an eye toward enhancing the effectiveness of rights protection, KCC expanded its jurisdiction to include the processing of individual constitutional complaints arising out of

21 Constitution of the Republic of Korea (amended by 29 October 1987) Art 37.

22 The statute requires that “police must pursue the course of action that fulfills their duties while inflicting the least possible harm upon the rights and interests of the people”: Police Duties Act (Act No 12600, May 20, 2014) (South Korea) Art 1, quoted in 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* (Francesca Bignami & David Zaring gen eds) (Edward Elgar Publishing, 2014) at p 313.

23 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* (Francesca Bignami & David Zaring gen eds) (Edward Elgar Publishing, 2014) at p 313.

24 See Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press, 2003) at pp 239–242.

25 Constitution of the Republic of Korea (amended by 29 October 1987).

26 Constitution of the Republic of Korea (amended by 29 October 1987) Art 107 s 2.

27 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* (Francesca Bignami & David Zaring gen eds) (Edward Elgar Publishing, 2014) at pp 313–314.

administrative decisions, which (a) further marginalises the South Korean Supreme Court, while (b) assuring a steady caseload.²⁸

26 Most important for present purposes, KCC referees disputes rooted in the country's often fraught democratic politics.²⁹ The most high-stakes case concerned the impeachment of President Moo-Hyun Roh in 2004. Roh was accused of campaigning in legislative elections, thereby contravening a statutory ban on electioneering by the president.³⁰ The National Assembly mustered the two-thirds supermajority necessary to impeach Roh, and the matter moved to KCC.³¹ While the court found that President Roh had violated both the statute and the South Korean Constitution,³² it invalidated the impeachment, on the grounds that it was disproportionate. Assessing the permissibility of impeachment, the court held, requires "balancing the 'degree of the negative impact on or the harm to the constitutional order caused by the violation of law'" against the (negative) effects to be incurred "by the removal of the respondent from office".³³ The court stressed that its concern was for Korean democracy, not Roh's fate, concluding that impeachment would both thwart the will of the voters and disrupt government processes. Impeachment was, therefore, judged to be a fit penalty only for misdeeds that threatened the "basic order of free democracy".³⁴

B. *Taiwan*

27 After four decades of single-party rule and martial law, Taiwan experienced a democratic transition in the late 1980s. Although Taiwan's

28 For data on the court's rising caseload during its first 12 years in operation, see Tom Ginsburg, "Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan" (2002) 27 *Law & Society Inquiry* 763 at 781–782.

29 Po Jen Yap, *Courts and Democracies in Asia* (forthcoming) (Cambridge University Press, 2017) ch 7; Tom Ginsburg, "The Constitutional Court and the Judicialization of Korean Politics" in *New Courts in Asia* (Andrew Harding & Penelope (Pip) Nicholson gen eds) (Routledge, 2010) at pp 147–149.

30 Youngjae Lee, "Law, Politics, and Impeachment: The Impeachment of Roh Moo-Hyun from a Comparative Constitutional Perspective" (2005) 53 *Am J Comp L* 403 at 410.

31 Constitution of the Republic of Korea (amended by 29 October 1987) Art 111; Youngjoon Kwon, "Bridging the Gap between Korean Substance and Western Form" in *Law and Legal Institutions of Asia* (Ann E Black & Gary F Bell gen eds) (Cambridge University Press, 2011) at p 166.

32 Youngjae Lee, "Law, Politics, and Impeachment: The Impeachment of Roh Moo-Hyun from a Comparative Constitutional Perspective," (2005) 53 *Am J Comp L* 403 at 410 and 415–418.

33 Constitutional Court of Korea, 14 May 2004, Case No 2004Hun-Na1, Impeachment case at p 145.

34 Constitutional Court of Korea, 14 May 2004, Case No 2004Hun-Na1, Impeachment case at p 181.

Constitutional Court (“TCC”) was a fixture of the old regime, it quickly reinvented itself as a modern rights-protecting court. In the mid-1990s, TCC adapted a form of PA from antecedents in Taiwanese administrative law, and then gradually refined it in ways that aligned with international standards. TCC has generally been more willing to provide individual rights protection than to intervene in the most politically perilous constitutional disputes, such as those involving electoral matters or inter-branch relations. But even in these domains, the court has sometimes defied the wishes of the dominant political powers.

28 Taiwan’s Constitution³⁵ dates from 1947. The Taiwanese Constitution establishes a government with five branches, including two borrowed from Chinese imperial history.³⁶ Other features of the 1947 Taiwanese Constitution are less uniquely Chinese. The Taiwanese Constitution proclaims a roster of liberal rights and, in Art 23, a limitations clause providing that no rights shall be restricted except by law, and when “necessary to prevent infringement upon the freedoms of others, to avert an imminent danger, to maintain social order, or to promote public welfare”.³⁷ The Taiwanese Constitution also established TCC (or Council of Grand Justices) with explicit authority to overturn legislation not conforming to rights.

29 Notwithstanding these formal features, TCC provided no meaningful review of government action during the period of martial law and political dominance of the Kuomintang (“KMT”). When TCC did flex its muscles in the 1950s, KMT punished it by reducing its jurisdiction.³⁸ But, with the end of martial law (in 1987), and especially since 1990, the court has developed an imposing rights jurisprudence.

30 As in Korea, a simple form of PA appeared in Taiwanese public law in the 1950s.³⁹ In 1994, the Taiwanese Administrative Court declared proportionality to be a general principle of constitutional stature; and,

35 Constitution of the Republic of China (promulgated on 25 December 1947) (Taiwan).

36 Thomas Weishing Huang, “Judicial Activism in the Transitional Polity: The Council of Grand Justices in Taiwan” (2005) 19 *Temp Int’l & Comp LJ* 1 at 6.

37 Thomas Weishing Huang, “Judicial Activism in the Transitional Polity: The Council of Grand Justices in Taiwan” (2005) 19 *Temp Int’l & Comp LJ* 1 at 23.

38 Tom Ginsburg, “Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan” (2002) 27 *Law & Society Inquiry* 763 at 769.

39 For historical background on PA’s evolution in Taiwan through 2002, we rely heavily on the discussion in 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* (Francesca Bignami & David Zaring gen eds) (Edward Elgar Publishing, 2014) at pp 317–321.

two years later, TCC officially adopted PA in a challenge to the Taiwanese government's use of eminent domain powers, deriving it from Art 23 of the Taiwanese Constitution (the general limitation clause).⁴⁰ While TCC limited its first forays into proportionality to necessity analysis, the court began applying a more developed, multi-step version of PA in 1999, following a challenge to a statute authorising life sentences and the death penalty for drug crimes. The court focused heavily on: (a) the legitimacy of the Government's objectives (proper purpose); (b) the necessity of the penalties; and (c) their proportionality in the narrow sense. The court added a suitability test in 2002, in conformity with international practice. Today, PA comprises the dominant doctrinal framework for rights protection, deploying it in approximately half of all cases decided between 1994 and 2013.⁴¹ TCC wobbles in how it uses PA, but "[d]espite the inconsistency, the principle of proportionality constitutes the most favored ... standard of judicial review ... both academically and practically".⁴²

31 TCC has been an active – and on some accounts activist – court, and its rulings have had significant influence on Taiwanese democracy. The annual number of petitions the court receives, and the number of judgments it hands down, exploded dramatically in the 15 years following the end of martial law, and remain high today.⁴³ Rulings on due process, civil liberties, criminal procedure and labour rights⁴⁴ reveal a rights-favouring approach⁴⁵ that, as in South Korea, has given it an edge in jurisdictional competition with the other courts.⁴⁶

32 TCC has also intervened in high-stakes political disputes, seemingly in order to keep the transition to pluralist democracy on track. Indeed, its ruling in Interpretation No 261 – enforcing the constitutional requirement of periodic elections in the three national

40 JY Interpretation No 409 (5 July 1996).

41 Yen-Tu Su & Han-Wei Ho, "The Causes of Rising Opinion Dissensus on Taiwan's Constitutional Court", *Institutum Iurisprudentiae, Academia Sinica* (January 2016) at p 18.

42 Chung-Lin Chen, "In Search of a New Approach to Information Privacy Judicial Review: Interpreting No. 603 of Taiwan's Constitutional Court as a Guide" (2010) 20 *Ind Int'l & Comp L Rev* 22 at 26.

43 Jau-Yuan Hwang, "Taiwan's Constitutional Court from 2003 to 2011: New Appointments and Different Performance" (2012) 53 *Seoul Law Journal* 41 at 47.

44 Tom Ginsburg, "Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan" (2002) 27 *Law & Society Inquiry* 763 at 771–772; Margaret K Lewis & Jerome A Cohen, "How Taiwan's Constitutional Court Reined in Police Power: Lessons for the People's Republic of China" (2014) 37 *Fordham Int'l LJ* 863.

45 Jou-Juo Chu, "Global Constitutionalism and Judicial Activism in Taiwan" (2008) 38 *Journal of Contemporary Asia* 515 at 526–527.

46 Chien-Chih Lin & Ching-Fang Hsu, "An Inter-court Struggle for Judicial Supremacy" (2016) 11 *U Pa Asian L Rev* 294 at 326–331.

legislative bodies, which KMT had suspended for decades⁴⁷ – was crucial to the emergence of multi-party democracy in Taiwan in the first place. Interpretation No 419 blocked Vice President Lien Chan from assuming the Premiership of the administration on constitutional grounds.⁴⁸ And, following the first change in ruling party in Taiwan's history, in 2000, TCC ruled unconstitutional a raft of proposed constitutional amendments.⁴⁹ At present, there is academic controversy swirling around the question of whether TCC has shrunk from playing an active role in high-stakes, political constitutional disputes,⁵⁰ or whether the court seeks to intervene only when a solid majority of public opinion is firmly on its side.⁵¹

33 In any event, TCC clearly remains willing to intervene in hot-button political controversies that implicate individual rights. In May 2017, the court ruled unconstitutional provisions of the Civil Code not allowing same-sex partners to marry.⁵² Rather than crafting a remedy itself, however, TCC gave lawmakers two years to amend the statute. TCC, thus, balanced its assertion of judicial power with recognition of the political branches' role in giving substance to the country's constitutional commitments.

C. *Hong Kong*

34 Hong Kong's courts operate in a uniquely challenging environment. Pursuant to the "one country, two systems" approach pioneered by Deng Xiaoping, Hong Kong operates as a "special administrative region" ("SAR") within China. The status gives it a substantial measure of autonomy, but only within parameters that are ultimately subject to the control of Chinese authorities. The responsibility for interpreting Hong Kong's Basic Law⁵³ is shared among Hong Kong's courts and the Standing Committee of the National People's Congress ("NPCSC") in Beijing. Since Britain ceded sovereignty over Hong Kong to China in 1997, its highest court, the Court of Final

47 JY Interpretation No 261 (1990/6/21); Jou-Juo Chu, "Global Constitutionalism and Judicial Activism in Taiwan" (2008) 38 *Journal of Contemporary Asia* 515 at 523–524.

48 JY Interpretation No 419 (31 December 1996).

49 JY Interpretation No 499 (24 March 2000).

50 Ming-Sung Kuo, "Moving Towards a Nominal Constitutional Court? Critical Reflections on the Shift from Judicial Activism to Constitutional Irrelevance in Taiwan's Constitutional Politics" (2016) 25 *Wash Int'l LJ* 597.

51 Jiunn-Rong Yeh & Wen-Chen Chang, "The Emergence of East Asian Constitutionalism: Features in Comparison" (2011) 59 *Am J Comp L* 811 at 830–831.

52 JY Interpretation No 748 (24 May 2017).

53 The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China.

Appeal (“CFA”), has built a jurisprudence that provides some meaningful protection of rights, including through the use of PA. At the same time, the court knows that it must avoid producing (too many) results that the authorities in Beijing might find intolerable.

35 Pursuant to the terms of the Sino–British Joint Declaration of 1984,⁵⁴ a mix of drafters from the Mainland and Hong Kong, all chosen by the Chinese government, drafted the Basic Law in the years prior to the handoff.⁵⁵ Chapter III of the Basic Law guarantees a number of fundamental rights, including civil liberties, due process and a handful of economic rights, but does not formally establish statutory judicial review.⁵⁶ A Bill of Rights Ordinance seemingly offered further protection by incorporating the International Covenant on Civil and Political Rights, but provisions that placed it in a hierarchically superior position to non-conforming legislation were repudiated after the handover.⁵⁷ The Basic Law establishes a tiered judiciary, with CFA on top, below that, the Hong Kong High Court (comprising the Hong Kong Court of Appeal and the Court of First Instance), and a number of lower courts. The Basic Law also vests interpretative powers in NPCSC.⁵⁸ NPCSC delegates to the courts of Hong Kong authority to interpret the Basic Law in the course of adjudicating cases, but further provides that the courts shall refer questions to NPCSC when they implicate the competencies of the Central People’s Government or its relation to Hong Kong.⁵⁹ The chief executive, who is named by Beijing, chooses Hong Kong’s judges, in consultation with a commission. Hong Kong’s legislature, the Legislative Council (“LegCo”), is a semi-corporatist body that over-represents traditionally pro-establishment and pro-China constituencies.⁶⁰

54 Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of China on the Question of Hong Kong.

55 Po Jen Yap, *Constitutional Dialogue in Common Law Asia* (Oxford University Press, 2015) at p 33.

56 The Basic Law further provides that rights contained in some international human rights instruments “shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region”: The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, Art 39.

57 Po Jen Yap, *Constitutional Dialogue in Common Law Asia* (Oxford University Press, 2015) at p 39. For details on the legal relation between the Basic Law, the Bill of Rights Ordinance and the covenant, see Johannes Chan & Chin Leng Lim, *Law of the Hong Kong Constitution* (Sweet and Maxwell, 2015) paras 16.009–16.127.

58 The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, Art 158.

59 The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, Art 158.

60 Po Jen Yap, *Constitutional Dialogue in Common Law Asia* (Oxford University Press, 2015) at pp 34–37.

36 Given these institutional arrangements, one might suppose that Hong Kong's courts would be thoroughly dominated by the officials of the SAR and Mainland China. In fact, as Eric Ip has argued, bringing the courts to heel entails real costs.⁶¹ Although pro-Beijing parties hold a majority in LegCo, they do not move in lockstep, and the co-ordination necessary to overturn an unwanted judicial decision is difficult to muster. And, while NPCSC has power to issue binding interpretations of the Basic Law, in the hands of a 170-member body with no particular expertise in Hong Kong law, it is a cumbersome mechanism for supervising courts.⁶² What is more, NPCSC interpretations are likely to engender substantial public controversy. NPCSC has issued interpretations of the Basic Law on only five occasions, several of which became flashpoints for political unrest. The upshot is that the higher courts enjoy a modicum of judicial independence as a practical matter, and they have made the most of it, developing a body of constitutional common law whose effect is to further raise the costs of court-curbing.⁶³ But there remain red lines that the courts cross at their peril, including in particular electoral engineering. Hong Kong's courts have charted a course through this terrain with a mixture of boldness and prudence, and a flexible, PA-based rights jurisprudence has been an important part of its strategy.

37 It was the Hong Kong Court of Appeal that first introduced PA into Hong Kong's rights jurisprudence, borrowing the concept from Canadian law in its first Bill of Rights case, decided several years prior to the 1997 handover to China.⁶⁴ While the court initially applied PA alongside a more deferential rationality test, PA came to subsume this other inquiry.⁶⁵ CFA only started operations after the handover, and at first, that court embraced proportionality more in name than spirit. The first important case, from 1999, is *HKSAR v Ng Kung Siu*⁶⁶ ("*Ng Kung Siu*"), a free-expression challenge to statutes making desecration of the Chinese and Hong Kong flags a crime. In holding that the restriction on the right must be "proportionate to the aims sought to be achieved

61 Eric C Ip, "The Politics of Constitutional Common Law in Hong Kong under Chinese Sovereignty" (2016) 25 *Pacific Rim Law & Policy Journal* 565 at 586.

62 Eric C Ip, "Constitutional Competition between the Hong Kong Court of Final Appeal and the Chinese National People's Congress Standing Committee: A Game Theory Perspective" (2014) 39 *Law & Society Inquiry* 824 at 840.

63 Eric C Ip, "The Politics of Constitutional Common Law in Hong Kong under Chinese Sovereignty" (2016) 25 *Pacific Rim Law & Policy Journal* 565 at 576–593; see also Po Jen Yap, *Courts and Democracies in Asia* (forthcoming) (Cambridge University Press, 2017) ch 4.

64 *R v Sin Yau Ming* [1992] 1 HKCLR 127; Danny Gittlings, *Introduction to the Hong Kong Basic Law* (Hong Kong University Press, 2nd Ed, 2016) at p 291.

65 Danny Gittlings, *Introduction to the Hong Kong Basic Law* (Hong Kong University Press, 2nd Ed, 2016) at p 291.

66 [1999] 3 HKLRD 907.

thereby”, CFA cited a 1996 decision of the Privy Council, *Ming Pao Newspapers Ltd v The Attorney General of Hong Kong*.⁶⁷ But while *Ng Kung Siu* nominally endorsed PA, the court’s conclusion that the measures were justified was little more than an *ipse dixit*.⁶⁸

38 CFA, nonetheless, built on this foundation to apply a more rigorous form of PA in subsequent cases. In *Leung Kwok Hung v HKSAR*,⁶⁹ which concerned a freedom of assembly challenge to an ordinance⁷⁰ restricting public processions, the court justified its embrace of proportionality review in global terms, noting its adoption in “many jurisdictions”, including the UK, the European Court of Human Rights, Canada and South Africa. While noting that “the terms in which [PA] is formulated for application may vary from one jurisdiction to another, having regard to matters such as the text of the constitutional instrument in question and the legal history and tradition informing constitutional interpretation in the jurisdiction concerned”, the court concluded that “the nature of the proportionality principle is essentially the same”. For its part, the court opted for a two-part test, requiring: (a) a rational connection to a legitimate purpose (suitability); and (b) a least restrictive means requirement (necessity). Following a careful analysis of the statutory provisions, the court concluded that the Ordinance did not fail this test, although it was deficient on other grounds.

39 In the intervening years, CFA has developed an active rights jurisprudence that has resulted in the invalidation of a number of important government measures.⁷¹ Nevertheless, it is clear that the judges have carefully calibrated their moves in order to avoid direct confrontation with Beijing over critical issues. The divergence in how the court handled two cases involving electoral challenges illustrates the point.⁷² In *Mok Charles Peter v Tam Wai Ho*⁷³ (“*Charles Mok*”), CFA struck down a provision that barred appellate review of judicial rulings on electoral disputes in LegCo races, as a disproportionate restriction on its own function as a court of final adjudication. In *Leung Chun Ying v Ho Chun Yan Albert*,⁷⁴ the court was asked to review a seven-day

67 [1996] AC 907.

68 For a critical discussion of the decision, see Danny Gittlings, *Introduction to the Hong Kong Basic Law* (Hong Kong University Press, 2nd Ed, 2016) at pp 295–299.

69 [2005] 3 HKLRD 164.

70 Public Order Ordinance (Cap 245).

71 See Eric C Ip, “Constitutional Competition between the Hong Kong Court of Final Appeal and the Chinese National People’s Congress Standing Committee: A Game Theory Perspective” (2014) 39 *Law & Society Inquiry* 824 at 825, fn 1.

72 Po Jen Yap highlighted the inconsistency in his book: Po Jen Yap, *Courts and Democracies in Asia* (forthcoming) (Cambridge University Press, 2017) ch 4.

73 (2010) 13 HKCFAR 762.

74 (2013) 16 HKCFAR 735.

limitation on bringing judicial challenges to chief-executive elections, a high-profile case given that it was brought against a candidate acceptable to Beijing, by one who was not.⁷⁵ The court dismissed the appeal, distinguishing *Charles Mok* and declining to engage in PA altogether.

40 Hong Kong's CFA has largely succeeded in avoiding head-on confrontations with Beijing over fundamental governance issues, while managing to raise standards of rights protection in less sensitive domains. The challenge facing the court will likely increase, as political controversy concerning Hong Kong's relationship to Beijing expands. Over the last three years, Hong Kong has been roiled, first by a white paper asserting more central authority over Hong Kong's affairs (including the appointment of judges)⁷⁶ and then by Beijing's treatment of two elected members of LegCo, who pointedly inserted criticisms of China into the oath of office.⁷⁷ The Hong Kong Court of Appeal affirmed the disqualification of the LegCo members on the basis of an NPCSC interpretation of the Basic Law. Navigating these turbulent waters will require great care in the years ahead.

D. Malaysia

41 Malaysia's courts also operate in an unusually challenging political environment. From independence in 1957 until very recently, the country's politics have been dominated by one very powerful party coalition: the Barisan Nasional. Until 2008, the Barisan Nasional held not only a parliamentary majority, but a supermajority sufficient to amend most parts of the Malaysian Constitution.⁷⁸ Over the years, the courts have taken different stances towards the party, with differing degrees of success. Following decades of deference, a move towards more vigorous judicial review in the 1980s ended in chaos and disaster, culminating in the removal of the lord president and two other judges of the Malaysian Supreme Court, and in the curtailment of the court's powers and status. Malaysia's judges are now pushing back, subjecting government actions to more searching scrutiny, this time through PA. As in Hong Kong, Malaysia's courts must remain sensitive to the political ramifications of their rulings. But it

75 Po Jen Yap, *Courts and Democracies in Asia* (Cambridge University Press, 2017) ch 4.

76 Alan Wong, "Beijing's 'White Paper' Sets off a Firestorm in Hong Kong" *The New York Times* (11 June 2014).

77 Officials disqualified the two from their seats, and later prosecuted them for unlawful assembly: Ng Kang-chung & Joyce Ng, "Disqualified Hong Kong Pro-Independence Lawmakers Yau Wai-ching and Baggio Leung Charged with Unlawful Assembly", *South China Morning Post* (26 April 2017).

78 Federal Constitution (M'sia).

appears that proportionality now has a foothold in Malaysia's constitutional jurisprudence.

42 The Malaysian Constitution contains a roster of justiciable rights, including rights to life and liberty, equality, freedom of expression, freedom of association and freedom of religion.⁷⁹ The Malaysian Constitution also establishes an independent judiciary with the Federal Court – known as the Supreme Court until 1994 – at its head. The courts have long asserted the power to review statutes for conformity with the Malaysian Constitution. Historically, however, they have adopted a posture of deference. Under the “four walls” doctrine, Malaysia's courts refused to look beyond domestic practice in interpreting the Malaysian Constitution; and domestic practice long featured narrow-gauged, formalistic review, and wide deference to the Parliament and the Executive.⁸⁰

43 In the late-1980s, judges took some important steps forward, ruling against the Malaysian government in a series of cases. But this newfound assertiveness was short-lived. In 1987, after the Malaysian High Court resolved an electoral dispute between two factions of the leading party in a way that displeased the prime minister, Mahathir Mohamad, conflict between the Malaysian government and the courts rapidly escalated to a crisis point.⁸¹ If the electoral dispute was the immediate trigger for the crisis, a series of constitutional rulings had already antagonised the Malaysian government. In the previous 18 months, Malaysian courts had, among other things, overturned the ban on a publication critical of the Malaysian government,⁸² granted *habeas corpus* to a prominent dissident,⁸³ and invalidated a statutory provision authorising prosecutors to remove criminal cases directly to the Malaysian High Court.⁸⁴ In 1988, officials of the ruling party succeeded in dismissing the lord president of the Malaysian Supreme Court and two other Supreme Court judges; and the Malaysian Parliament revised the Constitution, making it clear that the Malaysian judiciary was subservient to legislative authority, a creature of “federal law”. The Malaysian Supreme Court was renamed the Federal Court,

79 Federal Constitution (M'sia) Arts 5–13. See Po Jen Yap, *Constitutional Dialogue in Common Law Asia* (Oxford University Press, 2015) at pp 47–48.

80 Yvonne Tew, “On the Uneven Road to Constitutional Redemption: The Malaysian Judiciary and Constitutional Politics” (2016) 25(3) Wash Int'l LJ 673 at 681–685.

81 See Andrew Harding, *The Constitution of Malaysia: A Contextual Analysis* (Hart Publishing, 2012) at pp 207–216.

82 *Persatuan Aliran Kesedaran Negara v Minister of Home Affairs* [1988] 1 MLJ 440; [1990] 1 MLJ 351.

83 *Karpal Singh v Menteri Hal Ehwal Dalam Negeri Malaysia* [1988] 1 MLJ 468.

84 *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311.

and the Malaysian Parliament claimed authority to restrict the jurisdiction of the courts through statute.

44 The Federal Court retreated from political confrontation over the next 20 years, and quashed occasional flashes of activism from the lower courts.⁸⁵ Over the same period, the Barisan Nasional's dominance of national politics steadily diminished. In 2008, it lost the two-thirds supermajority necessary to amend (most portions of) the Malaysian Constitution. Shortly thereafter, the Malaysian Federal Court endorsed a more intrusive approach to constitutional rights review built around PA.⁸⁶

45 In *Sivarasa Rasiah v Badan Peguam Malaysia*⁸⁷ (“*Sivarasa Rasiah*”), the court entertained a challenge to a statute excluding professional politicians from membership in the Bar Council. The court rejected the “traditional and narrow” approach to rights from earlier jurisprudence in favour of a “[generous] and ... prismatic” approach pioneered in three recent decisions.⁸⁸ In evaluating the appellant's equal protection claim, the court expressly adopted a three-step proportionality framework that required: (a) a “sufficiently important” legislative objective; (b) a “rational nexus” between the chosen measures and that objective; and (c) that the means adopted in the measure “be proportionate” in its objective.⁸⁹ Notwithstanding the four walls doctrine, the court cited or quoted seminal proportionality precedents from South Africa,⁹⁰ the UK⁹¹ and Canada⁹² in support of its approach. The court concluded that the challenged measure was proportionate, finding that the aim of keeping politics out of the Bar Council was in the public interest, and noting with approval that the Malaysian government had declined to adopt more farther-reaching means, such as barring politicians from addressing the Bar Council, or from practicing law altogether.⁹³ In *Public Prosecutor v Azmi bin Sharom*⁹⁴ (“*Azmi bin*

85 Gan Ching Chuan, “Administrative Law and Judicialized Governance in Malaysia: The Indian Connection” in *Administrative Law and Governance in Asia: Comparative Perspectives* (Tom Ginsburg & Albert H Y Chen gen eds) (Routledge, 2009) at pp 267–269.

86 The move towards proportionality in the late 2000s did not come out of the blue; there were antecedents in some earlier cases, notably the 1996 Court of Appeal's decision *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan* [1996] 1 MLJ 261.

87 [2010] 2 MLJ 333.

88 [2010] 2 MLJ 333 at 313 and 319.

89 [2010] 2 MLJ 333 at 324.

90 *Nyambirai v National Social Security Authority* [1996] 1 LRC 64.

91 *De Freitas v The Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1998] UKPC 30.

92 *R v Oakes* [1986] 1 SCR 103.

93 [2010] 2 MLJ 333 at 324–325.

94 [2015] 6 MLJ 751.

Sharom”), which relied on *Sivarasas Rasiah*, the court reiterated its commitment to PA, although it did not strike down the Sedition Act 1948 on freedom of expression grounds.

46 Meanwhile, the Barisan Nasional’s decline continued, with the party losing the overall popular vote for the first time in the 2013 elections. In November 2016, the Malaysian Court of Appeal invalidated parliamentary legislation on constitutional grounds. The case, *Mat Shuhaimi bin Shafiei v Kerajaan Malaysia*⁹⁵ (“*Mat Shuhaimi bin Shafiei*”) raised the question of the conformity of certain provisions of the same Sedition Act with Arts 8 and 10 of the Federal Constitution, which guarantee equal protection and freedom of expression respectively. Article 10 includes a limitation clause, which provides in relevant part:⁹⁶

- (2) Parliament may by law impose —
- (a) on the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation ... public order or morality and restrictions designed to protect the privileges of Parliament ...

47 The limitation clause is virtually identical to the relevant parts of Art 14 of the Singapore Constitution.⁹⁷ Most important for present purposes, the court declared that:⁹⁸

There [is] no longer any room for disputing that the jurisprudence related to operation of fundamental liberties guaranteed under the [Federal Constitution has] now evolved to a stage [in which all must recognise] that any legislation or any provision of law [in order] to be maintained as valid or sustainable, apart from the already accepted criteria of ‘reasonable or rational classification’ and that such law did not ‘render the liberty to be ineffective and merely illusory’ [must] also meet the test of proportionality. This [is] particularly so where the fundamental liberty/right [is] not absolute but qualified, as in the case of liberties guaranteed to citizens under art 10 ...

48 The court then went on to survey its case law on the point, highlighting its *Azmi bin Sharom* ruling, which had “expressly endorsed that the proportionality test was now an *entrenched* part of our law” [emphasis added].⁹⁹ The court struck down the offending provisions of the Sedition Act, comparing the heavy burden placed on individuals

95 [2017] 1 MLJ 436.

96 Federal Constitution (M’sia) Art 10(2)(a).

97 Constitution of the Republic of Singapore (1999 Reprint).

98 *Mat Shuhaimi bin Shafiei v Kerajaan Malaysia* [2017] 1 MLJ 436 at 445.

99 *Mat Shuhaimi bin Shafiei v Kerajaan Malaysia* [2017] 1 MLJ 436 at 445–447.

(“strict liability”) laid down by the Act, with the suite of rebuttable presumptions found in statutes penalising more “heinous crimes”.¹⁰⁰

49 Five months later, in April 2017, the Federal Court invalidated, as unconstitutional, parliamentary restrictions placed on the courts’ jurisdiction, a development heralded in Malaysia as a dramatic “rebirth of judicial power”¹⁰¹ after its demise in 1988. It remains to be seen whether the Federal Court will deploy PA with the same intensity as the South Korea, Taiwan or even the Hong Kong courts. But, with Malaysian politics in a state of flux, the court has positioned itself to play a stabilising and rights-enhancing role if the country continues to clear a path toward competitive, pluralist democracy.

III. Conclusion: Whither Singapore?

50 The case studies just presented direct our attention to the capacity of Asian courts to build effective systems of constitutional justice. As discussed in part I, those who have taken a more general, explanatory approach to rights and review argue that effective judicial review will not emerge without commitment among elites to the building of pluralist democracy. In a stable one-party state, for example, judicial power will reflect but not threaten the power of rulers; and the party will curb courts that do adopt the mantle of rights protector. Others have approached these questions from a normative and cultural standpoint, stressing the incompatibility of “Western”, “liberal” and “individualistic” conceptions of rights with Asian “values” and principles of political organisation, including “soft authoritarianism”.

51 The case studies show how courts can sometimes take the lead, working to lay a rights-based foundation for pluralist democratic politics that – the judges must hope – ruling elites will find in their interest. PA has been an important part of these efforts. In adopting PA, the courts are telling the rulers that:

- (a) The constitution is the source of the power you exercise, just as the constitution confers upon us the authority to review how you exercise it.
- (b) You are under a duty to justify your rights-regarding decisions with reasons, which we are under an obligation to assess.

100 These include the Dangerous Drugs Act 1952, and the Malaysian Anti-Corruption Commission Act 2009: *Mat Shuhaimi bin Shafiei v Kerajaan Malaysia* [2017] 1 MLJ 436 at 450.

101 *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat* [2017] 5 CLJ 526.

(c) You act unlawfully – disproportionately – whenever you infringe too much upon a right, given your stated reasons for doing so, and our nation’s constitutional commitments.

The turn toward proportionality shows that Asian courts are, indeed, able to engage ruling parties directly, even when it comes to highly sensitive policy issues, including the making of electoral law. These developments also shine a bright spotlight on Singapore, showing it to be a laggard state.

52 The Singapore situation comfortably fits predictions of comparative scholarship. The country has experienced one-party rule since the People’s Action Party (“PAP”) came to power in 1959; ever since, PAP has held far more seats in Parliament than it needs to adopt an amendment to the Singapore Constitution (66%). On the basis of these two facts, and knowing nothing else about Singapore, any student who has passed a basic comparative constitutional law course would be able to describe the Singapore situation accurately, at least in general terms. The scope of the Singapore judiciary’s constitutional margin of manoeuvre – its “zone of discretion”¹⁰² or its “constitutional space”¹⁰³ to act with relative autonomy from politics – is highly restricted, given PAP dominance, and the decision-rules governing constitutional amendment. Indeed, as a theoretical matter, the size of the space is nil. If no constitutionally important innovations emanating from the Singapore courts will be viable if they conflict with PAP’s interests, then one would predict that the judges would not be inclined to innovate at all. In fact, as all Singaporean readers will know, the Singapore judiciary and legal academy have been haunted by the spectacle of the withering punishment, administered by PAP, of the Court of Appeal following its ruling in *Chng Suan Tze v Minister for Home Affairs*,¹⁰⁴ which Po Jen Yap called “the single most important constitutional decision that the Singapore judiciary has ever handed down”¹⁰⁵.

53 Readers of this journal will also be intimately familiar with the discourse of “Asian values”, also called (tellingly) the “Singapore School”.

102 Alec Stone Sweet, “Constitutional Courts and Parliamentary Democracy” (2002) 25 *West European Politics* 77 at 93.

103 Gordon Silverstein, “Singapore: the Exception that Proves Rules Matter” in *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Tom Ginsburg & Tamir Moustafa eds) (Cambridge University Press, 2008) at p 81.

104 [1988] 2 SLR(R) 525. See Po Jen Yap, *Constitutional Dialogue in Common Law Asia* (Oxford University Press, 2015) at pp 73–77 and Gordon Silverstein, “Singapore: the Exception that Proves Rules Matter” in *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Tom Ginsburg & Tamir Moustafa eds) (Cambridge University Press, 2008) at pp 78–82.

105 See Po Jen Yap, *Constitutional Dialogue in Common Law Asia* (Oxford University Press, 2015) at p 74.

Although high officials of Singapore's government and ruling party have routinely invoked "Asian values" to explain the absence of robust judicial review and rights protection, most sophisticated Singaporean scholars have rejected the notion, treating it more as apology than explanation.¹⁰⁶ One can recognise important cross-national and cross-regional differences in cultural values, they insist, while committing to a mode of meaningful rights protection. Singapore judges, for their part, are aware of the importance of PA in influential common law systems, including the UK and Canada. But they have pointedly rejected it as alien to Singapore, in terms that are commensurate with the apology. Deference to the Legislature and Executive is defended in terms of government priorities: efficiency, the expertise of decision-makers and higher state interests, such as security, public order and social solidarity.

54 Jack Lee has published the most important article on proportionality and the Singapore Constitution.¹⁰⁷ Lee situated the Singapore case comparatively, discussed the relevant case law of the Singapore High Court and Court of Appeal, and suggested how the courts could justify, as a doctrinal matter, a move to develop its own version of PA. We endorse these arguments. The case studies presented in part II add a further set of reasons for Singapore judges to reassess their jurisprudence on rights.¹⁰⁸ Being a laggard state in Asia when it comes to rights protection makes it easy for observers to reject Singapore's oft-proclaimed commitment to rule of law.

55 The attachment of the Singapore courts to formalised deference doctrines – in particular, to standards such as "Wednesbury

106 For example, "The articulators of the 'Asian values' school are by and large government officials or diplomats seeking to justify the operation of the regimes they represent. The presentation of "Asian" and "Western" cultural values as identifiable, distinct entities obscures the existence of divergent views within a region or within a single state itself": Li-Ann Thio, "Implementing Human Rights in ASEAN Countries: 'Promises to Keep and Miles to Go before I Sleep'" (1999) 2 Yale Hum Rts & Dev LJ 1 at 16. David Tan has turned the "Asian values" argument on its head, arguing for some expanded freedom of speech protections based on Confucian values: David Tan, "Whither the Autochthonous Narrative of Freedom of Speech? A Guide to Defaming Politicians and Scandalising Judges in Singapore" in *Constitutional Interpretation in Singapore: Theory and Practice* (Jaclyn L Neo gen ed) (Routledge, 2016) at p 210.

107 Jack Tsen-Ta Lee, "According to the Spirit and Not to the Letter: Proportionality and the Singapore Constitution" (2014) 8 *Vienna Journal on International Constitutional Law* 276.

108 Jaclyn Neo already detected a less deferential posture in recent rights jurisprudence of Singapore courts: Jaclyn L Neo, "Balancing Act: The Balancing Metaphor as Deference and Dialogue in Constitutional Adjudication" in *Constitutional Interpretation in Singapore: Theory and Practice* (Jaclyn L Neo gen ed) (Routledge, 2016) at p 159. Whether Singapore courts would actually declare legislation unconstitutional, however, remains unknown.

reasonableness”, manifest or facial “arbitrariness” and “rational basis” – drains rights of their normative status.¹⁰⁹ Indeed, it deprives rights, as such, of their *juridical* existence. It also undercuts the capacity of the Singapore Constitution itself to legitimise one-party rule. Arguably, PAP would benefit from the “certificate of constitutionality” that courts would bestow on policies found to be justified and proportionate. As matters stand now, the citizenry has good reasons to believe in the ruling party’s commitments to maintaining its own power, but not to the Singapore Constitution or rights.

56 It is worth noting that, while formal deference doctrines are anathema to PA-based systems, judges within them routinely build deference into their inquiries, when warranted. In necessity analysis, for example, they may bow to the technical expertise of policymakers, especially under conditions of epistemic uncertainty. In the balancing stage, judges may well uphold the Government’s view that national security or the rights of a group must take primacy over an individual’s rights to speech or religious freedom, given the circumstances. Put differently, many of the outcomes Singapore judges produced might well be produced under PA. But judges in PA systems are not allowed to abdicate; as a procedural matter, they must be positioned to review the proportionality of any decision that infringes upon a qualified right. In contrast, where there is no entitlement to require officials to give reviewable reasons for limiting the exercise of rights, no genuine rights exist, and the legitimacy of the law cannot be assured.

57 PA also provides a principled response to the universalism versus cultural relativism debate.¹¹⁰ PA applies to rights that are qualified by limitation clauses. These clauses allow officials to infringe rights for important public purposes, including the development of the economy (under powers of eminent domain), national security, the moral values held by groups, and to secure the rights of others. Such limitations clearly subsume “Asian Values” arguments, making them irrelevant to contemporary debates about judicial review. How any qualified right is actually operationalised will be contingent upon national circumstances on the ground, which include the reasons officials have for restricting rights in pursuit of the public interest. Courts that enforce the proportionality principle are squarely in the business of adapting (abstract) rights to (concrete) circumstances. What is common across national systems of constitutional justice is not a list of universal rights

109 Jack Tsen-Ta Lee, “According to the Spirit and Not to the Letter: Proportionality and the Singapore Constitution” (2014) 8 *Vienna Journal on International Constitutional Law* 276 at 288–289.

110 See Alec Stone Sweet, “Managing Difference: Constitutional Pluralism and Transnational Rights Protection” in *Democracy and Difference* (Kolja Raube & Annika Sattler gen eds) (Campus Verlag, 2012) at p 227.

that generate a fixed point of application, but a mode of argumentation and justification based on a distinctive sequence of tests. Judges are attracted to PA because it “fits” the structure of qualified rights, which they are under a duty to enforce, while giving them the flexibility to tailor outcomes to context, including in highly charged situations. The Malaysian court’s ruling in *Mat Shuhaimi bin Shafiei*,¹¹¹ which enforced the right to freedom of expression against a statute defended in terms of security, should give Singaporean judges, lawyers and scholars reasons for pause and reflection, in particular, those who would justify judicial abdication by pointing to the language of Art 14 of the Singapore Constitution.

58 In conclusion, we see no defensible legal – or culture-laden – reason for reading rights out of the Singapore Constitution, as generations of Singapore judges have done. But what about politics? Can Singapore prove scholars of comparative constitutional law wrong? Does single-party rule make the emergence of sustained, effective review and rights protection impossible? The examples of Hong Kong and Malaysia show that even courts with limited zones of discretion have moved to enhance rights protection. And as an international commercial hub that boasts of its world-class legal and regulatory institutions, Singapore has additional incentive to prove us wrong, by modernising its constitutional practices, and adopting best-practice standards.

59 In the most recent ruling to discuss PA, *Chee Siok Chin v Minister for Home Affairs*,¹¹² VK Rajah J of the Singapore High Court dismissed it in cursory *obiter dicta*.¹¹³

Proportionality is a more exacting requirement than reasonableness and requires, in some cases, the court to substitute its own judgment for that of the proper authority. Needless to say, the notion of proportionality has never been part of the common law in relation to the judicial review of the exercise of a legislative and/or an administrative power or discretion. Nor has it ever been part of Singapore law.

It may be time for these *dicta*, and the legal reasoning that supports them, to be revisited.

111 [2017] 1 MLJ 436.

112 [2006] 1 SLR 582.

113 *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR 582 at [88].