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# Proportionality in Interpreting Constitutional Rights: A Comparison between Canada, the United Kingdom and Singapore and its Implications for Vietnam

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# Proportionality in Interpreting Constitutional Rights: A Comparison between Canada, the United Kingdom and Singapore and its Implications for Vietnam

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Few rights that are guaranteed by constitutions and bills of rights are expressed to be absolute. In many jurisdictions, the legislature is permitted to impose restrictions on rights for specified reasons and under particular conditions. However, constitutional or bill of rights text often do not expressly indicate how the courts should determine that applicants' rights have been legitimately restricted. To this end, courts in jurisdictions such as Canada and the United Kingdom have adopted the European doctrine of proportionality. Essentially, this requires them to balance opposing types of public interests – the interest sought to be protected by the rights in question, and other public interests such as national security, the protection of people's reputation, public order, and so on. A proportionality analysis also requires courts to consider whether limitations on rights imposed by executive or legislative action have a rational relationship with the object of the action, and, if so, whether the limitations restrict rights as little as possible.

On the other hand, when interpreting the fundamental liberties in the Singapore Constitution, courts presently do not engage in a proportionality analysis. This paper considers how the rejection of proportionality has affected the rights to freedom of speech and assembly, and argues that the application of proportionality in Singapore is not only desirable but necessary if the Constitution is to be regarded as guaranteeing fundamental liberties instead of merely setting out privileges that may be abridged at will by the Government. It is hoped there are lessons in Singapore's experience that Vietnam can learn from.

FEW RIGHTS that are guaranteed by constitutions and bills of rights are expressed to be absolute. In many common law jurisdictions, the legislature is permitted to impose restrictions on rights for specified reasons and under particular conditions. However, constitutional or bill of rights text often do not expressly indicate how the courts should determine that applicants' rights have been legitimately restricted. To this end, courts in jurisdictions such as Canada and the United Kingdom have adopted the European doctrine of proportionality, which essentially requires them to balance opposing types of public interests – the interest sought to be protected by the rights in question, and other public interests such as national security, the protection of people's reputation, public order, and so on.

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The Singapore courts currently do not take a proportionality approach in constitutional adjudication. This paper argues that adopting proportionality would be consonant with the text of the Constitution, and would allow the courts to perform their role of checking executive and legislative power more effectively. We then consider what lessons the experiences of Canada, the United Kingdom and Singapore have for Vietnam, the 1992 Constitution of which is drafted in a manner not very different from the Singapore Constitution.

Our discussion of proportionality presupposes that a system of constitutional review exists in the jurisdiction. Part I of the paper explains how rights are enforced through constitutional review in common law jurisdictions that have written constitutions, and looks at how the Vietnamese Constitution might be reformed in this regard. Part II describes what a proportionality analysis involves and examines how it operates in Canada and the United Kingdom. It then goes on to discuss the current position in Singapore, and compares it to the Vietnamese situation. Thereafter, it is argued that despite the way in which the Singapore Constitution is drafted – without terms such as “reasonable restrictions” or “restrictions necessary in a democratic society” that might require the courts to apply a proportionality analysis – the adoption of proportionality is consistent with the text and some of the Singapore courts’ jurisprudence, and would avoid problems associated with the current interpretive methodology. Part III contains concluding thoughts. It suggests that a proportionality analysis should be applied when interpreting the bill of rights in the Singapore Constitution, and that the Vietnamese Constitution should also be amended to allow for the use of proportionality in constitutional review.

## I. ENFORCEMENT OF CONSTITUTIONAL RIGHTS

A proportionality analysis is a technique applied by courts in some jurisdictions such as Canada and the United Kingdom to determine whether it is appropriate for the executive branch of government to take actions or make decisions, or for the legislature to enact laws, that limit constitutional rights. Judges in those legal systems have the responsibility to ensure that executive and legislative acts are in line with the constitution.

Therefore, before we examine how a proportionality analysis assists in constitutional interpretation, it is necessary to say something about the enforcement of constitutional rights. In common law jurisdictions that have a written constitution such as Canada, India, Malaysia, Singapore and the United States of America, the constitution is regarded as a law that is more basic and fundamental than ordinary laws enacted by the legislature or issued by the executive branch of government. If an ordinary law is inconsistent with one or more provisions of the constitution, the constitution takes precedence over the ordinary law. The latter is therefore void and has no effect. Sometimes this is made clear by a provision in the constitution itself. For example, Article 4 of the Constitution of the Republic of Singapore<sup>2</sup> states:

This Constitution is the supreme law of the Republic of Singapore and any law enacted by the Legislature after the commencement of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

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<sup>2</sup> 1985 Rev Ed, 1999 Reprint. The Constitution can be viewed on the Internet at [Singapore Statutes Online](http://statutes.agc.gov.sg) <<http://statutes.agc.gov.sg>>.

Constitutions frequently contain bills of rights, that is, lists of human rights that are guaranteed to people within the jurisdiction. Such rights are thus superior to ordinary laws.

The branch of government considered to have power to decide whether or not an ordinary law is unconstitutional is the judiciary. This concept was established in the 19th century in a United States case, *Marbury v Madison*.<sup>3</sup> The Supreme Court of the United States held that since it is the court's duty to decide legal disputes that are brought before it, and since the Constitution is a form of law, it must be the responsibility of the court to determine whether there is a conflict between the Constitution and an ordinary law. In the case *Chan Hiang Leng Colin v Public Prosecutor*,<sup>4</sup> the Singapore High Court made a similar assertion:

The court has the power and duty to ensure that the provisions of the Constitution are observed. The court also has a duty to declare invalid any exercise of power, legislative and executive, which exceeds the limits of the power conferred by the Constitution, or which contravenes any prohibition which the Constitution provides.<sup>5</sup>

Significantly, the Court recognized that its role is to ensure that both laws and actions by executive bodies comply with the requirements of the Constitution.

The situation in Vietnam is different, even though Article 146 of the 1992 Constitution of Vietnam<sup>6</sup> is a supremacy clause much like the one in the Singapore Constitution:

The Constitution of the Socialist Republic of Vietnam is the fundamental law of the State and has supreme legal force.

All other legal documents must be consistent with the Constitution.

Article 84 goes on to provide that the National Assembly of Vietnam has the duty and power to “exercise the right to supreme supervision over the observance of the Constitution”<sup>7</sup> and to “abrogate texts adopted by the President, the Standing Committee of the National Assembly, the Government, the Prime Minister of the Government, the Supreme People's Court and the People's Inspectorate General which are incompatible with the Constitution, the laws and resolutions of the National Assembly”.<sup>8</sup> More specifically, under Article 91(5) it is the duty of the Standing Committee of the National Assembly:

... to suspend the implementation of texts adopted by the Government, the Prime Minister, the Supreme People's Court, the People's Inspectorate General which are incompatible with the Constitution, laws and resolutions of the National Assembly

<sup>3</sup> 5 US (1 Cranch) 137 (1803).

<sup>4</sup> [1994] 3 SLR(R) 209, HC (Singapore).

<sup>5</sup> *Id* at 231, [50], citing a paper by Harry Gibbs, “The Court as Guardian of the Constitution: The Basic Principle” in Mohamed Salleh Abas & Visu Sinnadurai (eds), *Law, Justice and the Judiciary: Transnational Trends* (Kuala Lumpur: Professional Law Book Publishers, 1988) at 51–66.

<sup>6</sup> 1992 Constitution of the Socialist Republic of Vietnam, as amended by Resolution 51-2001-QH10 of Legislature X of the National Assembly at its 10th Session, 25 December 2001. In this paper, I refer to the [English translation of the Constitution](http://www.vietnamlaws.com/freelaws/Constitution92%28aa01%29.pdf/) prepared by Allens Arthur Robinson, which is available at <http://www.vietnamlaws.com/freelaws/Constitution92%28aa01%29.pdf/> (accessed 13 July 2012; [archived](http://web.archive.org/web/20110717202221/http://www.vietnamlaws.com/freelaws/Constitution92%28aa01%29.pdf/) at <http://web.archive.org/web/20110717202221/http://www.vietnamlaws.com/freelaws/Constitution92%28aa01%29.pdf/>).

<sup>7</sup> Vietnam Constitution, Art 84(2).

<sup>8</sup> *Id*, Art 84(9).

and submit to decision of the National Assembly recommendations on the abrogation of those texts ... .

One distinction between the Vietnamese legal system and those of common law jurisdictions having written constitutions is that in Vietnam the legislature rather than the judiciary is responsible for ensuring compliance with the Constitution. Nonetheless, as of 2009 it appears that neither the National Assembly nor the Standing Committee have declared any legal texts to be unconstitutional.<sup>9</sup> Legal scholar Nguyen Van Thao has suggested two reasons for this: first, the Constitution does not make it clear which government institution is responsible for assessing the constitutionality of laws; and secondly, the Constitution does not clearly explain the National Assembly's powers to abrogate or cancel laws on the basis of unconstitutionality.<sup>10</sup>

There have been calls since the 1990s<sup>11</sup> for some mechanism to be established to enable laws and executive actions and decisions that are incompatible with the Constitution to be annulled. For instance, in October 2001 Nguyen Van Thao published an article in the *Tap chi Cong san (Communist Review)*, the Communist Party of Vietnam's leading theoretical journal, calling for a constitutional court (*toa an hien phap*) or constitutional commission (*uy ban hien phap*)<sup>12</sup> to be set up so that unconstitutional legal documents can be dealt with. He also submitted that administrative courts can be empowered to determine if activities of governmental bodies comply with the Constitution and other laws.<sup>13</sup> The need for a means of constitutional review was also raised by some delegates during National Assembly discussions on amendments to the Constitution in November 2001,<sup>14</sup> and in March 2005 a conference held under the auspices of the Standing Committee of the National Assembly and the Communist Party's Internal Affairs Commission highlighted that "constitutional protection" was difficult because the Constitution did not create a specialized body such as a constitutional court or commission but left the task to various state bodies.<sup>15</sup>

Thus, it is likely that when the Constitution is reviewed again, this issue will need to be addressed. Mark Sidel has suggested that since protection of the Constitution formally lies with the National Assembly, the Government can delegate to the Ministry of Justice the task of dealing with unconstitutional or otherwise

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<sup>9</sup> Mark Sidel, "Enforcing the Constitution: The Debate over 'Constitutional Protection' and a Constitutional Court" in *The Constitution of Vietnam: A Contextual Analysis* (Oxford; Portland, Or: Hart Publishing, 2009), 183–210 at 186. The point is also made by a Vietnamese legal scholar, Nguyen Van Thao: see "[Vi kiem tra tinh hop hien, hop phap cua van ban phap luat vac ac co quan tu phap](#) [On the Inspection of the Constitutionality and Legality of Legal Documents and Judicial Agencies]", *Bao Khoa hoc va Phat trien (Science and Development News)* (3 October 2001), reprinted at <<http://www.na.gov.vn>>, cited by Sidel, *id* at 190.

<sup>10</sup> Thao, *ibid*.

<sup>11</sup> In 1997, the National Assembly was petitioned to establish a constitutional court "to have an institution with jurisdiction to review petitions and to adjudicate (*xet xu*) cases of Constitutional violations": cited in Sidel, *Constitution of Vietnam*, above, n 9 at 188.

<sup>12</sup> The Vietnamese terms are mentioned in Mark Sidel, "Constitutionalism and the Emergence of Constitutional Dialogue in Vietnam" in *Law and Society in Vietnam* (Cambridge: Cambridge University Press, 2008), 18–49 at 39.

<sup>13</sup> Nguyen Van Thao, "[Soan thao, sua doi hien phap va thuc hien bao ve Hien phap](#) [Revising and Amending the Constitution and Mechanisms for Constitutional Protection]", *Tai chi Cong san (Communist Review)* (October 2001) <<http://www.tapchicongsan.org.vn>> (accessed 26 February 2009), cited by Sidel, *Constitution of Vietnam*, above, n 9 at 189–190.

<sup>14</sup> Sidel, *Constitution of Vietnam*, *id* at 190–191.

<sup>15</sup> *Id* at 201.

illegal laws made by provincial and municipal authorities.<sup>16</sup> As for legislation issued by the National Assembly itself, it may be feasible for a special committee of the Assembly to be set up to examine whether draft laws are consistent with the Constitution before they are enacted by the Assembly. Committees of this nature exist in a number of common law jurisdictions. For example, in the Parliament of the United Kingdom this task is fulfilled by two committees. The Parliament has two chambers – the upper chamber is called the House of Lords, and the lower chamber the House of Commons. The Constitution Committee of the House of Lords considers the constitutional implications of bills (draft laws) and, if it thinks fit, prepares reports to notify members of House of Lords on its views.<sup>17</sup> There is also a Joint Committee on Human Rights – ‘joint’ because it consists of members from both Houses of Parliament – that examines government bills for their compatibility with human rights law.<sup>18</sup>

Although such legislative committees play an important role in ensuring that laws that are enacted comply with constitutional and human rights principles, it is submitted that they are an insufficient check because they are not independent of the legislature. The doctrine of the rule of law requires that the validity of laws be assessed by a body unconnected with the law-creating institution.<sup>19</sup> For this reason, in common law jurisdictions the main responsibility of ensuring the constitutionality of laws lies with the courts, which are regarded as independent from the executive government and the legislature. It may be noted that in many of these jurisdictions, including Canada, Singapore and the United Kingdom, the task is carried out by ordinary courts rather than specialized constitutional courts.

## II. PROPORTIONALITY ANALYSIS

### A. INTRODUCTION; CANADA AND THE UNITED KINGDOM

Let us assume, then, that a constitutional review mechanism is adopted in Vietnam, whether such review is carried out by the National Assembly or some other institution such as a constitutional court or commission. One key question that arises is how the reviewing body should go about determining whether it is appropriate for the legislature or other lawmaking bodies to issue laws that restrict rights guaranteed by the constitution.

This question is relevant because bills of rights generally do not express in absolute terms the fundamental rights in them. In other words, most rights are subject to legitimate limitations on specified grounds. For example, Article 10(1) of

<sup>16</sup> *Id* at 208.

<sup>17</sup> “[Lords Select Committee: Constitutional Committee – Role](http://www.parliament.uk/business/committees/committees-a-z/lords-select/constitution-committee/role/)” <<http://www.parliament.uk/business/committees/committees-a-z/lords-select/constitution-committee/role/>> (accessed 18 July 2012; [archived](http://web.archive.org/web/20110605114257/http://www.parliament.uk/business/committees/committees-a-z/lords-select/constitution-committee/role/) at <<http://web.archive.org/web/20110605114257/http://www.parliament.uk/business/committees/committees-a-z/lords-select/constitution-committee/role/>>).

<sup>18</sup> “[Joint Select Committee: Human Rights](http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/)” <<http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/>> (accessed 18 July 2012; [archived](http://web.archive.org/web/20110605012549/http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/) at <<http://web.archive.org/web/20110605012549/http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/>>), and “[Joint Select Committee: \[Human Rights:\] Legislative Scrutiny 2012–13](http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/legislative-scrutiny-2012-13/)” <<http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/legislative-scrutiny-2012-13/>> (accessed 18 July 2012; [archived](http://www.webcitation.org/69EWjGVeL) at <<http://www.webcitation.org/69EWjGVeL>>). As the UK does not have a written constitution, human rights are protected by a law called the Human Rights Act 1998 (c 42) (available on the Internet at <<http://www.legislation.gov.uk/ukpga/1998/42/contents>>, accessed 19 July 2012).

<sup>19</sup> See, for example, Joseph Raz, “The Rule of Law and Its Virtue” (1977) 93 LQR 195 at 200–201.

the European Convention on Human Rights,<sup>20</sup> which applies to all Council of Europe member states including the United Kingdom, guarantees the right to freedom of expression, while Article 10(2) provides, in the following terms, that restrictions on the right may be imposed:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Similarly, fundamental liberties are guaranteed by the Canadian Charter of Rights and Freedoms,<sup>21</sup> but section 1 of the Charter states that they are subject “only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. In the presence of such limitation clauses, when a litigant presents a plausible argument that an activity lies within a liberty guaranteed to him or her by the constitution, it is incumbent on the court to consider if the government has presented sufficient public interest reasons showing that limitations are reasonable and proportional.

Commentators have noted that the application of proportionality analysis in rights adjudication is now widespread, particularly in jurisdictions on the ‘new constitutionalism’ model. The characteristics of this model of government include (1) a written constitution establishing and empowering institutions of government; (2) ultimate power placed in the hands of the people through regular elections or referenda; (3) the subjection of public authority to the constitution; (4) the existence of a bill of rights and a judicial review system ensuring that rights are upheld; and (5) procedures specified in the constitution for its revision.<sup>22</sup> Thus, in *R v Oakes*,<sup>23</sup> the Supreme Court of Canada held that a proportionality analysis was to be applied when determining if a law limiting a right guaranteed by the Canadian Charter could be upheld under section 1 of the Charter as “reasonable” and “demonstrably justified in a free and democratic society”. So, too, has the European Court of Human Rights employed a proportionality approach to the necessity clauses qualifying European Convention rights. This is evident in such cases as *Dudgeon v United Kingdom*<sup>24</sup> which held that interference with a right cannot be regarded as necessary in a democratic society unless it is proportionate to a legitimate aim pursued by the legal restriction in question.<sup>25</sup> When the Human Rights Act 1998 (UK)<sup>26</sup> came into force in 2000, providing aggrieved persons with remedies in domestic law for breaches of

<sup>20</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953), ETS 5, 213 UNTS 221, given legal effect in the United Kingdom by the Human Rights Act 1998, above, n 18, ss 1(1)–(3) read with Sch 1.

<sup>21</sup> [Pt I of the Constitution Act 1982](#) (Canada), which was itself enacted as Sch B to the Canada Act 1982 (c 11) (UK). See <<http://laws-lois.justice.gc.ca/eng/charter/>> (accessed 19 July 2012).

<sup>22</sup> Alec Stone Sweet & Jud Mathews, “Proportionality Balancing and Global Constitutionalism” (2008) 47 Colum J Transnat’l L 72 at 84–85.

<sup>23</sup> [1986] 1 SCR 103, SC (Canada). The proportionality analysis has been refined in subsequent cases such as *Irwin Toy Ltd v Quebec (Attorney General)* [1989] 1 SCR 927, SC (Canada); and *RJR-MacDonald Inc v Canada* [1995] 3 SCR 199, SC (Canada).

<sup>24</sup> (1981) 4 EHRR 149, ECHR.

<sup>25</sup> *Id* at 165, [53], applying *Handyside v United Kingdom* (1976) 1 EHRR 737 at 754, [49], ECHR, and *Young, James & Webster v United Kingdom* (1981) 4 EHRR 38 at 56, [63], ECHR.

<sup>26</sup> Above, n 18.



Convention rights, the House of Lords confirmed that a proportionality analysis would be applied to necessity clauses.<sup>27</sup>

In general, adopting a proportionality approach can be said to be a four-stage process:<sup>28</sup>

- i. First, there is a consideration of whether the government is legally authorized to enact the restrictive measure in question.
- ii. Secondly, an assessment is carried out as to whether there is a rational relation between the means adopted in the measure and the stated policy objectives of the measure. This is often known as the test of suitability.
- iii. Thirdly, the measure must be found to infringe rights as minimally as possible. This is known as the test of necessity.
- iv. Finally, there is an examination of whether the benefits of the measure outweigh the costs arising from a curtailment of rights. This is often termed ‘proportionality in the narrow sense’.

As might be imagined, the manner in which proportionality is applied differs slightly from jurisdiction to jurisdiction.<sup>29</sup> While a detailed comparison is beyond the scope of this paper, in general most proportionality analyses have the elements of the four-stage process set out above. I submit that the method of analysis has several advantages. First, stage 1 ensures that the lawmaking body has legal authorization for passing the restrictive measure, thus fulfilling what the rule of law requires. Secondly, the analysis provides a structured framework for deciding whether a measure appropriately limits constitutional rights. In particular, stage 2 ensures that the restriction is put in place for the purpose of fulfilling an important government policy and not for trivial reasons; while stage 3 mandates that the measure to restrict rights as little as possible, thus securing that people are still able to enjoy their rights to the greatest allowable extent. Thirdly, stage 4 requires a consideration of whether the restrictive measure is excessive. A familiar expression used in this context is that one should not use a sledgehammer to crack a nut – it would be inappropriate, for example, to impose the death penalty on someone who committed a minor criminal offence.

## B. SINGAPORE AND VIETNAM

### 1. Singapore

The situation in Singapore contrasts with the situation in Canada and the United Kingdom, because the bill of rights in the Singapore Constitution does not expressly require courts to balance the costs of limiting fundamental liberties against legislative goals. As a result, the High Court of Singapore has decided in some cases

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<sup>27</sup> *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 at 547, [27], HL, citing *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 at 80, PC (on appeal from Antigua and Barbuda).

<sup>28</sup> Stone Sweet & Mathews, above, n 22 at 75–76.

<sup>29</sup> For instance, it has been pointed out that the ECHR does not regard the first stage as part of the proportionality analysis: *id* at 75, n 8. The test applied by the House of Lords in *Daly*, above, n 27, omitted the first and fourth stages, and included before stage 2 a consideration of whether the legislative objective is sufficiently important to justify limiting a fundamental right. Arguably, this consideration can be regarded as part of stage 2 of the four-stage process set out in the main text.

that a proportionality analysis should not be applied to the Constitution. This, it is submitted, leads to certain problems.

Part IV of the Singapore Constitution contains its bill of rights. Like the Canadian Charter and the European Convention, various provisions guarantee fundamental liberties to all persons (or, in some cases, to Singapore citizens),<sup>30</sup> but permit legislative restrictions to be imposed for specific purposes. Articles 14(1) and (2) of the Constitution, for instance, read as follows:

14.— (1) Subject to clauses (2) and (3) —

- (a) every citizen of Singapore has the right to freedom of speech and expression;
- (b) all citizens of Singapore have the right to assemble peaceably and without arms; and
- (c) all citizens of Singapore have the right to form associations.

(2) Parliament may by law impose —

- (a) on the rights conferred by clause (1)(a), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or to provide against contempt of court, defamation or incitement to any offence;
- (b) on the right conferred by clause (1)(b), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof or public order; and
- (c) on the right conferred by clause (1)(c), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof, public order or morality.

One significant difference between this clause and analogous provisions in the European Convention and the Canadian Charter is that it does not contain any words significantly qualifying the ability of the Singapore Parliament to restrict the fundamental liberties in question. Thus, on a plain reading, Article 14(2) appears to permit Parliament to enact restrictive laws that curtail rights to free speech, assembly and association, without any requirement that the laws are reasonable and necessary in a democratic society. The Article does introduce tests of necessity and expediency, but, as we will see shortly,<sup>31</sup> they do not operate as appreciable constraints on Parliament's lawmaking powers. Furthermore, the tests do not apply to some of the grounds listed in Article 14(2)(a), thus apparently authorizing Parliament to impose outright on the freedom of speech and expression "restrictions designed to protect the privileges of Parliament or to provide against contempt of court, defamation or incitement to any offence".

In view of how this constitutional provision is drafted, the High Court has, to date, largely rejected the application of a proportionality analysis. In *Chee Siok Chin v Minister for Home Affairs*,<sup>32</sup> the applicants had been staging a protest outside a

<sup>30</sup> See the Singapore Constitution, Art 12(2) (prohibition of certain forms of discrimination), Art 13 (prohibition of banishment, and freedom of movement), Art 14 (rights to freedom of speech and expression, assembly and association), and Art 16 (rights in respect of education).

<sup>31</sup> See the text accompanying n 38, below.

<sup>32</sup> [2006] 1 SLR(R) 582, HC (Singapore). A proportionality analysis has also been rejected in a more recent case, *Chee Soon Juan v Public Prosecutor* [2011] 2 SLR 940, HC (Singapore).

government building when they were asked by a police officer to disperse on the basis that they were causing a public nuisance contrary to the Miscellaneous Offences (Public Order and Nuisance) Act ('MOA').<sup>33</sup> The applicants commenced proceedings in the High Court against the Minister for Home Affairs and the Commissioner of Police, asserting that, by so acting, the police officer had behaved unlawfully and/or unconstitutionally, in violation of their rights to free expression and assembly guaranteed by Articles 14(1)(a) and (b) of the Constitution. Upon the respondents' application for the proceedings to be struck out on the ground that they were, among other things, scandalous, frivolous, vexatious or otherwise an abuse of process,<sup>34</sup> the High Court considered whether the provisions of the MOA relied upon by the respondents to justify the police officer's actions were constitutional.<sup>35</sup>

The Court contrasted Article 14(2), which authorizes Parliament to impose restrictions on the rights protected by Article 14(1), with Article 19(3) of the Indian Constitution. The latter permits the state to impose "reasonable restrictions" on the right to assemble in the interests of the sovereignty and integrity of India or public order.<sup>36</sup> In view of the absence of an equivalent phrase from the Singapore Constitution, the Court said that "there can be no questioning of whether the legislation is 'reasonable'. The court's sole task, when a constitutional challenge is advanced, is to ascertain whether an impugned law is within the purview of any of the permissible restrictions. ... All that needs to be established is a nexus between the object of the impugned law and one of the permissible subjects stipulated in Art 14(2) of the Constitution."<sup>37</sup> Further, the Court noted that the phrase *necessary or expedient* appearing in Article 14(2) ("Parliament may by law impose... such restrictions as it considers necessary or expedient in the interest of... public order...") conferred on Parliament "an extremely wide discretionary power and remit that permits a multifarious and multifaceted approach towards achieving any of the purposes specified in Art 14(2) of the Constitution. ... The presumption of legislative constitutionality will not be lightly displaced".<sup>38</sup> Since it was clear from the long title and "contents and purport" of the MOA, and relevant parliamentary debates, that the Act was enacted to preserve public order, its constitutionality was unchallengeable.<sup>39</sup>

The Court also stated it was "axiomatic that the terms and tenor" of Article 10(2) of the European Convention are "very different" from Article 14(2) of the Singapore Constitution.<sup>40</sup> Another "fundamental difference" between English law and Singapore law was the applicability of the notion of proportionality, which "*inter alia*, allows a court to examine whether legislative interference with individual rights corresponds with a pressing social need; whether it is proportionate to its legitimate aim and whether the reasons to justify the statutory interference are relevant and sufficient". The Court then commented: "Needless to say, the notion of proportionality has never been part of the common law in relation to the judicial

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<sup>33</sup> Cap 184, 1997 Rev Ed: *id* at 592, [13]. During the legal proceedings the Attorney-General, acting on the respondents' behalf, identified the relevant provisions of the Act as s 13A or s 13B, which criminalize the causing of harassment, alarm or distress to any person: at 605, [59].

<sup>34</sup> *Id* at 589, [1].

<sup>35</sup> *Id* at 599–600, [41].

<sup>36</sup> *Id* at 601, [45].

<sup>37</sup> *Id* at 602–603, [49].

<sup>38</sup> *Ibid.*

<sup>39</sup> *Id* at 604, [55]–[56].

<sup>40</sup> *Id* at 615, [86].

review of the exercise of a legislative and/or an administrative power or discretion. Nor has it ever been part of Singapore law.”<sup>41</sup>

The result of the Singapore courts not adopting a proportionality analysis is that they accept legislation as constitutional so long as it relates to subjects the bill of rights specifies as grounds for restricting fundamental liberties, regardless of how disproportionate such laws may be.

## 2. Vietnam

Chapter V (Articles 49–82) of the 1992 Constitution of Vietnam contains a statement of the basic rights and obligations of its citizens. Like the Singapore Constitution – and unlike the Canadian Charter and European Charter – it is drafted in a manner that does not seem to require lawmakers to comply with any test of reasonableness or necessity in a democratic society before passing laws that restrict basic rights. For example, Article 69 of the Vietnamese Constitution states: “Citizens are entitled to freedom of speech and freedom of the press; they have the right to receive information and the right of assembly, association and demonstration in accordance with the law.”<sup>42</sup> The phrase *in accordance with the law* suggests that so long as some law that limits any of the rights mentioned in Article 69 has been validly issued, citizens must obey that law and cannot argue that it is arbitrary or a disproportionate constraint on their rights. If this interpretation is correct, the possibility exists for basic rights to be restricted fairly easily.

## 3. Shortcomings of the Singapore Approach, and Implications for Vietnam

If bills of rights are phrased along the lines of the Singapore Constitution, does this effectively rule out the application of a proportionality analysis? It is submitted there are a number of reasons why what we may call the *Chee Siok Chin*<sup>43</sup> approach should not be followed.

First, full effect ought to be given to the use of the word *right* in constitutions. In a 1998 decision of the Singapore High Court, constitutional rights were distinguished from privileges in the following manner:

Constitutional rights are enjoyed because they are constitutional in nature. They are enjoyed as fundamental liberties – not stick-and-carrot privileges. To the extent that the Constitution is supreme, those rights are inalienable. Other privileges such as subsidies... are enjoyed because the Legislature chooses to confer them – these are expressions of policy and political will.<sup>44</sup>

It is submitted that the word *freedom* should be understood in the same way. If ‘rights’ and ‘freedoms’ can be overridden simply by the legislature enacting a restrictive measure, which is essentially what *Chee Siok Chin* suggested, then in

<sup>41</sup> *Id* at 616, [87].

<sup>42</sup> Other provisions of the Vietnamese Constitution are drafted similarly, such as Art 57 (“Citizens have the right to freely do business *in accordance with the law*.”), Art 68 (“Citizens are entitled to freedom of movement and residence inside the country, of departure for and return from foreign countries *in accordance with the law*.”), and Art 70 (“Citizens have the right to freedom of belief and religion, and may practise or not practise any religion. ... No one has the right to infringe on the freedom of faith and religion or to take advantage of the latter *to violate State laws and policies*.”) (emphasis added).

<sup>43</sup> Above, n 32.

<sup>44</sup> *Taw Cheng Kong v Public Prosecutor* [1998] 1 SLR(R) 78 at 102, [56], HC (Singapore).

reality they are more similar to privileges which can be taken away at any time. Thus, if something is to be properly characterized as a freedom or right, with the fundamentality and inalienability that entails, the court must surely be capable of assessing whether it has been legitimately abridged. This is where the proportionality test comes to the fore.

When the body bearing responsibility for constitutional review has no role in evaluating the fairness of laws, this fails to give proper weight to the concept of a right in the constitution. If a right is fundamental and inalienable, it should only be limitable in narrowly defined situations which may be discerned through a proportionality analysis.

Secondly, the *Chee Siok Chin* approach can lead to the enactment of arbitrary laws. In a number of Singapore cases judges have asserted it is their duty to gauge whether the executive and legislative branches of government have acted arbitrarily. *Chng Suan Tze v Minister for Home Affairs*<sup>45</sup> involved a challenge to detentions without trial under the Internal Security Act ('ISA').<sup>46</sup> The Court of Appeal accepted the appellants' argument that Article 12(1) of the Constitution, which guarantees to every person equality before the law and equal protection of the law, requires Parliament's legislative powers not to be "exercised in a manner which authorises or requires the exercise of arbitrary power, or the exercise of power in breach of fundamental rules of natural justice".<sup>47</sup> Further, since Article 93 vests judicial power in the courts, it is for them to determine whether Parliament has exercised its discretion properly.<sup>48</sup> As the Court put it: "[T]he notion of a subjective or unfettered discretion is contrary to the rule of law. All power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power."<sup>49</sup>

Chan Sek Keong J, one of the three judges contributing to the *Chng Suan Tze* decision, was appointed Chief Justice of Singapore in 2006. Delivering the judgment of the Court of Appeal in the 2010 case *Yong Vui Kong v Public Prosecutor*,<sup>50</sup> he expressed the view that legislation "of so absurd or arbitrary a nature that it could not possibly have been contemplated by our constitutional framers as being 'law' when they crafted the constitutional provisions protecting fundamental liberties" would be unconstitutional.<sup>51</sup> Unfortunately, taking the *Chee Siok Chin* approach to constitutional interpretation, whether in Singapore or Vietnam, leaves the door open for arbitrary laws to be enacted.

### III. CONCLUDING THOUGHTS

While the manner of applying a proportionality analysis in rights adjudication differs among jurisdictions, four steps are typically involved: (1) a determination that the government has legal authority to enact the restrictive measure in question; (2) a suitability test that establishes whether the means adopted in the measure and the policy objectives of the measure are linked by a rational relationship; (3) a necessity

<sup>45</sup> [1988] 2 SLR(R) 525, CA.

<sup>46</sup> Cap 143, 1985 Rev Ed.

<sup>47</sup> *Chng Suan Tze*, above, n 45 at 551–552, [79] and [82], applied in *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at 313, [149], HC, and *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 at 1233–1234, [78]–[80], CA.

<sup>48</sup> *Chng Suan Tze*, *ibid.*

<sup>49</sup> *Id* at 553, [86].

<sup>50</sup> [2010] 3 SLR 489, CA (Singapore).

<sup>51</sup> *Id* at 500, [16].

test that requires the measure to restrict rights as minimally as is reasonably possible in the circumstances; and (4) a balancing exercise in which the benefits of the restrictive measure are compared against the costs arising from the curtailment of rights.

What I have attempted to do in this brief paper is to justify why a proportionality analysis should be used when determining whether the lawmaking branch of government has a legitimate interest in restricting a particular fundamental liberty through legislation. It is submitted that doing so would give full and substantial meaning to the concept of rights, and would prevent the enactment of arbitrary legislation.

Admittedly, the provisions in the Singapore Constitution permitting Parliament to impose limitations on fundamental liberties lack terms such as “reasonable restrictions” and “restrictions necessary in a democratic society”, thus lending themselves to the idea that the courts must find to be constitutional whatever legislation falling within the enumerated grounds for limitation that Parliament chooses to enact, regardless of how disproportionate or unreasonable it is. The position under the 1992 Constitution of Vietnam may be similar. It is submitted that such an approach is undesirable. To avoid this result, one possible reform that may be considered when the Vietnamese Constitution is reviewed is to permit laws restricting basic rights and freedoms only if the restrictions are reasonable and necessary in a democratic society, which is the position in Canada and the United Kingdom.

Alternatively, assuming a mechanism for constitutional review is adopted, the institution responsible for carrying out this function should consider implementing a proportionality analysis when interpreting the bill of rights. Ultimately, this institution is likely to do so only if it sees that it has a duty to maximize the fundamental liberties guaranteed to people, and to avoid literal, legalistic readings of the constitution. Under the proportionality approach, this institution will possess a fair degree of discretion in determining whether a restrictive measure should prevail against a right. This should be regarded as a strength and not a shortcoming of constitutional adjudication. The discretion will enable the institution to express independent, considered views on key issues of the day, engaging the executive and legislative branches of government in a constitutional dialogue.

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## List of Abbreviations

### **AC ... Appeal Cases (UK)**

Art, Arts ... Article, Articles (of a constitution)

### **c ... chapter number (of a UK statute)**

CA ... Court of Appeal

Cap ... chapter number (of a Singapore statute)

Colum J Transnat'l L ... *Columbia Journal of Transnational Law*

### **ECHR ... European Court of Human Rights**

ed, eds ... editor, editors

EHRR ... *European Human Rights Reports*

ETS ... *European Treaty Series*

### **HC ... High Court**

HL ... House of Lords

### **J ... Justice (a judge)**

### **LQR ... Law Quarterly Review**

### **n ... note (footnote)**

### **para ... paragraph**

PC ... (Judicial Committee of the) Privy Council

Pt ... Part (of a statute)

### **Rev Ed ... Revised Edition (of a statute)**

### **s, ss ... section, sections (of a statute)**

Sch ... Schedule (of a statute)

SC ... Supreme Court

SCR ... *Supreme Court Reports* (Canada)

SLR(R) ... *Singapore Law Reports* (Reissue)

### **UNTS ... United Nations Treaty Series**

US ... *United States Reports*

In the footnotes, a number in brackets (such as “[50]”) is a paragraph number.

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