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The Necessity of Balancing: Hong Kong's Flawed Approach to Proportionality - And Why it Matters

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Virtually all of the world's most powerful high courts recognise the proportionality principle — as enforced through a distinctive sequence of subtests — to be an overarching criterion of constitutional legality. In Hysan Development Co Ltd v Town Planning Board, *the Court of Final Appeal added a fourth and final "balancing phase" to what had been a truncated version of the proportionality framework. This article analyses* Hysan *and its effects from two perspectives. First, compared to the standard model of proportionality analysis,* Hysan *places deference to legislative and executive authority at its core, thereby transforming rights doctrine into a form of reasonableness review. Indeed, it creates an approach more akin to* Wednesbury *unreasonableness than proportionality. Second, the foreign case law invoked by the Court of Final Appeal does not actually support the* Hysan *framework. Unless corrected, judicial fidelity to* Hysan *will chronically reproduce three pathologies: analytical incompleteness; doctrinal instability; and judicial abdication.*

1. Introduction

The proportionality principle, as enforced through a distinctive, sequence of interrelated tests, is arguably the world's most successful legal transplant. First expounded by German philosophers in the eighteenth century, proportionality analysis (PA) has now been constitutionalised by high courts on every continent. The steady expansion of proportionality's empire[1] is rooted in a larger process that began in the final phases of World War II: the construction of a new rights-based constitutionalism wherein compliance with charters of rights comprises an overarching criteria of systemic legitimacy and legal validity. The International Bill of Rights,[2]

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1 Alec Stone Sweet and Jud Mathews, *Proportionality Balancing and Constitutional Governance: A Comparative and Global Approach* (Oxford: Oxford University Press, 2019).

2 Including the United Nations Declaration of Human Rights (1948); the International Covenant on Economic, Social, and Political Rights (1966, entered into force in 1976); and the International Covenant on Civil and Political Rights (1966, entered into force in 1976).

regional conventions such as the European Convention on Human Rights (ECHR) and domestic charters resemble one another in content and form; they are meant to perform similar politico-legal functions; and they overlap and mutually reinforce one another in myriad ways, not least in doctrinal terms.[3] Today, the world's powerful apex courts routinely cite one another, as do domestic and international judges. These inter-judicial "dialogues" are grounded in a common purpose, methodology and vernacular: that of reviewing, through PA, state measures taken under a limitation clause.[4]

PA is the dominant, best-practice doctrinal standard for adjudicating rights in the world today; indeed, it has no serious rival. If the goal of an apex court is to build the effectiveness of rights protection, then embracing the framework is the single most important doctrinal move a high court can make. Nevertheless, how courts deploy it varies across time and place. Some courts (eg, the German Federal Constitutional Court) combine the first phase (proper purpose) with the second (suitability) tests. Others (eg, the European Court of Human Rights, the South African Constitutional Court) blend third (necessity) and fourth (balancing in the strict sense) phases, while distinguishing modes of analysis along the way. Still others, whether in guile or ignorance (eg, Hong Kong judges), balance within necessity. Nevertheless, the scope of cross-jurisdictional variance has narrowed over time. The drive towards convergence has been facilitated by (1) the growing intensity of inter-judicial dialogue, and (2) the influence of an epistemic community, a group of cosmopolitan scholars and judges, the most important of whom is the former Chief Justice of Israel and law professor, Aharon Barak.[5] Empirically, one finds that every important rights-protecting court has significantly altered how it applies PA over time, the vast majority of changes in the direction of harmonising to what this article calls the "standard model" of PA. Barak has done the most to refine this model, distilling it from the jurisprudence of courts that have self-consciously invested in developing PA.

This article examines the fate of PA in the courts of Hong Kong, from the judgment of the Court of Final Appeal (CFA) in *Hysan Development Co Ltd v Town Planning Board* (2016),[6] to the Court of Appeal's (CA)

[3] Stephen Gardbaum, "Human Rights as International Constitutional Rights" (2008) 19 *European Journal of International Law* 749; Mathias Kumm, "The Cosmopolitan Turn in Constitutionalism: An Integrative Conception of Public Law" (2013) 20 *Indiana Journal of Global Legal Studies* 605; Alec Stone Sweet, "The Structure of Constitutional Pluralism" (2013) 11 *International Journal of Constitutional Law* 491.

[4] Stone Sweet and Mathews (n 1 above) Ch 6.

[5] Aharon Barak's scholarship, in particular, *Proportionality: Constitutional Rights and their Limitations* (Cambridge: Cambridge University Press 2012), has been repeatedly cited by domestic and international courts when they move to adopt, or perfect their use of PA.

[6] (2016) 19 HKCFAR 372.

2019 ruling on the Prohibition on Face Covering Regulation (Cap 241K) (PFCR).[7] It does so from two comparative perspectives. The first evaluates Hong Kong's approach to PA with reference to the standard model, a basic template that explains and justifies the framework in a particular way. Doing so is fair, given that Hong Kong courts have engaged Barak's scholarship. The second examines Hong Kong practice with reference to the case law of three courts: the European Court of Human Rights; the UK Supreme Court; and the Supreme Court of Canada. It is to the authority of these courts that Hong Kong's judges have referred most often when considering how PA ought to be conceptualised and applied. Due to space limitations, the analysis is relatively condensed, focusing on those considerations most important to the argument.

It is worth clearing away a potential misunderstanding at the outset. In directing attention to a particular account of PA, I am not advancing a covert claim to the effect that there exists a "correct", "one-size-fits-all" version. As argued at length elsewhere, PA's global diffusion is in large part due to its flexibility, an inherent capacity for adaptation to diverse purposes and circumstances.[8] The brute fact is, however, that the standard model not only exists, it also functions as a major focal point for inter-judicial coordination and doctrinal convergence on a global scale.

Hong Kong' approach to PA provides a telling counterexample, at least to date. In *Hysan*, the CFA added a final balancing phase (stage four) to what had been a truncated version of PA (ending in step three necessity). At the same time, *Hysan* committed the courts — within necessity analysis — to the selection of one of two "standards of review" labelled, respectively: (1) "No More than Necessary" (NMTN) and (2) "Manifestly without Reasonable Foundation" (MWRF). This choice not only exhibits characteristics of categorical reasoning — which are normally eschewed under PA — it also effectively displaces PA as a stand-alone standard of review. The CFA also emphasised that it was meant to determine the variable "intensity" of scrutiny applicable to the government act under review. By incorporating this fork-in-the-road into PA, Hong Kong judges have fundamentally deformed the framework; indeed, they expressly relegate phase four balancing to a "secondary or supplementary"[9] status. The result: Hong Kong judges falsely claim to be

[7] *Leung Kwok Hung v Secretary for Justice* [2020] HKCA 192.

[8] Alec Stone Sweet and Jud Mathews, "Proportionality Balancing and Global Constitutionalism" (2008) 47 *Columbia Journal of Transnational Law* 73; Stone Sweet and Mathews (n 1 above), Chs 2 and 3.

[9] Johannes Chan, "Proportionality after Hysan: Fair Balance, Manifestly without Reasonable Foundation, and *Wednesbury* Unreasonableness" (2018) 49 *HKLJ* 265, 266.

applying PA.[10] They routinely balance within step three (necessity) to determine outcomes, for example, while virtually never reaching phase four balancing.

In *Hysan*, the CFA failed to provide a persuasive, proportionality-congruent explanation for this fork-in-the-road, let alone for the strange and unwieldly hybrid analysis one finds in subsequent rulings that purport to deploy it, including the CA's PFCR judgment. Not surprisingly, the foreign case law invoked by the CFA to justify *Hysan* does not actually support what it did. A puzzle is posed: if the authority of foreign courts can neither explain nor justify *Hysan* and its aftermath, what (unspoken) factors do? What are the Hong Kong courts doing, and why?

The article is organised as follows. Section 2 lays out the basics of the standard account of PA, describing how each of its four stages fit together as a logical sequence of steps for adjudicating limitation clauses. Most important for present purposes, I consider at length why stages three and four must be kept separate from one another, and I discuss the various ways that PA enables a court to express respect for legislative and executive powers and expertise. Section 3 examines the fork-in-the-road from two standpoints: that of the standard model and that of the case law of the European Court and the Canadian Supreme Court. Section 4 directs attention to the aftermath of *Hysan* and, in particular, to the CA's ruling on the PFCR. As the post-*Hysan* cases demonstrate, Hong Kong's version of PA threatens to institutionalise the chronic reproduction of three pathologies, which the standard model had been developed to avoid: (1) analytical incompleteness; (2) indeterminacy with respect to standards of review; and (3) the abdication of judicial duties. A simple, off-the-shelf doctrinal fix is available: Hong Kong courts should follow the Canadian Court's lead, clearly distinguishing stages three and four of PA, and cleansing its approach of the legacies of reasonableness review. As it is, the approach reflects only a shallow, surface commitment to enforcing the proportionality principle. Its deep structure indicates an attachment to an inchoate standard of reasonableness which, in turn, is haunted by the spectre of *Wednesbury* unreasonableness.

2. Proportionality Analysis

Modern bills of rights announce a small number of "absolute" rights, typically the core of the dignity norm, access to justice and the prohibition

[10] Rehan Abeyratne, "More Structure, More Deference? Proportionality in Hong Kong" in PJ Yap (ed), *Proportionality in Asia* (Cambridge: Cambridge University Press, 2020) Ch 2.

of torture, slavery and inhuman treatment. They then enumerate the "qualified" rights, so called because their scope may be restricted by government for some sufficiently important public purpose, under a "limitation clause". PA is a bespoke analytical procedure for determining whether an official act, taken under a limitation clause, is constitutionally justified.[11]

The domain of qualified rights is extensive, in the aggregate covering virtually any condition or activity that individuals might choose for themselves. For their part, limitation clauses authorise public officials to restrict liberty, but only insofar as these restrictions satisfy the proportionality principle. Limitation clauses also place officials under a positive duty to enhance the effectiveness of a bill of rights, on an ongoing basis. The legislature does so when it acts to reduce conflicts that may arise between contending rights claims, for example. Thus, it would be a serious error to consider a limitation clause as a licence for public officials to derogate from the charter. On the contrary, limitation clauses enlist each branch of government in a common project to respect rights, under the case-by-case supervision of a high court.

(a) Step by Step

PA furnishes judges with a comprehensive "checklist" of those "individually necessary and collectively sufficient criteria" that any exercise of public authority must meet to be considered valid in a "constitutional democracy".[12] In its most articulated form, PA proceeds through a sequence of four subtests: (1) "legitimacy" or "proper purpose"; (2) "suitability" or "rational connection"; (3) "necessity"; and (4) "balancing" or "proportionality in the strict sense". A government act that fails any subtest in this sequence is unlawful; and each stage is a threshold requirement for moving to the next stage, the last of which is stage four balancing.

To illustrate, consider the review of a statute challenged on the grounds that it unlawfully restricts a right holder's liberty, as expressed or implied by a charter provision. The first phase of PA mandates inquiry into the "legitimacy" of the statute's purpose: the judge confirms that the constitution authorises the parliament to legislate in service of the chosen policy objective. If the constitution does not permit the legislature to

[11] This section based on Stone Sweet and Mathews (n 1 above) Ch 2 and Barak (n 5 above) Chs 9–14.

[12] Mattias Kumm, "The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review" (2010) 4 *Law & Ethics of Human Rights* 141, 144; Jacob Weinrib, *Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law* (Cambridge: Cambridge University Press, 2016).

pursue such a purpose, then the rights claimant must prevail. The analysis focuses on legislative ends, not on the means chosen to effectuate those ends. A legislative purpose that could — if only hypothetically — "justify a limitation of a right" is proper, as when the legislature acts under a heading listed in, or implied by, a limitation clause.

In the second step — "suitability" — lawmakers must demonstrate that a rational relationship exists between the *means chosen* and the *ends pursued*, such that the former is capable of advancing the end. The legislature need not show that the means chosen are optimal or that its purpose meets some measure of significance. Few laws are invalidated on grounds that the stated purpose is illicit (*per se* illegitimate) or that the act is facially irrational or arbitrary (the means being unsuitable).[13] And nothing of importance is lost in combining stages one and two such that the judge certifies that a *rational nexus* exists between the means chosen and the realisation of a *proper purpose*.

The third phase — "necessity" — has far more bite. At its core is a least-restrictive means test, called a requirement of "minimal impairment" in Canada. The court's task is to ensure that the measure under review does not impair the pleaded right more than is necessary for the legislature to achieve its declared purpose. In practice, judges skilled in PA rarely censure a measure simply because they can imagine one less-restrictive alternative. Instead, they require that policymakers consider a range of *reasonably-available* alternatives and choose among equally effective options that burden the right the least. As a pleading matter, judges expect the rights holders to identify less-restrictive alternatives. The subtest also constrains judges: it is inappropriate for a court to strike down a statute without explicit consideration of a *bona fide* alternative.

Within necessity analysis, the class of genuine alternatives is strictly limited to those means that would fully realise the legislature's declared objectives, but with less harm to the rights holder. As Barak puts it, in necessity analysis, the judge ensures that

> "no other hypothetical alternative exists that would be less harmful to the right in question *while equally advancing the law's purpose*. If a less limiting alternative exists, able to fulfill the law's purpose, then there is no need for the law. If a different law will fulfill the goal with less or no limitation of the human rights, then the legislator should choose this law."[14] (Emphases added)

[13] Neither the first nor the second subtest directs attention to the impact of the impugned measure on the scope of the pleaded right, which is the province of the third and fourth prongs.

[14] Barak (n 5 above) p 317.

Thus, a hypothetical alternative may be reasonable and less restrictive on rights, but it is not a *bona fide* alternative if — relative to the impugned law — it reduces capacity to achieve the legislatively-specified aims.[15]

Stage four balancing entails assessing, in light of the facts of the dispute and the policy context, the law's marginal addition to the realisation of a public good against the marginal harm incurred by infringement of the right.[16] One core function of balancing is to ensure that a comparatively small or even trivial addition to the commonweal does not curtail liberties more than can be justified, given a polity's constitutional commitments. Balancing also permits judges to "complete" the analysis, by ensuring that no factor of significance has been overlooked under the more narrow analytical constraints of prior stages of PA.[17] After all, it is only after the government's own policy choices have survived scrutiny under the legitimacy, suitability, and necessity tests that the importance of the right, in the context of its limitation by the law under review, becomes the centre of direct attention.

The ideas of Robert Alexy[18] and Aharon Barak[19] are, today, integral components of the doctrinal construction of balancing. Due to space limitations, I can only summarise the essentials of what is a fiercely complex topic. Alexy, synthesizing the jurisprudence of the German Federal Constitutional Court, has declared the *Law of Balancing*:

> "The greater the degree of non-satisfaction of, or detriment to, one principle [eg, the right being pleaded], the greater must be the importance of satisfying the other [eg, the collective good being pursued by the legislature]."[20]

Defensible rulings in balancing are those that meet the demands laid down by this "law". For his part, Barak has elaborated the *Rule of Balancing*, emphasizing a structured assessment of the *relative* harms and benefits produced by, or expected from, the act under review:

> "[A]s the importance of avoiding the marginal limitation on the constitutional right and the likelihood of the limitation [to harm the right holders] increase, so do the required importance of the marginal benefit

[15] The analysis proceeds only when "the less limiting means has an identical effect to that chosen by the [legislature] in every respect", Barak (n 5 above) p 324.

[16] Aharon Barak "Proportionality" in M Rosenfeld and A Sajó (eds), *Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) Ch 35, pp 744–747.

[17] Most prominently, members of the German Federal Constitutional Court and the Supreme Court of Israel.

[18] Robert Alexy, *A Theory of Constitutional Rights* (Oxford: Oxford University Press, 2002).

[19] Barak (n 5 above).

[20] Robert Alexy, "Balancing, Constitutional Review and Representation" (2005) 3 *International Journal of Constitutional Law* 572, 573; Alexy (n 18 above) Postscript.

> of the public interest or the competing private right and the required likelihood of that benefit being realised."[21]

Both rest on a strong presumption: that it is possible to assess the intensity of relative harms and benefits.[22] As Barak stresses:

> "The social importance of avoiding the limitation of a right is influenced by the scope of the limitation and its extent. The severity of the limitation also bears on the social importance of avoiding it. A limitation on one right, accordingly, is not the same as a limitation on several; a limitation that approaches the core of a right is not the same as one that affects it only on its margins; a permanent limitation is not the same as a temporary one; and a limitation very likely to eventuate is not the same as one whose probability of realization is more remote."[23]

In accepting the rationality of these directives, Alexy and Barak argue, one is led to acknowledge that stage four balancing need not reduce to judges merely enacting their (ideological) preferences when choosing among the policy options on offer.

Under these constraints, balancing will bear "little relation to cost–benefit analysis in a crude utilitarian sense".[24] As Barak puts it: "[T]o speak of 'balancing' is to speak metaphorically, but the mode of thought is normative. It is based on legal rules that determine when a proper purpose may be realized despite the limitation on a constitutional right".[25] The stage four subtest involves assessing the relationship between the two most important components of the constitutional order: (1) the juridical guarantees of autonomy and freedom; and (2) the authority of state officials to govern in the public interest, under a limitation clause. Tensions that emerge in the relationship between these two components set into motion a process of mutual re-equilibration. In balancing, judges make a holistic evaluation of whether, in light of circumstances and the polity's constitutional commitments, officials are justified in taking a rights-restricting measure.

(b) The Necessity of Balancing

Assume that the legislature has chosen to prohibit the sale, possession and use of a recreational drug in order to ensure that *no person* is harmed

[21] Barak (n 16 above) p 746.

[22] I do not discuss here the fraught issue of balancing under conditions of incommensurability, but see Stone Sweet and Mathews (n 1 above) pp 38–41.

[23] Barak (n 16 above) p 746. See also Aharon Barak, "Proportionality and Principled Balancing" (2010) 4 *Law & Ethics of Human Rights* 1, 10.

[24] Alec Stone Sweet and Eric Palmer, "A Kantian System of Constitutional Justice: Rights, Trusteeship, Balancing" 6 *Journal of Global Constitutionalism* 377, 400.

[25] Barak (n 16 above) p 745.

by the hazardous side effects that may accompany use. Assume as well that the ban provokes litigation by those wishing to defend their right to use the drug, triggering PA. Regulating through a labelling requirement (eg, mandating packaging that includes a warning to the effect that use of the drug has been found to endanger health) is obviously not a *bona fide* alternative, since its capacity to eliminate harm is weaker than prohibition. The ban passes the first three subtests: *legitimacy* (the government is empowered to protect public health); *suitability* (the ban is rationally connected to protecting health); and necessity, given that there exists no less-restrictive means that would enable government to reach its goals as effectively. Under the standard necessity test, the government has full discretion to choose the level of health protection it desires; in this hypothetical, the law easily passes stage three, precisely because the state can only hope to achieve its purpose by forbidding the drug altogether. (Indeed, compared to banning sales, possession and use, a labelling requirement is premised on the view that it is not necessary to reduce the danger to public health of the drug to nil.) In necessity analysis, the reviewing court may not censure the government for failing to choose a *less effective* means on the grounds that it would impose *less harm* to rights holders. Such is the domain of phase four balancing.

Now consider a stylised version of the PFCR case. Article 17 of the Hong Kong Bill of Rights reads:

> "The right of peaceful assembly shall be recognised. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others."

The limitation clause explicitly authorises government to take a measure such as the PFCR, in order to secure public safety, to protect the rights of others to peaceful assembly and to prosecute criminal acts against persons and property committed by protesters. In the standard model of PA, there would be no question that the PFCR would pass the legitimacy and suitability subtests (as they, in fact, did). Now assume that Hong Kong authorities claim that only a total ban on the wearing of face coverings during demonstrations is capable of optimising the aim of identifying and prosecuting *every* person that commits a criminal act in the course of *any* protest. (The government pleaded the goal of eliminating the emboldening effect of facial covering.) Again, it would be a misuse of necessity analysis to declare the PFCR unconstitutional on the grounds that there exists (1) a reasonably available but less effective alternative that (2) yields less harm to art 17 rights. A court that would do so is, in

effect, smuggling balancing into necessity, with a cost to both transparency and the underlying logics of PA. In excluding the application of the ban to authorised demonstrations, the CA did exactly that.

It should now be obvious why PA cannot end with necessity. If it did, a legislature could routinely eliminate the set of less-restrictive alternatives altogether — thereby insulating a law from annulment — merely by seeking the highest level of protection of a social good (of health, the environment, security and so on). Put differently, ending with necessity will inevitably generate moral hazard that directly threatens the effectiveness of rights protection. Measures that impose a relatively heavy burden on the rights holder, including reducing the scope of the right to nil, are more likely to pass the necessity test than those with more modest goals. In doing so, however, the government will bear a heavier burden of justification in balancing — as the law and rule of balancing indicate.

(c) Deference and the Zone of Proportionality

The standard model of PA precludes the adoption of formal deference doctrines: those approaches to rights adjudication that would classify a rights claim or policy issue as *per se* non-justiciable (eg, "political questions"; disputes involving "national security") or that impose a burden on the claimant that is so high as to make the routine rights review virtually impossible (eg, under a *Wednesbury unreasonableness* or weak *rational basis* test). In embracing PA, a court places all policymaking and its implementation in the shadow of proportionality review, fulling exposing judges as important actors in the policymaking process. Rulings taken pursuant to PA make law both (1) directly, as when the court invalidates a statutory provision found to be disproportionate; and (2) indirectly, as when the court requires legislatures or executives to revise the law in a particular way, issues mandatory interpretive constructions so as to render its enforcement proportionate[26] and promulgates, in its case law, constitutional constraints meant to govern future lawmaking.[27]

At the same time, PA provides a stable set of opportunities for expressing respect and *de facto* deference to those who make and enforce the law. Most judges skilled in PA, for example, treat stages one and two in a relatively *pro forma* manner, opening discursive space to praise the legislature. Declaring that the lawmakers have pursued an *improper* purpose or acted *arbitrarily* and *irrationally* is blunt and stigmatising. The legislature

[26] See Po Jen Yap and Jiang Zixin, "Remedial Discretion and the Prohibition on Face Covering Regulation" (2020) 50 *HKLJ* 569–584.

[27] Alec Stone Sweet, *Governing with Judges: Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000) Ch 3. Stone Sweet and Mathews (n 1 above) Ch 5.

is far more likely to interpret such decisions as hostile acts of war between branches of government than as attempts to elicit cooperation in a common effort to guarantee respect for the proportionality principle. Of course, when the court confronts a plainly arbitrary statute, or when a parliamentary majority has clearly acted in bad faith, stages one and two are appropriate prongs for rulings of unconstitutionality. These same steps are also occasions for judges to commend lawmakers. "Yes", the court tells us, "the legislature is pursuing a proper — even important — purpose in a suitable way". Courts also regularly commend lawmakers when they pass a necessity test, that is, for taking rights into account in their decision-making. In step four, such opportunities run out. If the judges find a rights violation, they can only tell the legislature: "although you have passed three of the tests, we nonetheless find that this law restricts a right more than can be justified, given our underlying constitutional commitments". Judges then typically go on to tell legislators exactly how they can or must proceed, albeit to achieve more limited aims.

Properly deployed, PA respects rather than subverts the separation of powers. The legislature possesses all of the competences necessary to achieve a proper purpose, so long as the statute produced satisfies the proportionality principle. All branches of the government — including judges of the constitution — are constrained by the proportionality principle when they act to limit the scope of a qualified right. Unlike judges, the legislature is self-activating, deciding when, for what purpose and how to limit a right. In regulating through statute, legislatures almost always have multiple options — points with the zone of proportionality — from which to choose. Under the separation of powers, courts are under a duty to respect fully the legislature's authority to select among those options. But separation of powers doctrines must also conform to the constitution; they cannot deprive a bill of rights of its higher law status and binding authority. Nor can "deference" be invoked to strip a high court of its powers or diminish that court's duty to supervise legislative compliance with rights.[28] On the contrary, judges who hide behind deference doctrines, or otherwise refuse to enforce the proportionality principle in good faith, *subvert* the separation of powers, and *abdicate* its most important constitutional duty: to delineate the zone of proportionality in an authoritative manner.

[28] "[I]n the present context – the proportionality of a limitation on a constitutional right – we can define deference as a situation where a judge adopts an opinion expressed by another branch of government (either the legislative or executive) regarding the components of proportionality when, without this expression, the judge would not have adopted that opinion. The three most common justifications for this deference are: the lack of democratic legitimacy for judging; the lack of institutional capacity; and, finally, judicial wisdom. None of these justifications is proper. Judging enjoys full democratic legitimacy, as it is derived directly from the constitution. Similarly, the institutional structure allows the judiciary to receive information regarding

Nothing in this discussion casts suspicion on judges who are wont to give (*de facto*) deference to policymakers on epistemic grounds, in particular with regard to the assessment of risks to health, national security, environment protection and so on. After all, in many contexts, legislators and executives may be better equipped to assess such risk than are judges; and again, where there are multiple ways of regulating proportionally, that choice is properly the legislature's. But, here again, giving epistemic deference does not entail abdication. In the 2004 *Security Fence* case, the Israeli Supreme Court evaluated the proportionality of the planned route of the fence to be built for the purpose of reducing terrorist attacks originating in Palestinian-held territory. In what is perhaps that Court's most controversial ruling, Barak CJ famously deferred to military expertise at necessity, but not at balancing:

> "The military commander is the expert regarding the [necessity] of the separation fence route. We are experts regarding its humanitarian aspects. The military commander determines where, on hill and plain, the separation fence will be erected. That is his expertise. We examine whether this route's harm to the local residents is proportional. That is our expertise."[29]

Although (*de facto*) deference to expertise occurs frequently in the third stage, it should never determine balancing outcomes on its own. Instead, epistemic uncertainty and the opinions of experts are important factors to be weighed in the balance; and decisions that give deference must be supported by reasons.

3. A Comparative Analysis of *Hysan*

This section examines *Hysan* in light of the standard account, and from the standpoint of the foreign case law invoked by the CFA in support of its approach to PA. I make three inter-related points. First, the fork-in-the-road introduced in *Hysan* reflects a fundamental misunderstanding of PA, and of the role of judicial power in a proportionality-based system of rights protection. Second, *Hysan* seriously mischaracterises the margin of appreciation doctrine, which the CFA purports to incorporate. Third, on the question of importing stage four balancing to Hong Kong,

the different considerations in the same way this information is presented to other branches of government. Of course, the judge does not set social policy. That assertion, however, has nothing to do with deference and everything to do with the principle of separation of powers and the scope of the court's authority within that principle. Finally, judicial wisdom cannot replace constitutional duty. There is no room for deference." Barak (n 5 above) p 398.

[29] Sitting as the High Court of Justice, *Beit Sourik Village Council v Government of Israel* [2004] HCJ 2056/04, [48].

the CFA relies on reasons elaborated by the Supreme Court of Canada, in *Hutterian Brethren of Wilson Colony v Alberta* (2009),[30] rationales the CFA immediately subverts.

(a) The Fork-in-the-Road

Prior to *Hysan*, necessity comprised the final stage of PA in Hong Kong,[31] in the form of a minimal impairment test. Hong Kong courts applied this test with reference to *RJR-MacDonald Inc v A-G of Canada* (1995), a decision of the Supreme Court of Canada that is influential for the following statement:

> "The tailoring process seldom admits of perfection. … If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement. … On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail."[32]

This approach to necessity, which involves comparing the government-preferred means against a "reasonably available" and "equally effective" alternative, does not conflict with the standard model of PA. Today, it operates as a kind of common sense, rule-of-thumb disposition for applying necessity all over the world.

The CFA radically departs from PA in its startling insistence that judges choose — within necessity analysis — between one of two standards of review: NMTN and MWRF. Even more astonishing, the CFA characterises NMTN as demanding a stricter form of scrutiny than MWRF, which it describes as a deference doctrine. This fork-in-the-road deforms PA, obliterating its most important strictures. It replaces a coherent sequence of subtests, supported by secure justificatory logics, with categorical decision-making whose purpose is to recast PA as a form of deference-infused reasonableness review. It bears repeating that PA provides a standard of review on its own, one that increases the intensity of judicial scrutiny with each subtest. Layering in NMTN and MWRF does not fill a gap that inheres in PA, since there is no gap to fill. Rather, it punches massive holes in PA, weakening rights in ways that are glaringly obvious.

As described by the CFA, NMTN is virtually identical to standard stage three necessity analysis. In the standard model, judges are charged

[30] [2009] 2 SCR 567.

[31] "The restriction or limitation [of a qualified right] must be no more than is necessary to accomplish [a] legitimate aim." *Hysan* (n 6 above) [52].

[32] *Hysan* (n 6 above) [85], citing to *RJR-MacDonald Inc v A-G of Canada* [1995] 3 SCR 199, [160].

with enforcing the NMTN standard — that is the specific and only function of the subtest. The dicta that follow are, thus, inexplicable:

> "[T]he case for accepting in principle the applicability of a fourth step in the proportionality analysis is logically compelling, although in the great majority of cases, its application would not invalidate a restriction which has satisfied the requirements of the first three stages of the inquiry. One would hope and expect that most laws and governmental decisions at the sub-constitutional level internally reflect a reasonable balance between the public interest pursued by such laws and the rights of individuals or groups negatively affected by those laws. In such cases, where the law passes the first three tests, it would be unlikely to fail the test of proportionality "*stricto sensu*" … at the fourth stage."[33]

The passage implies that necessity subsumes (or substitutes for) balancing, reflecting a fundamental error.[34] Stages one to three scrutinise the government's purposes and the means chosen to realise those purposes; but they do *not* directly examine the importance of the right being pleaded. As discussed at length in Section 2, judges can only balance the relative harms and benefits of the act under review in stage four.

With regard to MWRF, the CFA makes no attempt to disguise its purpose: to protect Hong Kong courts from the accusation that PA will necessarily lead judges to arrogate to themselves law-making powers more appropriately held by legislatures and executives. According to the CFA, citing to the passage of *RJR-MacDonald* just quoted, NMTN is operationalised by a "reasonable necessity test":

> "The legislative or executive authority must show that the measure impairs the right as little as reasonably possible in order to achieve the legislative objective. … In these cases, the acceptable range of reasonable alternatives will depend on the factual context but one would expect such range to be significantly narrower than where the 'manifest' threshold is applied."[35]

MWRF instantiates a deferential "margin of appreciation" doctrine — which it labels "the margin of discretion":

> "In practice, where a wide margin of discretion exists, in applying the 'manifest' standard, the Court will allow the decision-maker latitude to adopt one of a relatively wide range of possible alternatives in fashioning the impugned measure which encroaches upon the protected right."[36]

[33] *Hysan* (n 6 above) [73].
[34] See also Chan (n 9 above) pp 270–271.
[35] *Hysan* (n 6 above) [121].
[36] *Ibid.*, [120].

To repeat, standard necessity analysis *already* recognises the government's (virtually unfettered) authority to choose *any* (proper and suitable) means it deems necessary to achieve its declared purpose, even those means that would extinguish the enjoyment of the right being pleaded. The *Hysan* passage just quoted makes sense only if MWRF is actually intended to constrain stage four balancing, that is, the assessment of reasonably available but less effective alternatives. Indeed, NMTN and MWRF are *not* competing standards: the first governs stage three necessity and the second constrains stage four balancing. If I am correct, then the only real choice to be made is whether to declare deference — that is, to abdicate — in stage four.

(b) The European Court of Human Rights and the Margin of Appreciation

In *Hysan*, the CFA sought to justify MWRF through the jurisprudence of the European Court of Human Rights. It did so in a series of misrepresentations of that Court's case law. In fact, the European Court does *not* primarily conceptualise, invoke or deploy the margin of appreciation as a deference doctrine. On the contrary, it uses PA to determine, on a case-by-case basis, the extent of discretion that state officials possess when seeking to limit the scope of Convention rights in domestic law.

The European Court first seriously engaged with a limitation clause of the ECHR in *Handyside v United Kingdom* (1976). In that judgment, the Court held that states enjoyed a margin of appreciation with regard to how they might choose to limit the scope of a qualified right, but that "[t]he domestic margin of appreciation … goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its 'necessity'; it covers not only the basic legislation but also the decision applying it, even one given by an independent [domestic] court".[37] By the end of the 1990s, the Court had enshrined PA as the obligatory standard of review applicable to the adjudication of all of the qualified rights (arts 8–12 of the ECHR).[38] Indeed, the failure of national judges to use PA in rights case constitutes, in itself, a violation of art 13

[37] (1979–1980) 1 EHRR 737, [49].

[38] *Hysan* involved property rights, which led the CFA to consult the European Court's case law on Protocol No 1 of the Convention. I will not go into detail on the evolution of the Court's approach to Protocol No 1, which differs in important ways from its approach to arts 8–12 of the ECHR. For present purposes, it is enough to note that the size of the margin of appreciation recognised by the Court in Protocol No 1 cases is an outcome of PA, rather than an *a priori* result of structural deference. For an authoritative survey of the jurisprudence on proportionality and margin of appreciation, see European Court of Human Rights, "Guide on Article 1 of Protocol No. 1 to the European Convention" (2019), pp 25–31, available at https://www.echr.coe.int/Documents/Guide_Art_1_Protocol_1_ENG.pdf (visited 12 June 2020).

of the ECHR: the right to an "effective judicial remedy". These outcomes reflect the Court's steadfast rejection of the reliance, on the part of the UK courts, on reasonableness approaches.[39]

It is well understood that the European Court deploys two starkly incompatible versions of the margin of appreciation doctrine, in Letsas's terminology:[40] a "substantive" and a "structural" version. In the first — by far the dominant form — the Court uses PA to delineate the margin of appreciation. The position it took in *Handyside* has stuck, as the Court has reiterated in literally thousands of cases. Domestic judges can earn the Court's respect through balancing in light of the latter's jurisprudence, not by ignoring it. As the Court puts it: "[W]here the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts".[41]

Thus, the substantive margin of appreciation is decidedly *not* a formal deference doctrine: it does not render a legal dispute about rights non-justiciable; and it does not relieve domestic officials from their duty to proffer reviewable, proportionality-congruent justifications for limiting a Convention right. Indeed, because the substantive margin of appreciation is a product of PA, the concept adds nothing of interest to what actually takes place — PA — when qualified rights are adjudicated. As Candia puts the point:

> "When applying a margin of appreciation, the European Court does not ignore that the test to be employed is highly intrusive. In order to ameliorate a potential conflict with the states parties, it simultaneously invokes both the margin of appreciation and the principle of proportionality, as if they represented two faces of the same coin. Nevertheless, this use of the margin is merely rhetorical and it does not produce any normative impact on the decision ultimately reached by the Court. Therefore, the sole invocation of the margin of appreciation does not prevent the ECHR from carefully analyzing the merits of each case and balancing the interests involved in it under no specific criteria."[42]

In contrast, the "structural" version of the margin of appreciation facilitates deference, albeit atypical, that the Court hides behind for

[39] For a detailed account of this confrontation, see Alec Stone Sweet and Clare Ryan, *A Cosmopolitan Legal Order: Kant, Constitutional Justice, and the ECHR* (Oxford: Oxford University Press, 2018) pp 103–108.

[40] George Letsas, "Two Concepts of the Margin of Appreciation" (2006) 26 *Oxford Journal of Legal Studies* 705.

[41] *Von Hannover v Germany* (2012) 55 EHRR 15, [107].

[42] Gonzalo Candia, "Comparing Diverse Approaches to the Margin of Appreciation: The Case of the European and the Inter-American Court of Human Rights (2014), p 9, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2406705 (visited 12 June 2020).

prudential reasons.[43] It has been subjected to enormous criticism, insofar as the Court invokes it in an *ad hoc* manner, but only in highly sensitive cases, and only to abdicate its responsibilities.[44] It is worth noting that every other regional human rights court has taken pains to reject "margin of appreciation" doctrines altogether, as *per se* inimical to effective rights protection.[45]

The dominant (substantive) doctrine of *margin of appreciation* is usually taken to be the transnational analogue of the domestic *zone of proportionality*, although the domestic judge must "base decisions on the notion of the 'zone of proportionality'," not on a margin of appreciation.[46] The point brings us to the UK Supreme Court, which has steadily altered its approach towards deference and margin of appreciation since at least 2007,[47] by reducing (at least the rhetorical) force of both. Well before the CFA issued its *Hysan* ruling, the UK Supreme Court had clearly distinguished domestic from transnational rights protection.[48] To take just one example, in *Re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* (2015), Lord Mance JSC joined by two other justices, stated :

> "The European Court of Human Rights has examined … a number of [similar] cases. These are cases at an international level, in which the margin of appreciation had … an important potential role. We are concerned with the domestic application of the Convention. The margin of appreciation does not apply. Instead, the issue is with what intensity we should review the Bill and what deference is due … to the legislature's view as to the appropriateness of the Bill. … At the domestic level, the margin

[43] See the discussion of the religion and abortion cases in Stone Sweet and Ryan (n 39 above) pp 184–196.

[44] Andreas Føllesdal, "Appreciating the Margin of Appreciation" in A Etinson (ed), *Human Rights: Moral or Political?* (Oxford: Oxford University Press, 2017) Ch 8, reviews these debates and defends a deferential version of the transnational margin of appreciation.

[45] Stone Sweet and Mathews (n 1 above) Ch 6. When the European Court is in its normal, "substantive" review mode, PA also accommodates "consensus analysis", which involves a comparative assessment of the extent to which, on what grounds and how states have chosen to restrict the scope of qualified rights, over time. The result of this assessment is treated as facts to be weighed in the overall balance. The practice underwrites a strategy of "majoritarian activism" in which the margin of appreciation-afforded states will shrink (or disappear altogether) as regime consensus for higher standards grows. See Stone Sweet and Ryan (n 39 above) Ch 5; and Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge: Cambridge University Press, 2015). As Barak [(n 5 above) p 418] puts the matter: in European law, the margin of appreciation "is based … on the notion that, [when no little or no consensus] exists at the European level as to the relative social importance of the public interest or of human rights, a certain weight should be accorded to the opinion of the state against which it was argued that its legislation has disproportionally limited a human right protected by international treaties". Put differently, the margin of appreciation is part and parcel of balancing, not antithetical to balancing.

[46] See Barak (n 5 above) Ch 14, p 421.

[47] In *Huang v Secretary of State for the Home Department* [2007] 2 AC 167. See the analysis in Eirik Bjorge, *Domestic Application of the ECHR: Courts as Faithful Trustees* (Oxford: Oxford University Press, 2015) Ch 6.

[48] The topic is explored at length in Bjorge (n 47 above) Ch 6.

> of appreciation is not applicable, and the domestic court is not under the same disadvantages of physical and cultural distance as an international court. The fact that a measure is within a national legislature's margin of appreciation is not conclusive of proportionality when a national court is examining a measure at national level."[49]

As this passage suggests, UK judges is willing to consider "deference" to legislatures and executives within their respective "discretionary areas of judgment", implying some role for preliminary categorical reasoning. Yet it is also clear that the Supreme Court recognises its role, and the importance of PA, in delineating a "zone of proportionality".

It is telling that, in *Hysan*, the CFA strongly implies that the European Court's doctrine of margin of appreciation operates, in effect, as an analogue of *Wednesbury* unreasonableness.[50] One might defend this posture in terms of the difficult political situation in which Hong Kong judges find themselves, but not in terms of European rights doctrine.

(c) The Supreme Court of Canada and the Standard Model

Until its decision in *Hutterian Brethren*,[51] the Supreme Court of Canada regularly assessed "the proportionality of effects" within stage three. Through 2015, as Petersen reports, only 6 per cent of successful Charter challenges rested explicitly on phase four balancing.[52] Simplifying a complex set of practices, the Canadian Court routinely smuggled balancing techniques into necessity analysis in order to avoid moving to stage four.[53] In *R v Wholesale Travel Group Inc* (1991), for example,

[49] [2015] AC 1016, [54] (Lord Mance JSC). Quoted and analysed in Bjorge (n 47 above) p 186.

[50] In *Hysan*, the CFA stated:

> "103. Following *Fok Chun Wah*, the 'manifestly without reasonable foundation' threshold for intervention was adopted in the following terms: 'Where the disputed measure involves implementation of the Government's socio-economic policy choices regarding the allocation of limited public funds without impinging upon fundamental rights or involving possible discrimination on inherently suspect grounds, the Court has held that it has a duty to intervene only where the impugned measure is 'manifestly without reasonable justification.'
>
> "104. It was explained that this approach was linked to the ECtHR's 'margin of appreciation' adapted for application in our domestic context: 'That is a test initially applied by the European Court of Human Rights while according a broad margin of appreciation to member States in setting and implementing their socio-economic policies. As the Chief Justice points out, the margin of appreciation principle has previously been adapted to apply in the context of our domestic law. It is appropriate similarly to apply the "manifestly without reasonable foundation" test in our domestic context.'" (Citations omitted) (n 6 above)

[51] *Hutterian Brethren* (n 30 above).

[52] Niels Petersen, *Proportionality and Judicial Activism: Fundamental Rights Adjudication in Canada, Germany and South Africa* (Cambridge: Cambridge University Press, 2017) p 85.

[53] *Ibid.*, Ch 5.

that Court struck down a strict liability prohibition against false and misleading advertising on the grounds that such advertisements could be corrected upon notice to the offending party, although it acknowledged that this alternative would be less effective as a deterrent.[54] These practices provoked consternation,[55] not least, because they conflicted with the standard procedure, reducing coherence and transparency.

With *Hutterian Brethren*, the Court finally "corrected" itself, self-consciously harmonising to the standard model.[56] The dispute involved a challenge, on freedom of religion grounds, to a regulation issued by the Province of Alberta requiring that all drivers' permits display a photograph. The regulation, members of the Hutterian sect believed, would force the colony to violate the second commandment prohibiting graven images and likenesses. The province had justified the regulation, among other reasons, as a means of preventing identity fraud. For its part, the Hutterians claimed that the measure would force them to choose between either (1) foregoing driver permits, "thereby eroding fabric of our social, cultural and religious way of life", or (2) the respect for a religious commandment. Anxious to consider alternative means, the Province proposed issuing the Colony permits without photos, which would instead be placed in a data bank to be used only in case of investigation. The Colony rejected the compromise, since photos would still be taken. The Court of First Instance balanced within necessity, finding that the regulation imposed an "undue burden" on the freedom of religion. In standard PA, undue burden tests operationalise stage four balancing, but they have no place in stage three necessity.

The Court's ruling committed itself to distinguishing stages three and four. Writing for the majority and quoting Barak, McLachlin CJ declared that "the minimum impairment test requires only that the government choose the least drastic means *of achieving its objective*. [Emphasis in the original.] Less drastic means which do not actually achieve the government's objective are not considered at this stage".[57] With regard to *RJR-MacDonald*, McLachlin noted that whatever "deference" owed to the government in choosing means is neither "blind" nor "absolute";

[54] [1991] 3 SCR 154.

[55] Dieter Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence" (2007) 57 *University of Toronto Law Journal* 383; Marcus Moore, "*R. v. KRJ*: Shifting the Balance of the *Oakes* Test from Minimal Impairment to Proportionality of Effects" (2018) 82 *Supreme Court Law Review* 143.

[56] The Court had reaffirmed the importance of balancing in earlier cases, including *Canada (Attorney General) v JTI-MacDonald Corp* [2007] 2 SCR 610, [46]: "Although cases are most often resolved on the issue of minimal impairment, the final inquiry into proportionality of effects is essential. It is the only place where the attainment of the objective may be weighed against the impact on the right. If rational connection and minimal impairment were to be met, and the analysis were to end there, the result might be to uphold a severe impairment on a right in the face of a less important objective."

[57] *Hutterian Brethren* (n 30 above) [54].

instead necessity analysis is strictly limited to determining whether there exists an equally effective but "less drastic means of achieving the objective in a real and substantial manner".[58]

The Court then moved to balancing, upholding the Province's regulation: the state's interest in combatting identity fraud outweighed the Colony's religious freedoms. Abella J, in dissent, would have found the regulation unconstitutional, pursuant to a far more searching analysis of the European Court's case law. A long-time proponent of the standard model, Abella insisted that "most of the heavy conceptual lifting and balancing ought to be done at the final step — proportionality. Proportionality [balancing] is, after all, what [the Charter] is about".[59] In a subsequent case, *R v J (KR)* (2016), the Court fully embraced Abella's view, endorsing Barak's view to the effect that the final phase of PA lies at "the very heart of proportionality". This "final step permits courts to address the essence of the proportionality enquiry", that is, "to stand back to determine on a normative basis whether a rights infringement is justified in a free and democratic society".[60]

In any event, *Hutterian Brethren* foreshadows but firmly rejects the CFA's conclusions on the necessity of balancing:

> "It may be questioned how a law which has passed the rigours of the first three stages of the proportionality analysis — pressing goal, rational connection, and minimum impairment — could fail at the final inquiry of proportionality of effects. The answer lies in the fact that the first three stages of *Oakes* are anchored in an assessment of the law's purpose. Only the fourth branch takes full account of the 'severity of the deleterious effects of a measure on individuals or groups' [discusses the views of Barak]… . Although the minimal impairment stage of the proportionality test necessarily takes into account the extent to which a *Charter* value is infringed, the ultimate standard is whether the *Charter* right is impaired as little as possible *given the validity of the legislative purpose*. [Only balancing] provides an opportunity to assess, in light of the practical and contextual details which are elucidated in the [earlier] stages, whether the benefits which accrue from the limitation are proportional to its deleterious effects as measured by the values underlying the *Charter*."[61] (Emphases in original) (Citations omitted)

This passage neatly expresses the logics of the standard model. In contrast, in the context of a discussion framed by *Hutterian Brethren*, the CFA bizarrely asserts that any law that passes the subtests of stages one to three is highly likely to pass stage four (see Section 3(a) above). There is nothing in PA that could point to that conclusion.

[58] *Ibid*., [55].
[59] *Ibid*., [149].
[60] [2016] 1 SCR 906, [78]–[79].
[61] *Hutterian Brethren* (n 30 above) [76]–[78].

Given the importance that Hong Kong judges assign to the rulings of UK courts, it is worth noting that the problem corrected by the *Hutterian Brethren* ruling in Canada continues to afflict UK doctrine, though matters are improving. In *Huang v Secretary of State for the Home Department* (2007), addressing the necessity of balancing, Lord Bingham noted that "if … insufficient attention has been paid to this requirement, the failure should be made good".[62] This passage is increasingly cited by counsel seeking to direct the judge's attention to balancing considerations. And, in 2020, Cavanagh J, for the High Court of Justice, cited approvingly to the passage from *Hutterian Brethren* just quoted (noting that passing the first three subtests of PA has no bearing on stage four balancing).[63] These points made, it is clear that the parroting of UK doctrine by Hong Kong's courts has been a major source of the latter's problems.

4. Pathologies of Rights Adjudication and the Ghost of *Wednesbury*

Hysan has failed: it has neither enhanced doctrinal coherence nor encouraged the courts to balance correctly and openly. Instead, the courts have all but dismantled "structured" PA, as Yap[64] calls the standard model. Consider the conclusions of Abeyratne, who has completed the most systematic study of rights adjudication in Hong Kong, post-*Hysan*.[65] The most significant impact of *Hysan*, as Abeyratne has convincingly demonstrated, has been the development of an infirm approach to rights protection that has little to do with standard PA. Abeyratne:

> "Thus far, this fourth step has added little, if any, value to [PA]. In none of the post-*Hysan* cases discussed did the analysis turn on [stage four]. More strikingly, judges do not seem willing to weigh the societal benefits of an impugned law or policy against the burden placed on individual rights. Instead, they seem to defer to the government even at this crucial stage, where they are called upon to make an independent 'value judgment.' To some degree, this reticence may be attributed to Justice Ribeiro's comment in *Hysan* that in a 'great majority of cases,' proportionality stricto sensu would not tip the balance in favor of the applicant."[66]

Abeyratne thus joins Chan, who has come to a similar diagnosis,[67] in urging the courts to embrace a version of PA more in accord with the standard model.

[62] *Huang* (n 47 above) [19].
[63] *R (Bloomsbury Institute Ltd) v Office for Students* [2020] EWHC 580 (Admin), [257(76)].
[64] Po Jen Yap (ed), *Proportionality in Asia* (Cambridge: Cambridge University Press, 2020) pp 9–13.
[65] Abeyratne (n 10 above), Ch 2.
[66] *Ibid.*, pp 57–58.
[67] Chan (n 9 above).

In this section, I briefly examine the most important recent decision of the Hong Kong courts, the CA's ruling on the constitutionality of the PFCR. I then argue that the present doctrinal disarray will routinely engender three pathologies of rights protection: judicial abdication; analytical incompleteness; and doctrinal instability. Last, I conclude that there are two solutions to the present doctrinal disarray: harmonise to the standard model or abandon PA altogether.

(a) The CA and the PFCR Rulings

While the CA claims to be deploying structured PA in the PFCR case,[68] it would be virtually impossible, a futile exercise in arid scholasticism, to attempt to reconstruct the CA's ruling as such.[69] I focus here only on two decisional pressure points: the choice of NMTN or MWRF; and the CA's reasoning with regard to its findings on the constitutionality of the enforcement powers contained in s 3(1).

One of the more bizarre effects of *Hysan* is to transform the choice of "standard of review" and "intensity of scrutiny" into a preliminary pleading matter. Predictably, given the CFA's discussion in *Hysan*, the rights claimant prefers NMTN, and the government pleads MWRF. How are judges to make this selection? The answer might surprise: through balancing. According to *Hysan*, judges are expected to weigh a host of factors that PA courts would normally be expected to consider in stage four balancing, that is, *after* the measure under review has survived the minimal impairment test. As per instructions, the CA balanced, albeit rather perfunctorily: "the nature and importance of the right in question and the degree to which it has been encroached upon" mandates NMTN, given the "significant" encroachment on the right by s 3 of the PFCR.[70] At the same time, the CA rejects the claim that the Chief Executive in Council (CEIC) is "better placed" than the judiciary "to make an assessment in relation to the particular issue in question"[71]; and it declares that the courts are "institutionally tasked with the constitutional duty to strike a balance between conflicting societal interest and fundamental rights of individuals in public order matters".[72] In other words, the court decides to assume its responsibilities under the Bill of Rights, while loading the dice in favour of the rights claimants, relative to proceeding under MWRF.

[68] *Leung Kwok Hung* (n 7 above) [Section F].
[69] The CA's ruling in PFCR has been the subject of commentary elsewhere, including in this volume.
[70] *Leung Kwok Hung* (n 7 above) [159], [161].
[71] *Ibid.*, [160].
[72] *Ibid.*, [162].

The CA's ruling is of importance for varied reasons, including with reference to questions of constitutional continuity after British cession, emergency powers, the CEIC's competences and the prohibition of face coverings and its enforcement. Other contributors to this volume examine the niceties of the decision in far greater detail. Here I examine only the proportionality of s 3 police powers.[73]

After choosing NMTN review, the CA subjects the enforcement regime to a "test of reasonable necessity",[74] which it applies more "strictly" with regard to unauthorised demonstrations, relative to protests that have been granted prior approval. The CA divides this part of its ruling into two parts, comprising separate analyses of (1) s 3(1)(b), and (2) s 3(1)(c) and 3(1)(d). In the first, the CA issues what Americans call a "savings construction", a "remedial interpretation" that saves s 3(1)(b) from being struck down.[75] Section 3(1)(b), the CA decided, would unreasonably expose certain classes of protesters to enforcement actions: (1) those unaware of the existence of an order pursuant to s 17(3) of the Public Order Ordinance (Cap 245) and (2) those without enough time to leave the demonstration after such an order. Adopting a purposive and "liberal" statutory construction, the CA extended the existing defence — a so-called defence of reasonable excuse — to cover those persons. The second part takes up s 3(1)(c) and 3(1)(d), which apply to unauthorised demonstrations, and which the CA invalidates as unconstitutional. The analysis is terse: "[S]o long as those meetings and processions proceed [lawfully] … there cannot be any serious public order or safety issues which warrant additional restrictions being placed on the same by way of prohibition to wear facial coverings".[76]

Both rulings are justified as means to guarantee the right of peaceful protest, which would otherwise be endangered by those who would hide among peaceful protestors to commit crimes against public order. This is no doubt a laudable, rights-protecting, policy goal. Moreover, the structure of the argument — that the rights of those who would engage in peaceful

[73] The CA also struck down provisions of s 5 of the PFCR, which authorises police officers to require the removal of face coverings in various situations. The CA notes that the Court of First Instance (CFI) held that "s 5 fails to strike a reasonable balance between the societal benefits derived from the measure and the inroads made to the protected rights", which implies it engaged in stage four balancing. The CFI appears to have blended stages three and four. *Leung Kwok Hung* (n 7 above) [250]. Nonetheless, in discussing the CFI's ruling and further submissions of government counsel, the CA implies that the lower court's ruling is one in "reasonable necessity". *Ibid.*, [256].

[74] *Ibid.*, [235].

[75] These "conditional rulings of constitutionality", as the Colombian Constitutional Court calls them, are heavily structured by PA; see Stone Sweet and Mathews (n 1 above) pp 132–137. See, more generally, Po Jen Yap, "Remedial Discretion and Dilemmas in Asia" (2019) 69(Supplement 1) *University of Toronto Law Journal* 84. See also Yap and Zixin (n 26 above).

[76] *Leung Kwok Hung* (n 7 above) [243].

protest deserve more consideration and are to be accorded more weight, than the rights of those who would, in effect "ruin it for everyone" — is facially unassailable and well supported in comparative case law. But it is impossible to arrive at such a decision through a standard necessity test, precisely because the ban is equally effective at achieving the CEIC's goals (*inter alia*, of deterring and eliminating the emboldening effect of facial covering[77]) whether the demonstration is authorised or not. In fact, the CA's holdings are paradigmatic examples of stage four balancing, but for the fact that they (allegedly) occur at stage three. The court assigns slight weight to "liberty to wear face coverings"[78] during an *unauthorised* demonstration, precisely because it may place at risk the liberty of those who wish to engage in *authorised* protests, and it declares that the liberty to wear a mask during an *unauthorised* demonstration "is not at the core" of art 17 of the Hong Kong Bill of Rights.[79] The CA underscores that it has arrived at its decision through a test of reasonable necessity and presents no separate section devoted to balancing.[80] Instead, the Court is content to announce, as if in afterthought:

> "We are *also* satisfied that on a systemic level the prohibition under s 3(1)(b) of the PFCR strikes a fair balance between the societal benefits pursued by the restriction and the inroads made to the rights of the individual subject to the same."[81] (Emphasis added)

(b) The Pathologies of Hysan

The problems that beset the *Hysan* framework, displayed in full view in the ruling on the PFCR, go far beyond rhetoric and packaging. Left in place, the approach will chronically reproduce three overlapping pathologies that standard PA was expressly designed to prevent abdication, incompleteness, and instability.

First, *Hysan* invites judicial abdication. Despite a superficial commitment to PA, the deep structure of rights doctrine in Hong Kong is reasonableness. The situation resembles one found in the United Kingdom 20 years ago. *Hysan* stands for MWRF, and MWRF is *Wednesbur*y by

[77] *Ibid*., [165].
[78] *Ibid*., [238(4)].
[79] *Ibid*., [238(7)].
[80] For s 3(1)(c) and 3(1)(d), the CA states, *Leung Kwok Hung* (n 7 above) [247]: "Even taking account of the propensity of mass demonstrations turned violent in the recent turmoil, we are not persuaded that it is necessary to extend the prohibitions under s 3(1) beyond the situations stipulated under subsections (a) and (b)." And, at [248]: "Thus, in respect of the prohibitions in s 3(1)(c) and 3(1)(d), we respectfully agree with the Judges that they cannot satisfy the proportionality test."
[81] *Ibid*., [240].

another name.[82] Its function is political, not judicial: it enables the courts to dump politically controversial cases into a bin marked — "defer" — whenever they find it politically inconvenient to enforce the Bill of Rights.

Second, *Hysan* undermines the primacy of stage four, which will routinely leave crucial questions unanswered. To repeat, in standard PA, balancing is the only phase of PA in which the judge directly assesses the (marginal) social benefit produced by the state measure against the (marginal) restriction on the right. An approach to adjudicating a limitation clause that leaves out the importance of the right, and the extent of harm to the rights holder occasioned by the impugned state measure, is unacceptably incomplete. And a court that adopts such an approach condemns itself to ineffectiveness.

Third, the *Hysan* framework is inherently unstable. The CFA established NMTN and MWRF as contending standards of review. Yet when the courts purport to be engaging in PA, they regularly smuggle balancing into necessity, but not always, and not transparently. They do so under the banner of reasonableness. Since it is impossible to know exactly how the "reasonable necessity test" actually differs from standard stage three necessity analysis, it must be that MWRF was developed to constrain the type of balancing that the Hong Kong courts smuggle into stage three. Under this tortured logic, NMTN permits balancing within necessity in Hong Kong, and MWRF limits or forbids it.

(c) The Fix

The *Hysan* framework boils down to a jumble of inchoate reasonableness tests that sometimes approximate exercises in balancing. NMTN fits PA only if it expresses the standard necessity subtest. However, if its true purpose is to grant judges licence to balance within minimal impairment analysis, then nothing would be lost by converting NMTN into the standard model. The courts would then evaluate the proportionality of less-restrictive *and* less effective alternatives within stage four, not stage three. In clearly distinguishing stages three and four, procedural transparency would be gained. What about MWRF? In the hands of skilled judges, the standard model easily accommodates the types of epistemic or prudential reasons that might typically lead the Hong Kong courts to prefer it over NMTN in the first place. In the event, nothing would be lost by eliminating MWRF altogether. The courts would simply be obligated to give defensible reasons for deferring to lawmakers in stages

[82] See also Chan (n 9 above) pp 284–285.

three and four. Such rulings will never satisfy everyone, but the courts would be behaving as honest courts.

There are two ways in which the Hong Kong courts could coherently right this situation. The first option is to follow the Canadian Court's lead in *Hutterian Brethren*, harmonising to the standard model. In doing so, the court would confirm orthodoxy: the modern constitutional judge is a balancing judge. Or the courts could renounce their positions as ultimate judges of the Bill of Rights, while clinging to a version of *Wednesbury*, updating on the margins. As a political matter, it may be that the Hong Kong courts have little choice but to accept this latter option, given the hostility of Greater China to rights review. In this volume, Zhu and Zhang defend a posture of deference as a "proper judicial attitude",[83] basing their arguments on alleged "separation of powers" doctrines that otherwise appear to be in conflict with Hong Kong's Constitution. Their purpose is to render the Hong Kong Bill of Rights non-justiciable — a political goal — and a rewriting of the Hong Kong Constitution.

5. Conclusion

Standard PA is a bespoke doctrinal framework for the adjudication of limitation clauses enumerated in charters of rights; it establishes, on its own, the standard of review and a comprehensive methodology for determining the proportionality (charter-legality) of any government act. Rights adjudication is famously open-textured and outcome indeterminate, which both limitation clauses and balancing reflect. PA neither dictates "correct" answers to disputes involving tensions between rights and government policies nor does it tell judges what weight to give the rights and interests at stake; rather it seeks to ensure procedural predictability. PA is an argumentation framework, furnishing a stable, trans-substantive template for how the parties will plead rights cases, and how judges will justify their decisions. PA "takes rights seriously", while affording abundant doctrinal space for judges to express (*de facto*) deference to lawmakers' constitutional competences, technical expertise and policy preferences, and it constitutes the discursive interface that grounds the construction of "constitutional dialogues" — between courts and those who make and enforce the law — that serve to enhance the effectiveness of the bill of rights as a "blueprint" for constitutional governance.[84] Put simply, the

[83] Guobin Zhu and Xiaoshan Zhang, "Deference as Proper Judicial Attitude — with Special Reference to Anti-Mask Law Judgments" (2020) 50 *HKLJ* 517–540.

[84] Stone Sweet and Mathews (n 1) Chs 2 and 5. Po Jen Yap, *Constitutional Dialogue in Common Law Asia* (Oxford: Oxford University Press, 2015).

standard model enables apex courts to fulfil their most important mission: to delineate the zone of proportionality on a case-by-case basis.

In this article, I have argued that the Hong Kong courts have been led astray by the CFA's *Hysan* ruling. *Hysan* deformed PA, adding layers of complex — and indeterminate — decision-making that can only exacerbate the greater indeterminacy of rights adjudication, while opening wide gaps in protection. Among other pernicious outcomes, the *Hysan* approach requires judges to balance to determine the standard of review (NMTN or MWRF) and then permits them (incorrectly) to balance within stage three necessity, as part of fraught manoeuvers to avoid moving to stage four, where balancing is necessary and proper. What Hong Kong courts are doing under *Hysan* is decidedly not PA. Even courts that seek in good faith to apply *Hysan* will continuously reproduce a cascade of pathologies: of abdication of the judicial function; analytical incompleteness; and doctrinal instability. It is precisely these problems that standard PA was developed to avoid. Moreover, as I have shown, the foreign case law invoked by the CFA to support its moves does not actually comfort the positions that court has taken. On the contrary, the foreign jurisprudence points in opposite directions.

Finally, I have argued that a relatively costless, off-the-shelf, fix is available. The CFA would do well to follow the path cleared by the Supreme Court of Canada, in *Hutterian Brethren*, a case on which the CFA dwelled in *Hysan*. The Canadian Court, in order to resolve a similar set of problems, harmonised to the standard model. The CFA could put its house in order by doing the same. Distilled to basics, adjustment costs would be minimal. The CFA would need to (1) clearly distinguish stages three and four, such that the analysis of reasonably available but less effective means would take place only in stage four and (2) abolish MWRF altogether, which would require judges to give defensible reasons for whatever *de facto* deference they wish to grant to legislators and executives on a case-by-case basis. Judges would have to assume their responsibilities under the Hong Kong Bill of Rights, honestly and unapologetically, which would entail acknowledging that they are at times important actors in the policy process. The CFA notes that stage four balancing "requires the Court to make a value judgment", from which the Court should not "shy away".[85] Judicial lawmaking is the inevitable tax a polity pays for enforcing constitutional rights. In my view, the benefits of embracing standard PA

[85] *Hysan* (n 6 above) [78]. The CFA recognises that stage four balancing "requires the Court to make a value judgment", and states that this fact does not mean that the Court should "shy away" from stage four. As Chan puts it: "While the test now requires the court to be more explicit in its value judgment, it is also more difficult to challenge such value judgment" (n 9 above) p 282.

far outweigh the costs of maintaining the present doctrinal debacle. In addition to eliminating the problems just mentioned, harmonising to the standard model has the potential to upgrade markedly the Hong Kong judiciary's status on the global stage. Only by abandoning *Hysan* can the CFA join the world's most influential courts, as equals in community, worthy of mutual recognition and respect.