



A Study on Proportionality: Comparative Perspectives, and Prospects in China

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Abstract

The core of proportionality is about adjusting the rational relationship between means and ends, seeking a balance between benefits and harms. This study discusses the application of Proportionality Analysis (PA), which is a structured test of proportionality created by The German Federal Constitutional Court and now used by almost all the world, from a comparative legal perspective, introducing the sub-tests of proportionality: legitimacy, suitability, necessity, and balancing tests, and illustrates its application through examples from four jurisdictions: Germany, Canada, Taiwan, and Hong Kong. For China, although proportionality is not explicitly included in the constitutional text, it is effectively applied through constitutional interpretation and judicial practice. PA is becoming integrated into China's constitutional review system. With increased emphasis on human rights protection, the application of PA is expected to expand in China.

Keywords: *Proportionality; Proportionality Analysis; Human Rights; Fundamental Rights; Constitution; Administrative Law; Government; Comparative Law*

Introduction

“The police should not shoot at sparrows with cannons.” This maxim reflects the idea of proportionality, meaning that in law, when the government acts, the means it chooses should be well-adapted to achieve the purpose. This essay will firstly introduce the Proportionality Analysis (PA), with its subtests: legitimacy test, suitability test, necessity test, balancing test, followed by evaluation. Then, comparative analysis is beneficial in providing insights into the application. This essay will select four jurisdictions (Germany, Canada, Taiwan, and Hong Kong) which include two civil law jurisdictions and two common law jurisdictions, as well as two Western jurisdictions and two jurisdictions closely tied with China, to illustrate the PA application in protecting constitutional fundamental rights in the judiciary.

“Why use a cleaver to kill a chicken?” This ancient saying reflects that China historically recognized the need for proportionality between means and purpose. Currently, with the ongoing trend of judicial reform in China and thus the advancement of constitutional review, establishing scientific

standards for constitutional review has become increasingly urgent. Advancing constitutional review in China is essential for protecting fundamental rights, and PA has been repeatedly proven worldwide effective for it. This essay will introduce the Chinese constitutional basis of proportionality by constitutional interpretation for the application of PA in practice. It will also discuss the legal texts and judicial experiences using PA in China. Finally, this essay will provide opinions on structured and effective approaches for the future application of PA in China by referring to comparative experiences.

Overview of Proportionality

What is Proportionality?

Constitutional rights are limited within their scope, which means that most constitutional rights are relative and thereby providing a rationale for not fully realizing these rights. The ruling in cases about fundamental rights depends on whether the state action being reviewed is constitutional, that is, whether the infringement on the right is reasonable, and whether these rights can be inadequately realized under specific circumstances: when fundamental rights conflict with public interests, the state restricts fundamental rights for the protection of public well-being. One of the criteria used for measurement is proportionality, like Alexy believes that fundamental rights themselves inherently involve the demands of proportionality, and this relationship is reciprocal. Broadly speaking, proportionality means that actors should choose necessary means that contribute to the realization of legitimate objectives, and the harm caused by such means should be proportional to the benefits promoted. The essence of proportionality lies in adjusting the rational relationship between purposes and means, seeking a balance of benefits and harms. The legal proportionality originated from German police law, initially meaning that the police could only exercise their administrative power to limit people's rights when necessary. Later, proportionality was elevated to the constitutional level and applied to legislation to establish limits to the limitation of fundamental rights and to clarify that only proportionate limitations of fundamental rights were compatible with the Basic Law. In short, when the government acts, the means it chooses should adapt to the objectives it pursues.

The German Federal Constitutional Court early adopted the practice of administrative courts, using the principle of proportionality as a tool for constitutional control over legislative infringements on fundamental rights, which elevated this regulatory tool originally found in administrative law to the constitutional level, making it one of the standards for unconstitutional review and limiting the power of legislators. It is a practical necessity to confer constitutional status on PA, which means using it to determine whether interferences with fundamental rights are constitutionally permissible. The principle of proportionality, as a basic constitutional principle, has become the general trend. After World War II, proportionality has become a leading principle in constitutional adjudication worldwide. In this century, PA in its various forms has become the most common legal theory relied upon in rights-adjudication. Some countries have specified PA to a greater or lesser extent directly in their constitutional texts.¹ Although there are concerns that this may affect the stability of the law, the reality that the proportionality has successfully been constitutional cannot be challenged, these concerns trigger directions for thought on refining its content and setting reasonable limits at most. As above, the application of proportionality to assess the constitutionality of state actions is one of ways to institutionalize the use of proportionality. There are other institutionalized applications of proportionality, for example, it can be used in the international human rights law to review whether state actions infringe on human rights,² and can also serve as a method of judicial interpretation in laws.³

Subtests

In its early rulings, to examine the proportionality of a government's measures, the German Federal Constitutional Court created a four-step test, which later became generally used as four subtests in PA.⁴ These four following tests are arranged in a sequential and progressive order: only after fulfilling

one can the next be applied and each test serves as a prerequisite for the next. Only government's means that pass all four tests meet the standard of proportionality, thus satisfying the conditions for limiting fundamental rights.

The first is the legitimacy test. It must examine whether the purpose of a government's mean is compatible with the law.⁵ This test emphasizes the purpose of means rather than their consequences, making it a threshold requirement. The purpose is the starting point of an action, and the legitimacy of the purpose is a prerequisite for the legitimacy of the means. The legitimacy test facilitates substantive democracy and good administration and is an essential requirement of substantive rule of law.

The second is the suitability test. Unsuitable means do not provide a valid justification for infringing rights. Under the requirements of suitability, there must be a demonstrable connection between the means and the purpose. But this test does not require that the means completely achieve the purpose, it is sufficient if the means contribute to or promote the realization of the purpose. If there is no connection between the means and the purpose, and the means do not help achieve the purpose at all, then such means do not meet the suitability. Meeting the suitability makes a government's mean more scientific.

The third is the necessity test. This necessity refers to the unavoidability of infringing on rights. The test requires that among various means that similarly promote the purpose, the one that minimally interferes with rights must be selected. A government's mean passes this test only if there is no alternative that would be less harmful while equally effective in achieving the purpose. This test prioritizes rights, prohibiting excessive harm to rights.

The fourth is the balancing test, also known as proportionality test in its narrow sense. The greater the degree of dissatisfaction or harm to one principle, the greater the importance of satisfying another principle. So, to justify limitations on rights, a proper relation should exist between the benefits gained by achieving the purpose and the harm caused to the right. This test assesses whether the act represents a net gain, weighing the limitation on rights against the degree of realization of the purpose. If a government's mean offers little help in achieving the purpose but excessively limits rights, meaning the degree of achievement and limitation are disproportionate, it fails the test. This test emphasizes weighing the overall costs and benefits, focusing on achieving efficiency.

Evaluation

PA has its importance when applied. First, proportionality has neutrality. Its nature requires it to be value-neutral, therefore it could be applied anywhere. In practice, when courts apply PA, their judgments are based on how parties evaluate the government's means, or the significance of the decisions currently being discussed in court, which provides judges with a clear and objective standard to differentiate between legal and illegal government actions, and in this process, as long as judges stick to the facts, their personal feelings towards those involved in the case do not influence the decisions. But there are also arguments that avoiding committing oneself to political morality or to conception of rights when applying PA is unlikely.

Then, PA is founded on the principle of structured discretion, requiring that it be applied through the mentioned four-step process. This structured approach allows both government and courts to think constitutionally, aligning with the constitutional nature of their actions.

What is more, the structured nature of the discretion exercised by PA promotes transparency: when reviewing a decision based on well-structured discretion, one can easily recognize and follow the stages and reasons that led to the decision because everything is transparently presented in the decision itself, which means that PA has the advantage of intuitiveness.

PA is also criticized for its shortcomings, most of which are about the balancing test. On one hand, any act of balancing between interests is based on intuition and improvisation, it lacks rational standard or basis, and therefore, it may be too arbitrary or too political, increasing the risk of inconsistent

outcomes in similar cases. Indeed, the balancing test grants discretion. However, one cannot deny the rationality of the balancing test merely due to the existence of discretion. Because of the mentioned transparency, the discretion exercised in the balancing test is always limited, operating within defined boundaries, and is open to criticism and review. On the other hand, balancing test provides judges with too broad a discretion, undermining judicial certainty, and empowering the judiciary allows judges to act as legislators, which harms the separation of powers.

Regarding the shortcomings of the balancing test, there is a more fundamental issue: the interests or values being balanced are not considered comparable. First, the interests or values involved in the balancing test are incommensurable, meaning they cannot be compared because they do not share a common standard for evaluation. In the court's balancing between two competing principles, it should be based on their common characteristics, but it is impossible to find such commonalities, as the two competing principles are inherently incommensurable. But PA may be not about comparing interests or values, but rather about comparing the social importance of protecting one right against the social importance of preventing further harm to another right. Second, courts lack objective standards when balancing or comparing competing interests and rely on the personal value judgments of judges. Establishing a hierarchy of rights both in fact and theory is difficult, a rule of superiority can only be determined between conflicting interests under specific conditions. However, as previously mentioned, as long as discretion is exercised according to rational standards and within certain limits, the decisions remain reasonable. Third, many argue that rights are trumps, superior to all policies related to public interest, even societal welfare as a whole cannot override these inviolable rights. But in reality, this view is acceptable to the balancing test, perhaps already within its consideration. Only interests with constitutional status are considered objective that may reasonably infringe constitutional rights and constitutional rights thus trump all interests less than constitutional status. This trumping effect is realized before balancing, as it operates in the first part of the PA: legitimacy test and thus determines whether it is possible to move constitutionally to the last test. The balancing test also provides a method for protecting rights.

Examples of the Application of Proportionality in Some Jurisdictions

Currently, apart from the United States and Australia,⁶ PA has become one of the most important interpretative tools in the judiciary of most jurisdictions. Next, a comparative introduction to the practical constitutional application of PA, which manifests as the general four subtests, in the judiciary's assessment of whether the legislation infringe upon constitutional fundamental rights across the following four jurisdictions, will be provided.

In Germany: Greater Emphasis on the Balancing Test

The proportionality originates from Germany and is a fundamental principle of German law. The *pharmacy case* decision, aimed at balancing competitive interests required by the fundamental right to occupational freedom, introduced PA as a decision-making framework. For the Federal Constitutional Court, PA is the central framework for deciding fundamental rights cases. The German judiciary provides a model for the focus and importance preferences in the four subtests of PA.

In the legitimacy test, the German Constitutional Court requires a legitimate purpose, which is considered as a purpose that is not prohibited by the constitution. In a democratic system, the legislature has the authority to pursue any purpose not prohibited by the constitution. Discussing the legitimacy is primarily to prepare for subsequent subtests by identifying the purpose pursued. In the *pharmacy case*, the Court, after reviewing relevant historical data, recognized that the purpose of protecting public health, as intended by Article 3, Paragraph 1 of the *Bavarian Pharmacy Act*, constitutes a significant public interest and a legitimate purpose. If the court deems that the legislation does not pursue a valuable purpose, the legislation might fail the PA. However, almost no laws fail at this test, as it is rare for the legislature to pursue purposes prohibited by the constitution.

In the suitability test, the Court requires that the law must be suitable to achieve its purpose. In the necessity test, the Court requires that there are no less infringing alternatives that can achieve the same purpose. The roles of these two tests in the PA applied by the Court are gradually diminishing, sometimes manifesting as a quick review or even skipping them and directly moving to the balancing test. The Court does not prefer to rely just on the suitability and necessity tests to negate legislation, as they always emphasize the legislature's political freedom in choosing means to achieve legislative goals, and these two tests often depend on predictions: predictions about the effectiveness in achieving the purpose and predictions about the extent of infringement on fundamental rights.

In cases where the Court considers the legislation under review to be unconstitutional, they prefer to use the balancing test to express this decision: Most of the German legislation that failed the PA failed in the balancing test. The Courts believes that the focus of the suitability and necessity tests is not on the relationship between means and related constitutional fundamental rights but on the relationship between the purpose and the means. PA represents the protection of rights in Germany, while the balancing test offers a framework for assessment, it involves the court weighing the potential loss of rights that will result from the enforcement of the law against the potential loss of values that the law aims to protect if fundamental rights prevail. What is more, from the Court's point of not recognizing the hierarchy among various fundamental rights, the balancing must be specific, and the balancing test is most suitable for addressing issues in specific cases.

In Canada: Greater Emphasis on the Necessity Test

The section of the *Canadian Constitution*, known as the *Canadian Charter of Rights and Freedoms*, acknowledges the role of PA within Canadian constitutional jurisprudence. The subtests were set by the Supreme Court of Canada in *R v Oakes*, known as the Oakes test.

The legitimacy test in the Oakes test is described as requesting a pressing and substantial purpose, adding the extra element compared to "not being prohibited by the Constitution", which is analyzed in subsequent German PA subtests. However, in fact, any legal purpose is considered sufficient. Similarly to Germany, cases rarely fail this test. Then in the suitability test, the Court requires a rational connection between the purpose and the means adopted by the legislature, with no fundamental difference from the German.

In the necessity test, the Court analyze whether the law minimally infringe fundamental rights while pursuing its purpose, thus preliminary requirements similar to the balancing of harmful and beneficial effects in the German balancing test are already mandated at this step. The necessity test is the core subtest most emphasized in Canadian PA, where most legislation initially fails, and even if legislation fails the first two subtests, in most cases, the courts continue the analysis to the necessity test to further support the judgment of disproportionality. What is more, most legislation that does not pass the necessity test is not considered further for the final balancing test and is directly declared disproportionality.

The balancing test has a minor role in Canada, mostly presenting a summary of the previous subtests. It balances the impact of the restrictive measures against the purpose's impact. The effects on protected individuals by infringements are already considered in the earlier subtests, so there is almost nothing left to analyze, so unconstitutional legislation is always found in earlier subtests. Despite academic criticisms claiming it makes PA ad hoc, Canadian courts also favor the view that balance must be specific or "contextual", emphasizing a more specific analysis of the proportionality which may help make more reasonable and rights-protective decisions, rather than a categorical approach, the issues in specific cases help find "a fair and just compromise" between two competing values in the test.

In Taiwan: Strictness and Subjectivity

Among the jurisdictions in Asia, only the courts in Hong Kong, Taiwan, and South Korea have adopted structured PA and frequently use proportionality to review legislative protection for

constitutional rights. Taiwan provides a constitutional textual basis for PA through Article 23 of its *Constitution*.⁷ The Taiwan Constitutional Court views this article as a constitutional mandate, requiring that every state action must satisfy all four subtests of PA.

In the legitimacy test, the Court rarely questions the legitimacy of purpose, but sometimes applies this test strictly, occasionally demanding that legislation should aim to protect an “extraordinarily important public interest”. This level of strictly is sometimes also applied to the suitability test, for example, legislation fails this test because it does not specify a time limit for temporary detention before deporting people, so considered not beneficial to the purpose of expedited deportation. Such strictness helps enhance the rigor and effectiveness of legislation, as a result of democratic development, but perhaps excessively restricts legislative power.

In practice, the necessity test is the subtest where most legislation fails. Generally, the balancing test grants the court more discretion. However, failures in the balancing test are far less common than in the necessity test, possibly because earlier subtests stop the failed legislation before reaching the balancing test, or because the Court avoids overly interfering in legislation due to the lack of democratic mandate. The Court’s subjectivity is evident in these two subtests, for example, with some cases presenting similar or identical issues faced by the Constitutional Court of Korea but drawing different conclusions in these subtests.⁸

In Hong Kong: Two Standards for Necessity Test

To protect the fundamental rights stipulated by the *Basic Law* and the *Bill of Rights Ordinance* to protect, the Hong Kong Court of Final Appeal adopts PA and, following the British case law, after *Hysan* case,⁹ has definitively clarified the four subtests of PA.

The first two subtests do not significantly differ from the general model. Notably, in the legitimacy test, the Court once further refined the criterion for a legal purpose of legislation, which request the legislation should be “adequately accessible” and “formulated with sufficient precision”; in the suitability test, the Court once refused to consider specific factors such as local conditions and societal views to assess whether there is rational connection.¹⁰

In the necessity test, the standard of “no more than necessary” generally requires the court to seek the alternative solution different from that provided by the legislation. For this, manifest unreasonableness and reasonable necessity serve as two standards of review for the Court to choose from.¹¹ Manifest unreasonableness means the Court will not intervene unless the discussed solution or alternative is obviously beyond reasonable bounds or clearly lacks a reasonable basis.¹² Reasonable necessity means the Court assess whether the limitation of fundamental rights by the legislation exceed what is necessary to achieve the purpose, showing less judicial deference to the legislator than the former standard. Factors to consider when choosing between the two standards include the importance of the rights involved and the extent of the intervention, as well as the identity of the decision-maker and the nature of the infringement measures. Currently, as the judiciary increasingly showing deference to the government, especially in politically sensitive cases, manifest unreasonableness, which originally applied just in the context of socio-economic rights, has been chose more broadly.

The balancing test has little role in the Court’s application in case law. The Court that has already performed value assessments in the previous test prefer to show deference in this test as well, which might lead to insufficient protection of fundamental rights.

Proportionality in China

The Constitutional Basis of Proportionality in China

Since the discussion on proportionality, it has become a hot topic in Chinese judiciary. However, the recognition and application of the PA by courts in practice remain poor. The fact that administrative power in China is too strong to infringe on fundamental rights cannot be corrected just by weak judicial

power, so emphasizing the supportive role of constitution on judicial power is essential, and thus, promoting the application of PA in China needs to start from the constitution, which requires firstly studying the Chinese constitutional basis of PA.

The principle of proportionality is not directly stipulated in the Chinese *Constitution*. It can only truly play its role in protecting rights and restraining public power through constitutional interpretation, bringing the spirit of constitutional into judicial practice. This essay believes that the Chinese constitutional basis of PA is mainly reflected in Article 33 of the *Constitution*: "...The State respects and preserves human rights. Every citizen enjoys the rights and at the same time must perform the duties prescribed by the Constitution and the law."

About the legitimacy test, Article 33 emphasizes the status of fundamental rights, and combined with Article 5, it is understood that all legislation and all government actions must comply with the *Constitution*; combined with Article 51,¹³ state power can only limit citizens' rights for the protection of national interests, social interests, collective interests, and interests of others. Any other purpose for limiting fundamental rights is unconstitutional.

About the suitability test, "respects and preserves" simultaneously constrain the purpose of state interventions and entitlement actions, requiring government to fundamentally respect fundamental rights to implement public power acts. This aligns with the suitability test's requirement that actions must be conducive to the achievement of the purpose.

About the necessity test, "perform the duties prescribed by the Constitution and the law" implies that interventions in rights must legally minimally infringe upon means according to the requirements of the *Constitution* and law, thus aligning with the spirit of the *Constitution*'s protection for fundamental rights.

About the balancing test, the requirement for citizens to legally enjoy rights and perform duties reflects a symmetry between rights and duties between citizens and the state, containing an inherent request for value assessment when government limits fundamental rights.

In addition, some views believe that the *Constitution*'s articles on the expropriation and requisition of land and private property of citizens establish the proportionality of citizens' property rights protection;¹⁴ The *Constitution*'s articles on equality of all citizens establishes the suitability of citizens' rights to equality;¹⁵ and so on.

Application in Chinese Law: Legal Texts and Judicial Experience

The principle of proportionality is considered one of the basic principles of administrative law in China and is widely stipulated in legal documents belong to administrative law. An earlier document reflecting proportionality is the *Regulations on Use of Police Implements and Arms by the Police*, which requires that police use of weapons and equipment must not be excessive,¹⁶ reflecting the necessity. The *Program for Comprehensively Promoting 'Administration by Law'* reflects the contents of proportionality through a comprehensive description of reasonable administration.¹⁷ Some local legislations also have comprehensive provisions on the application of proportionality in administrative procedures.¹⁸ Proportionality also appears in laws related to administrative procedures as the necessity form (minimal infringement) in areas such as administrative penalties and compulsion. As legislation are enacted according to the constitution, the elevation of proportionality from administrative law principle to constitutional principle is possible as its application in China continues to improve.

An increasing number of courts in China have applied proportionality in administrative litigation cases. The earliest judgment mentioning proportionality is in the judgment of the *Guo Jianjun* case,¹⁹ but as early as in the *Huifeng* Case,²⁰ the Supreme People's Court substantively used PA in its reasoning, arguing: the penalty does not violate constitutional and legal provisions; the penalty can achieve the purpose of sanctioning illegal activities; there are other less invasive penalty available, unnecessarily

increasing the party's losses, thus the administrative penalty is illegal. Although the Court did not mention PA in this case, its statement first provided views involving suitability test, necessity test, and balancing test that when exercising its powers, the administrative authority must ensure the achievement of administrative purpose while also protecting the rights and interests of the involved parties, causing the minimal possible harm. However, in subsequent practice, structured PA has hardly been strictly applied (even if strictly adhered to, the process is not standardized):²¹ most judges do not apply PA according to the subsequence of the subtests or only apply a single subtest. Their use is more like conclusory rhetoric by judges when obvious errors exist in administrative actions,²² mainly because of the lack of legal provisions about proportionality and the arbitrariness of the judges in China, which is not a common law jurisdiction.

The Future of Proportionality in China

The institution responsible for legislation review in China is not the judiciary but rather the Standing Committee of People's Congress (PC), which conducts "Recordation Review" (RR) to assess whether legislation has failed, thereby protecting fundamental rights.²³ The Standing Committee of National People's Congress (NPC) has emphasized the "consistency of measures taken with the principle of proportionality" as a "key focus" of its RR,²⁴ and it has clarified the content of PA within its constitutional review standards.²⁵ This indicates that PA has begun to integrate into China's constitutional review system, holding a significant position in RR. Under RR system, China does not face the issue of selecting review standards when applying PA as courts in other countries, but the approach is not much different. The comparative experience of structured PA can be localized to fit China's context.

During the legitimacy test, Germany's lenient standard and Canada's "pressing and substantial purpose" are both valuable. For example, in the review of delegated legislation, flexible legislation, and autonomous legislation, the experiences of Canada and Taiwan can be learned to examine suspicious provisions to determine whether they exceed the authorized purpose, constitute improper flexibility, or overstep autonomous authority in setting purpose, thereby avoiding the arbitrariness. As the partial overlap between the legislative and review bodies in China, a more lenient standard can be applied to other general legislation.

Currently, the Chinese practice of RR lacks clarity on how to conduct the suitability test. This may be because, under China's political system, the reviewing body has easier access to materials related to legislative purposes, making this subtest less significant. Based on the comparative experiences, rigorous logical reasoning should be emphasized when assessing the relationship between means and purpose, with a focus on the objectivity and universality of it.

This essay believes that the necessity test should be emphasized, as RR aims to ensure the implementation of the *Constitution* and laws, maintaining the legislation effective rather than promoting the efficiency. Although the NPC Standing Committee used the term "manifestly unnecessary", the "manifest unreasonableness" in Hong Kong should not be applied to RR. The reviewing body is not faced with the powers separation or deference faced by courts in other countries and thus should adhere more closely to Canada's minimal infringe standard. The PC Standing Committee presents a nationwide system, so that can gradually establish the standard of "the same purpose with less harm" through extensive practical work.

In Hong Kong, Taiwan, and Canada, the emphasis is not placed on the balancing test, but this subtest often involves a broader inquiry to determine whether the benefits of the challenged law outweigh the burden on rights, which is crucial for protecting fundamental rights. As in Germany, the balancing test should be emphasized, and the reasoning regarding value balancing should be strengthened in RR decisions to better protect fundamental rights, uphold the legislative spirit, and enhance the acceptability of review conclusions.²⁶

Moreover, with the ongoing advancement of the whole-process people's democracy in China, the importance of protecting fundamental rights has increased, and the justiciability of fundamental rights in China's legal environment is gradually being recognized. Consequently, judicial protection of fundamental rights will become emphasized in China's constitutionalism, and PA will receive greater emphasis. As mentioned earlier, PA has already been applied in judicial practice in administrative litigation. However, the courts face challenges and there are issues that need attention. The first is the request for legislation regarding proportionality, which will advance with the continuous development of judicial practice and understanding. Then, in public power lawsuits where the burden of proof generally falls on the defendant, courts may encounter difficulties with the application of the necessity test due to its excessive scrutiny. To address this, the burden of proof regarding minimal impairment can be partly shifted to the plaintiff who claims that the government means do not meet the necessity. Moreover, PA in practice raises higher demands on judges' abilities, so the role of expert opinions in litigation should be further emphasized as one of ways to alleviate the judicial burden of reviewing highly technical issues.

Conclusion

PA has been proven through practice in various countries as an effective tool for rights protection. The subtests differing in standards and significance across different jurisdictions, still provide the model for localization of PA in various legal systems. Proportionality is inherently embedded in China's *Constitution* and legal practices; more comparative experience of PA should be incorporated into legislation review and judicial application. With China placing greater emphasis on human rights, PA will be more widely applied in China.

Endnote

- 1 One of the most notable examples I found is in Section 36 of the currently in force South Africa's Constitution of 1996, which stipulates, "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom, taking into account all relevant factors, including: a. the nature of the right; b. the importance of the purpose of the limitation; c. the nature and extent of the limitation; d. the relation between the limitation and its purpose; and e. less restrictive means to achieve the purpose..."
- 2 For example, in *Handyside v The United Kingdom*, the European Court of Human Rights held, "among other things, that every 'formality', 'condition', 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued."
- 3 For example, Article 17 of the Interpretation of Several Issues Concerning the Application of Title One General Provisions of Book Three Contracts of the Civil Code of the People's Republic of China specifies that "when assessing if a contract violates public order and morals, the court should uphold core socialist values and consider various factors like the parties' motives, transaction purpose, frequency, regulatory intensity, and social consequences. The judgment must be well-reasoned."
- 4 Although there are differences in names, the number of tests, and specific operations across various jurisdictions and academic perspectives, the underlying structure are fundamentally the same.
- 5 Another widely accepted notion about this is the proper purpose test, which examines whether a government's mean that limits a constitutional right is for a purpose that justifies such limitation. Under this concept, legality or constitutionality serves as one of the formal standards for conducting this test.
- 6 However, in the case law within these two jurisdictions, some judges have already shown an interest in and have begun applying PA in their decisions.

- 7 [Constitution of Taiwan (Republic of China)] A 23: “All the freedoms and rights enumerated in the preceding articles shall not be restricted by law except such as may be necessary to prevent infringement upon the freedoms of others, to avert an imminent danger, to maintain social order, or to promote public welfare.”
- 8 J.Y. Interpretation No. 656 (Taiwan) (2009), Korean Constitutional Court, 89 Hun-Ma 160 (South Korea) (1991), J.Y. Interpretation No. 649 (Taiwan) (2008) and Korean Constitutional Court, 2006Hun-Ma1098 (South Korea) (2008).
- 9 Hysan Development Co Ltd v. Town Planning Board (2016) 19 HKCFAR 372, citing Bank Mellat v. Her Majesty’s Treasury (No 2) [2014] AC 700.
- 10 Leung Chun Kwong v. Secretary for the Civil Service [2019] HKCFA 19.
- 11 Hysan Development Co Ltd v. Town Planning Board (2016) 19 HKCFAR 372.
- 12 Fok Chun Wa v. Hospital Authority (2012)15 HKCFAR 409.
- 13 Ibid art51: “The exercise by citizens of the People’s Republic of China of their freedoms and rights may not infringe upon the interests of the state, of society and of the collective, or upon the lawful freedoms and rights of other citizens.”
- 14 [Constitution of the People’s Republic of China] art10: “...The State may, in the public interest and in accordance with the provisions of law, expropriate or requisition land for its use and shall make compensation for the land expropriated or requisitioned...”, art13: “...The State may, in the public interest and in accordance with law, expropriate or requisition private property for its use and shall make compensation for the private property expropriated or requisitioned. ...”
- 15 [Constitution of the People’s Republic of China] art5: “...No organization or individual may enjoy the privilege of being above the Constitution and the law...”, and art33: “...All citizens of the People’s Republic of China are equal before the law. ...”
- 16 Art4 of [Regulations of the People’s Republic of China on Use of Police Implements and Arms by the People’s Police] (People’s Republic of China) State Council, 16 January 1996: “When using police implements and arms, the people’s policemen shall take it as a principle to suppress illegal and criminal acts and minimize casualties and property loss.”
- 17 Art5 of State Council, Program for Comprehensively Promoting ‘Administration by Law’ (issued 22 March 2002): “..... The exercise of discretionary powers should align with legal objectives, eliminating interference from irrelevant factors; the measures and methods adopted must be necessary and appropriate. When there are multiple ways to achieve administrative objectives, administrative authorities should avoid methods that infringe on the rights and interests of the parties involved.”
- 18 For example, art6 of [Jiangsu Province Administrative Procedure Regulations]: “Administrative authorities must exercise their discretionary powers in accordance with legislative purposes; the measures or means adopted should be necessary and appropriate. In choosing administrative measures or means to achieve administrative objectives, administrative authorities should follow the principle that is most favorable to protecting the lawful rights and interests of citizens, legal persons, and other organizations.”
- 19 Guo Jianjun v Zhuji City Land and Resources Bureau [2008] [Shao Zhong Xing Zhong Zi No 37] decision: “..... When exercising discretion under these two relevant laws and regulations, the respondent should first consider the facts, nature, circumstances, and social harm of the illegal act, and choose a disposition method that is more favorable to protecting the interests of the administrative counterpart. If this condition cannot be met, then more stringent penalties may be

selected. Otherwise, the administrative penalty does not conform to the principle of proportionality. ...”

- 20 Huifeng Industrial Development Co., Ltd v Harbin Planning Bureau [1999] [Supreme People's Court Xing Zhong Zi No 20].
- 21 For example, in a certain administrative penalty case, although the judge was aware of the components of the principle of proportionality, the relationship between the sub-principles was confused in the discussion, and it was directly stated that “the amount of the fine lacks appropriateness and proportionality”; in some cases, although the content of the proportionality principle was elaborated in detail, there was a failure to discuss the specifics in relation to the facts of the case.
- 22 For example, Garment Processing Factory v Chuzhou City Broadcasting and Television News Publishing Bureau [2021] [Wan Xing Zhong No 226] decision: “...During the relevant penalty imposed by the Bureau, there was insufficient consideration of the facts, nature, circumstances, and the equivalent social harm of the illegal act. The facts concerning aggravating circumstances were unclear, leading to the imposition of a substantial fine on a certain garment processing factory, which violated the principle of proportionality, ...”
- 23 RR is a unique legislative review system in China established by the Legislation Law, based on the Constitution and the Standing Committees of PC Supervision Law, which grant the authority to revoke legal documents. See [Constitution of the People’s Republic of China], art67; [Legislation Law of the People's Republic of China], art 110-113; [Law of the People's Republic of China on the Supervision of Standing Committees of People's Congresses at Various Levels], art 28-33.
- 24 Standing Committee of the National People's Congress, Decision of the Standing Committee of the National People's Congress to Improve and Strengthen the Recordation Review System (issued 29 December 2023), art 6.
- 25 “The standards for constitutional review... primarily include: 1. The purpose of the normative document is unconstitutional. 2. The means prescribed to achieve the legislative purpose impose restrictions on constitutionally protected rights or legal interests, and there is no reasonable connection between the means and the legislative purpose. 3. The means prescribed to achieve the legislative purpose impose restrictions on constitutionally protected rights or legal interests, and they are manifestly unnecessary. 4. The means infringe upon more valuable legal interests that are protected by the Constitution.”. See Record Review Office of Legislative Affairs Commission of the NPC Standing Committee, A Guide to the “Regulations and Judicial Interpretations Record Review Working Methods” (China Democracy and Legal System Publishing House, 2020), 99.
- 26 For example, an RR report mentioned that certain regulations stipulate that ethnic schools should use their native languages for teaching, this provision is inconsistent with the Constitution’s mandate to promote the use of the national common language, Mandarin, as well as relevant laws such as the National Education Law. However, this reasoning is overly concise. The reviewing body needs to further analyze and balance the values of both in its reasoning process. For example, both the equal use of languages by ethnic groups and the promotion of Mandarin by the state serve the constitutional spirit of national unity. In the field of education, using Mandarin is more conducive to fostering this concept. When amending such provisions, it is also important to consider and protect the value of the equal use of languages.

References

Articles/Books/Reports

- Abeyratne, Rehan, 'More Structure, More Deference: Proportionality in Hong Kong' in Po Jen Yap (ed), *Proportionality in Asia* (Cambridge University Press, 2020).
- Alexy, Robert, *A Theory of Constitutional Rights*, translated by Julian Rivers (Oxford University Press, 2002).
- Baihua, Yu, 'On the Proportionality Built-in Rights' (2020)37(4) *Studies in Law and Business* 88.
- Barak, Aharon, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012).
- Beatty, David M, *The Ultimate Rule of Law* (Oxford University Press, 2004).
- Berg, G H v, *Handbuch der Deutschen Polizei Rechts* (2nd ed, Hannover, 1802).
- Cohen-Eliya, Moshe, and Iddo Porat, 'American Balancing and German Proportionality: The Historical Origins' (2010) 8(2) *International Journal of Constitutional Law* 263.
- Craig, Paul, 'Unreasonableness and Proportionality in UK Law' in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart Publishing, 1999).
- Dengjie, Yang, and Su Qiang, 'On Balancing Benchmarks in Appropriateness Review: Taking 31 Provinces (Autonomous Regions and Municipalities) for Example' (2023) 36(5) *Journal of Beijing University of Aeronautics and Astronautics (Social Sciences Edition)* 62.
- Dworkin, Ronald, 'Rights as Trumps' in Jeremy Waldron (ed), *Theories of Rights* (Oxford University Press, 1984).
- Fleiner, Fritz, *Institutionen des deutschen Verwaltungsrechts* (Mohr, 1928).
- Gray, Anthony, 'Proportionality in Australian Constitutional and Administrative Law' (2022) 41(1) *University of Tasmania Law Review* 7.
- Grimm, Dieter, *Constitutionalism: Past, Present, and Future* (Oxford University Press, 2016).
- Grimm, Dieter, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57 *University of Toronto Law Journal* 383.
- Hongzhen, Jiang, 'Judicial Application of the Hierarchical Order in the Principle of Proportionality' (2020) 42(4) *Chinese Journal of Law* 41.
- Huaide, Ma, *Administrative Law and Administrative Litigation Law* (5th ed, China Legal Publishing House, 2015).
- Jackson, Vicki C, 'Constitutional Law in an Age of Proportionality' (2015) 124(8) *Yale Law Journal* 3094.
- Jinghui, Chen, 'The Generalization of the Proportionality and the Nature of Fundamental Rights' (2017) 5 *China Legal Science* 279.
- Jinxue, Fan, 'On the Constitutional Principle of Proportionality' (2018) (5) *Journal of Comparative Law* 106.
- Klatt, Matthias, and Moritz Meister, *The Constitutional Structure of Proportionality* (Oxford University Press, 2012).
- Kremnitzer, Mordechai, et al (eds), *Proportionality in Action* (Cambridge University Press, 2020).

- Kun, Qian, 'Fundamental Rights as Democratic Rights: An Analysis of the Evolution of the Constitution of China' (2024) 18(3) *Northern Legal Science* 54.
- Kyritsis, Dimitrios, 'Whatever Works: Proportionality as a Constitutional Doctrine' (2014) 34 (2) *Oxford Journal of Legal Studies* 395.
- Lin, Chien-Chih, 'Proportionality in Taiwan: American-German Fusion' in Po Jen Yap (ed), *Proportionality in Asia* (Cambridge University Press, 2020).
- Luban, David, 'Incommensurable Values, Rational Choice, and Moral Absolutes' (1990) 38 *Cleveland State Law Review* 65.
- Marketou, Afroditi, *Local Meanings of Proportionality* (Cambridge University Press, 2021).
- Mathews, Jud, 'Proportionality Review in Administrative Law' in Peter Lindseth et al. (eds), *Comparative Administrative Law* (2nd ed, Edward Elgar, 2017).
- Ming'an, Jiang (ed), *Administrative Law and Administrative Litigation Law* (8th ed, Peking University Press, 2024).
- Nimmer, Melville B, 'The Right to Speak from Time to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy' (1968) 56(4) *California Law Review* 935.
- Ponomarenko, Iryna, 'The Unbearable Lightness of Balancing: Towards a Theoretical Framework for the Doctrinal Complexity in Proportionality Analysis in Constitutional Adjudication' (2016) 49(3) *UBC Law Review* 1103.
- Quan, Liu, *The Principle of Proportionality* (Tsinghua University Press, 2022).
- Rawls, John, *A Theory of Justice* (Harvard University Press, 1971).
- Record Review Office of Legislative Affairs Commission of the NPC Standing Committee, *A Guide to the "Regulations and Judicial Interpretations Record Review Working Methods"* (China Democracy and Legal System Publishing House, 2020).
- Sweet, Alec Stone, and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 68.
- Tsai, Tzung-Jen, 'An Introduction to the Principle of Proportionality in Public Law: Focusing on the Development of German Law' (1999) 62 *NCCU Law Review* 75.
- Tsakyraakis, Stavros, 'Proportionality: An Assault on Human Rights?' (2009) 7(3) *International Journal of Constitutional Law* 468.
- Tushnet, Mark V, 'Anti-Formalism in Recent Constitutional Theory' (1985) 83 *Michigan Law Review* 1502.
- Webber, Grégoire, 'Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship' (2010) 23(1) *Canadian Journal of Law and Jurisprudence* 179.
- Wolffers, Artur, "New Aspects of the Principle of Proportionality", *Journal of the Bern Jurists' Association* 113 (1977) 297.
- Xianghe, Gong, 'Ideal and Reality: A Study on the Justiciability of Fundamental Rights' (2009) 26(4) *Studies in Law and Business* 32.
- Xu, Wang, 'Elaboration of the Principle of Proportionality in Recordation Review' (2024) 46(4) *Global Law Review* 54.
- Yang, Mei, 'Application Scope and Limits of the Principle of Proportionality' (2020) 42(2) *Chinese Journal of Law* 57.

Yap, Po Jen, 'Proportionality in Asia: Joining the Global Choir' in Po Jen Yap (ed), *Proportionality in Asia* (Cambridge University Press, 2020).

Zhai Yi, 'A New Idea of Proportionality Principle in Chinese Constitution: Based on Article 33 of the Chinese Constitution' (2012) (5) *Social Sciences in Xinjiang* 88.

Zhongjing, Men, 'The Constitutional Position and Norm Basis of the Principle of Proportionality: Taking the Concept of Tolerance in a Constitutional Sense as the Analytical Perspective' (2014) 29(5) *Legal Forum* 94.

Ziyu, Wang, 'Seeking Consensus: The Judicial Practice and Knowledge Interaction of the Principle of Proportionality' (2022) 28(3) *Law and Social Development* 126.

Legislation

[Administrative Compulsion Law of the People's Republic of China] (People's Republic of China) Standing Committee of National People's Congress, 30 June 2011.

[Administrative Penalty Law of the People's Republic of China] (People's Republic of China) Standing Committee of National People's Congress, 22 January 2021.

Canada Act 1982 (UK) c 11, sch B pt I ('Canadian Charter of Rights and Freedoms').

[Constitution of Taiwan (Republic of China)].

[Constitution of the People's Republic of China].

Constitution of the Republic of South Africa Act 1996 (South Africa).

Hong Kong Bill of Rights Ordinance (Hong Kong).

[Jiangsu Province Administrative Procedure Regulations] (People's Republic of China) Standing Committee of the Jiangsu Provincial People's Congress, 29 July 2022.

[Law of the People's Republic of China on the Supervision of Standing Committees of People's Congresses at Various Levels] (People's Republic of China) Standing Committee of National People's Congress, 27 August 2006.

[Legislation Law of the People's Republic of China] (People's Republic of China) National People's Congress, 13 March 2023.

Pharmaziegesetz Bayern [Bavarian Pharmacy Act] (Germany).

[Regulations of the People's Republic of China on Use of Police Implements and Arms by the People's Police] (People's Republic of China) State Council, 16 January 1996.

[The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China] (People's Republic of China) National People's Congress, 4 April 1990.

Cases

Bank Mellat v. Her Majesty's Treasury (No 2) [2014] AC 700.

Bundesverfassungsgericht [German Constitutional Court], 1 BvR 802/58, 11 March 1958, reported in (1958) 7 BVerfGE 377.

Edmonton Journal v Alberta (Attorney General) [1989] 2 SCR 1326.

Fok Chun Wa v. Hospital Authority (2012)15 HKCFAR 409.

Garment Processing Factory v Chuzhou City Broadcasting and Television News Publishing Bureau [2021] [Wan Xing Zhong No 226].

Guo Jianjun v Zhuji City Land and Resources Bureau [2008] [Shao Zhong Xing Zhong Zi No 37].

Handyside v The United Kingdom (1976) 1 EHRR 737.

Huifeng Industrial Development Co., Ltd v Harbin Planning Bureau [1999] [Supreme People's Court Xing Zhong Zi No 20].

Hysan Development Co Ltd v. Town Planning Board (2016) 19 HKCFAR 372.

J.Y. Interpretation No. 649 (Taiwan) (2008).

J.Y. Interpretation No. 656 (Taiwan) (2009).

J.Y. Interpretation No. 710 (Taiwan) (2013).

J.Y. Interpretation No. 744 (Taiwan) (2017).

Korean Constitutional Court, 89 Hun-Ma 160 (South Korea) (1991).

Korean Constitutional Court, 2006Hun-Ma1098 (South Korea) (2008).

Leung Chun Kwong v. Secretary for the Civil Service [2019] HKCFA 19.

Leung Kwok Hung v. HKSAR [2005] 3 HKLRD 164.

R v Oakes [1986] 1 SCR 103.

Government Materials

Standing Committee of the National People's Congress, *Decision of the Standing Committee of the National People's Congress to Improve and Strengthen the Recordation Review System* (issued 29 December 2023).

State Council, *Program for Comprehensively Promoting 'Administration by Law'* (issued 22 March 2002)

Shen Chun Yao, 'Report on the Record Review Work Situation in 2020 by the Legislative Affairs Commission of the Standing Committee of the National People's Congress' *Standing Committee of the National People's Congress Gazette* (2021).

Supreme People's Court, *Interpretation of Several Issues Concerning the Application of Title One General Provisions of Book Three Contracts of the Civil Code of the People's Republic of China* (Interpretation No. 13 [2023]) (issued 12 April 2023).

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