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Towards a Clearer Expression of the Internal Points of View of Judges in Socio-Economic Rights Adjudication: Lessons from English and Hong Kong Law

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ABSTRACT

Clear and well-reasoned judgments are key to the development of healthy respect for the judiciary, for they provide practitioners and the public at large with opportunities to understand the fundamental rationales that shape the outcome of cases. This ideal, however, may sometimes come into conflict with robust protection of human rights by way of adopting a stringent standard of review despite the existence of factors suggesting that a more relaxed standard ought to be adopted. In this paper, the approaches to the proportionality test in courts in Hong Kong and the United Kingdom will be unpacked and analysed comparatively. It will be demonstrated and argued that it is essential for judges to spell out their internal legal point of view in the most crystal-clear sense, for the explication of a standard of review in proportionality adjudication necessarily involves two things: (a) explaining why competing factors relevant to the choice of such standard are treated in a certain a manner despite the existence of other viable alternatives; and (b) making a judge's perspectives and reasoning as accessible as possible to the public.

Keywords: socio-economic rights; discrimination law; comparative law; analytical jurisprudence; adjudication

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I. INTRODUCTION

As Lord Macmillan, a former member of the House of Lords, once cautioned: the object of a reasoned judgment "is not only to do but to seem to do justice".[1] The way in which decisions are written represents choices made by the judge as to how he wishes to justify his ruling.[2] This reminder is particularly apt in the realm of public law litigation, for it often engages controversial issues where the adjudicating court is faced with views diametrically opposed to one another, all of which may appear entirely reasonable. These analytical tensions are best illustrated by the focus of this paper—proportionality adjudication in socio-economic rights and matters concerning entitlements to social welfare and housing. This area is chosen because there exist variable intensities of review (under the third step of the test) and an overall balancing exercise (under the final step of the test) between rights and interests which are often diametrically opposed to one another.[3] These tensions also underpin the broader question this paper seeks to answer: in proportionality adjudication, where there exist multiple choices all of which appear reasonably arguable yet lead to diametrically opposed conclusions, how should a judge choose among the rival options?

This paper argues that since clear and effective communication with the relevant audience is key in rendering a defensible judgment, it is pertinent for judges to make their internal point of view (IPV) of the law—an internal legal point of view (ILPV)—accessible to the general public. The paper proceeds in three sections. First, it explicates the analytical intricacies underpinning a judge's reasoning process in making choices in a proportionality assessment, focusing on the third and fourth steps of the test. Second, it analyses the issues sketched therein through the lens of HLA Hart's IPV—as to how judges can express their preferences and choices in proportionality adjudication. Instead of offering a schema of adjudication or defending a normative understanding of it, the aim of this section is more modest: it seeks to explicate the analytical issues underpinning the practical selection of interpretive and adjudicative choices and the communication of legal reasoning in the process of delivering a judgment. This also avoids over-theorising the problems, which might otherwise result in limited

[1] Lord Macmillan, 'The Writing of Judgments' (1948) 26 Canadian Bar Review 491, 491.

[2] Tayla Steiner, Andrej Lang and Mordechai Kremnitzer, 'Comparative and Empirical Insights into Judicial Practice: Towards an Integrative Model of Proportionality' in Mordechai Kremnitzer, Tayla Steiner and Andrej Lang (eds), *Proportionality in Action: Comparative and Empirical Perspectives on the Judicial Practice* (CUP 2020) 542, 546.

[3] Meghan Campbell, 'The Austerity of Lone Motherhood: Discrimination Law and Benefit Reform' (2021) 41(4) Oxford Journal of Legal Studies 1197.

practical impacts being explicated.[4] Third, the paper will analyse comparatively these issues in Hong Kong and United Kingdom socio-economic rights cases involving discrimination claims. In these cases, the factual and legal factors in a proportionality assessment point towards diametrically different options over the standard of scrutiny (third step) and outcome of the balancing exercise (fourth step). In doing so, this paper will offer some preliminary thoughts towards improving the analytical coherence and clarity on the part of judges when it comes to making choices in a proportionality test.

Before proceeding further, it is helpful to first explain why a comparative exercise between Hong Kong and the United Kingdom is of value. Two reasons may be offered. The first, and more general, explanation is that comparative legal analysis allows practitioners and judges (and of course, academics) to engage with foreign judgments critically and directly. It involves "the recognition that different judiciaries may differ about the resolution of particular classes of legal problems." The analytical dimension of comparative legal analysis helps to avoid practitioners from "*bricolage* — rummaging around just about anywhere for materials which might support particular arguments."[5] The second, and more practical, reason is that the well-known four-stage proportionality test applies in both Hong Kong law and English law,[6] with Hong Kong courts frequently citing English courts (as will be demonstrated below). This makes their adjudicative approaches to its components worthy of comparison[7]. While it is true that the role played by the third step differs slightly between the two jurisdictions,[8] it remains the case that they employ the same notion in expressing the nature and various standards of review commonly seen in the third and fourth steps of the proportionality test. This means that—after all—the audiences in the respective jurisdictions face very similar expressions from the courts as to the outcome of a proportionality exercise and the reason(s) behind it. It is these similar expressions from the courts and reception by the readers that make the two jurisdictions worthy of comparison.

4 James W Harris, *Law and Legal Science* (Clarendon Press 1979) 103; see also more generally Maurice Sunkin, 'The Functionalist Style in Public Law' (2005) 55 University of Toronto Law Journal 361.

5 Robert French AC, "The Globalisation of Public Law: A Quilting of Legalities" in Mark Elliott, Jason NE Varuhas and Shona Wilson Stark (eds), *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Oxford; Hart Publishing, 2018) 231 at 232.

6 *Bank Mellat v Her Majesty's Treasury (No.2)* [2013] UKSC 39, [2014] AC 700; *Hysan Development Ltd v Town Planning Board* (2016) 19 HKCFAR 372;.

7 Thomas Yeon and Trevor Wan, 'Comparative Constitutional and Administrative Law in Hong Kong: In Search for Coherence' [2021] Public Law 261, 268–270.

8 See text to n 16 below.

II. Issues of Clarity in Proportionality Reasoning in Socio-Economic Rights Adjudication

Having set out the comparative basis of the article, it can now turn to the proportionality test as applied in practice. First, the impugned measure must pursue a legitimate aim. Second, the impugned measure must be rationally connected to the legitimate aim. Third, the impugned measure must be no more than necessary for the purpose of achieving the impugned aim. Last, a balance must be struck between the inroads against the relevant human right infringed by the impugned measure and the legitimate aim it sets out to achieve. As an "orderly process of decision-making",[9] it provides a communicable framework to the audiences explaining, amongst others, the legal standard adopted for scrutinising its compatibility with human rights, the reasons behind the standard adopted, and how (if at all) the measure rationally connects to a human right said to be infringed by it.[10] Such communication is particularly important for the third and fourth steps since they "inevitably overlap"[11] with one another in sketching the analytical tensions gravitating a judge towards one conclusion or another as to the proportionality of the measure in question.

The intelligibility of proportionality adjudication in spelling out the quality of a measure said to violate human rights can be found in *Bank Mellat v Her Majesty's Treasury (No.2)* where Lord Reed succinctly explained: "Its attraction *as a heuristic tool* is that, by breaking down an assessment of proportionality into distinct elements, it can clarify different aspects of such an assessment, and make value judgments more explicit."[12] This tool is particularly important for appellate courts (in particular apex courts), since they are tasked to "provide legal certainty, to deliver authoritative statements of the law for the guidance of lower courts, to legitimate specific doctrinal interpretations and extrapolations of the law."[13] That said, a level of generality nevertheless remains appropriate, for the principles and nuances so elucidated govern "many other fact-situations arising in the future

[9] *R (Lord Carlile of Berriew QC) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] AC 945 [89].

[10] Charles-Maxime Panaccio, 'In Defence of Two-Step Balancing and Proportionality in Rights Adjudication' (2011) 24 Canadian Journal of Law and Jurisprudence 109; Kai Möller, 'Balancing and the Structure of Constitutional Rights' (2007) 5 International Journal of Constitutional Law 453.

[11] *Bank Mellat* (n 6) [20].

[12] ibid [74] (emphasis added). Such a need to make value judgments has also been observed in Hong Kong: Johannes Chan, 'Proportionality after *Hysan*: Fair Balance, Manifestly without Reasonable Foundation and *Wednesbury* Unreasonableness' (2019) 49 Hong Kong Law Journal 265, 268.

[13] Peter McCormick, 'The Choral Court: Separate Concurrence and the McLachlin Court, 2000–2004' (2005–2006) 37 Ottawa Law Review 1, 3.

[which] will be governed by that statement of principle".[14] These opposing demands beg the question as to what an approach that can cater to both of them would look like. As will be illustrated below, issues of clarity of reasoning are all the most delicate in the third and fourth steps of a proportionality test.

A. A "SLIDING SCALE" OF REVIEW UNDER THE THIRD STEP

The third step of the proportionality test in both Hong Kong law and the English law admit for a "sliding scale" of review,[15] with the standards "no more than reasonably necessary" (NMRN) and "manifestly without reasonable foundation" (MWRN) on the more stringent and more relaxed ends of the scale respectively. For the MWRN standard, it has been suggested that the usages of the phrase in Hong Kong and the United Kingdom are doctrinally different, with the former jurisdiction using it as an actual limb of the proportionality test and the latter jurisdiction only using it to indicate the appropriate intensity of judicial scrutiny.[16] That said, it will be demonstrated below that such a doctrinal difference in the fields of socio-economic policies and discrimination cases is more apparent than real, and in any event does not dilute the pertinent need for judicial clarity in expressing and explaining the interpretive and adjudicative choices they have made.

It is helpful to turn to the approach in Hong Kong law first, for the operation of the sliding scale under the third step is now settled. This is laid down by Ribeiro PJ of the Hong Kong Court of Final Appeal (HKCFA) in the seminal case of *Hysan Development Co Ltd v Town Planning Board*, which concerned the protection of property rights under Articles 6 and 105 of the Hong Kong Basic Law (BL). After a "magisterial survey of the various [proportionality] doctrines" employed by common law courts,[17] his Lordship established that the choice between the NMRN and MWRF standards revolves around the "margin of discretion" as "determined by factors which affect the proportionality analysis in the circumstances of the particular case."[18] Instead of being disparate standards unrelated to one another, they indicate "positions on a continuous spectrum".[19]

[14] Sir Philip Sales, 'The Common Law: Context and Method' (2019) 135 Law Quarterly Review 47, 55.

[15] *Hysan* (n 6) [108]; *Pham v Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 WLR 1591 [106].

[16] Kai Yeung Wong, 'An Incomplete Victory: The Implications of *QT v Director of Immigration* for the Protection of Gay Rights in Hong Kong' (2018) 81(5) Modern Law Review 874, 888.

[17] Richard Clayton QC, 'Keeping a sense of proportion: political protest and the Hong Kong courts' [2018] Public Law 375, 378.

[18] *Hysan* (n 6) [106]–[107]. The use of the MWRN standard in socio-economic rights cases trace back to two pre-*Hysan* HKCFA cases, both of which will be examined in more detail in Section IV below.

[19] ibid [122].

The existence of a choice between the NMRN and MWRF standards begs the question behind it: How should such a choice be made? *Hysan* identified two key factors which shape the margin of discretion to be offered to the government: (a) significance and extent of interference with the right in question; and (b) the identity (and special competence, if any) of the decision-maker behind the impugned measure.[20] They were elaborated by the HKCFA in *Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs*,[21] where Ma CJ (as the Hon Geoffrey Ma then was) stated that a judge would need to consider three issues in making a choice between the standards: (a) the nature of the right engaged and the degree to which it has been encroached on; (b) the identification of the relevant decision-maker; and (c) the relevance of the margin of discretion that should be given to the decision-maker.[22] Although *Hysan* and *Kwok* concerned contexts of town planning and political speeches, the tests and observations set out therein are of general applicability[23] and, as will be demonstrated below, apply to socio-economic rights cases as well.

For socio-economic rights cases in the United Kingdom, although the four-step proportionality test applies, *R (DA and others) v Secretary of State for Work and Pensions* affirmed that, in terms of the appropriate label to follow in determining the degree of judicial scrutiny under all stages, the government's case would only fail if the applicant can prove in relation to all the four steps that the government's case is MWRF.[24] This means that under the third step, the general applicable standard is MWRF. That said, the MWRF is not a static standard *per se*. In the recent case of *R (SC and others) v Secretary of State for Work and Pensions*,[25] after a meticulous examination of the Strasbourg jurisprudence on the usage of the MWRF standard in social welfare contexts,[26] Lord Reed clarified that:

> [R]ather than trying to arrive at a precise definition of [MWRF], it is more fruitful to focus on the question *whether a wide margin of judgment is appropriate in the light of the circumstances of the case*. The ordinary approach to proportionality gives appropriate weight to the judgment of the primary decision-maker: a degree of weight

[20] ibid [108]–[109].

[21] *Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs* (2017) 20 HKCFAR 353.

[22] ibid [38].

[23] Rehan Abeyratne, 'More Structure, More Deference: Proportionality in Hong Kong' in Po Jen Yap (eds), *Proportionality in Asia* (CUP 2019) 25, 40–45.

[24] *R (DA and others) v Secretary of State for Work and Pensions* [2019] UKSC 21, [2019] 1 WLR 3289 [65], [114], [116].

[25] *R (SC and others) v Secretary for Work and Pensions* [2021] UKSC 26, [2021] 3 WLR 428.

[26] These include, among others, *Stec v United Kingdom* (2006) 43 EHRR 47, a Grand Chamber case cited with approval by *Hysan* (n 6) [111] in establishing the "MWRF" limb of the proportionality test in HK.

> which will normally be substantial in fields such as economic and social policy, national security, penal policy, and matters raising sensitive moral or ethical issues.…*the ordinary approach to proportionality will accord the same margin to the decision-maker as the [MWRF] formulation in circumstances where a particularly wide margin is appropriate*.[27]

Lord Reed's more elaborate and nuanced formulation of the approach to the MWRF standard will be further discussed in Section IV below. It suffices to note at this juncture that the MWRF standard, as understood in English law, is not a hard-and-fast standard *per se*, but instead requires multifaceted considerations in determining the appropriate margin of judgement to be accorded to the decision-maker. An illustrative but less obvious example of this can be found in *Re Brewster*,[28] A pre-*SC* judgment. Holding that the MWRF standard applies to an assessment of whether a nomination requirement imposed upon unmarried couples only under a pension scheme violates one's rights under Article 14 of the European Convention on Human Rights (ECHR14) read with Article 1 of Protocol no. 1 to the ECHR (A1P1),[29] Lord Kerr observed that "where the question of impact of a [socio-economic measure] has not been addressed by the government… the imperative for reticence on the part of a court tasked with the duty of reviewing the decision is diminished".[30]

That said, the existence of engagement *per se* is not sufficient, for if the reasons advanced are "proffered in defence of a decision which were not present to the mind of the decision-maker at the time it was made", the standard of scrutiny is likely to be more intense.[31] The converse applies as well, albeit not in an *a fortiori* manner—it remains necessary to determine the weight to be given to the decision-maker's views on a case-by-case basis.[32] These observations are particularly pertinent in the context of socio-economic rights. As Lord Hoffmann observed in *R (Carson) v Secretary of State for Work and Pensions*:[33] "[T]here may be borderline cases where it is not easy to allocate the ground of discrimination"[34] between (a) "discrimination which *prima facie* appear to offend our notions of

[27] ibid [161] (emphases added).
[28] *In re Brewster* [2017] UKSC 8, [2017] 1 WLR 519.
[29] ibid [55].
[30] ibid [64].
[31] ibid [52].
[32] *R (TD) v Secretary of State for Work and Pensions* [2020] EWCA Civ 618 at [54], citing *In re Brewster* (n 30).
[33] *R (Carson) v Secretary for Work and Pensions* [2005] UKHL 37, [2006] 1 AC 173.
[34] ibid [17].

respect due to the individual" and (b) "those which merely require some rational justification".[35]

Therefore, the differences between the MWRF standards in Hong Kong law and English law do not mask the more important and pressing analytical conundrum posed by a "sliding scale" of intensity of review—about the precise degree and method of reasoning which ought to be exhibited thereunder. None of the judgments canvassed above identified any factor to be of overarching or determinative influence for how a standard of scrutiny is to be selected. Nor do they hint to a unifying test for how the relevant factors in a case, if each is seen as inviting a judge to adopt different intensities of scrutiny on the sliding scale, should be weighed against one another. The cases analysed above may be said to identify, broadly, the following three factors as relevant for determining the appropriate standard of scrutiny to be applied: (a) nature of the right engaged; (b) the identity and acts of the decision-maker who enacted the impugned measure, and (c) the identity and acts of the decision-maker who enforced the impugned measure (as alleged to constitute a violation of the right in question).

The lack of a determinative or overarching factor suggests that the third step may be said to be a less-than-absolutely-certain legal test, in the sense that the standard of scrutiny adopted is likely to be unable to cater to all the competing considerations. As the nature of the impugned measure and its operation in practice (which gave rise to the alleged grievance of a claimant) are relevant to the balancing exercise under the fourth step of the proportionality test, the analysis conducted under the third step and conclusions reached therein will have an impact on the balancing exercise conducted under the final stage.

B. Choosing an outcome—as a result of a balancing exercise

The balancing exercise in proportionality analysis is concerned with "the harm caused by limiting the constitutional right", that is, whether the impugned measure excessively burdens the rights of individuals or groups adversely affected by it.[36] Courts in Hong Kong and the United Kingdom must ask whether a fair balance has been struck "between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights".[37] The analysis undertaken in this balancing exercise permits a court to "complete" the proportionality analysis by ensuring that no factor of significance has been overlooked in the prior steps, all of which focus more on the

[35] ibid [15].
[36] Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (CUP 2012) 344.
[37] *Bank Mellat* (n 6) [70], [73]–[76]; approved in *Hysan* (n 6) [69], [72]–[78].

legitimate aims in question.[38] It provides important room for a court to clarify the community values that it deems to be involved in the case, and in turn make those values transparent.[39] In conducting this assessment, "the legal validity of all of the conflicting principles is kept intact. Their scope is preserved."[40]

In the context of socio-economic rights adjudication in Hong Kong and the United Kingdom, however, this exercise is skewed in both jurisdictions for different reasons. In Hong Kong, Ribeiro PJ suggested that, "in the great majority of cases, [the balancing exercise] would not invalidate a restriction which has satisfied the requirements of the first three stages of proportionality."[41] This is because in such a case, when the impugned measure has passed the first three steps, one would expect that it "internally [reflects] a reasonable balance between the public interest pursued by such laws and the rights of individuals or groups negatively affected by those laws."[42] This observation was followed later in *Kwok*.[43] It, however, appears to sit uneasily with another observation in *Hysan* which was followed in *Kwok* as well:

> Without [the inclusion of the fourth step], the proportionality assessment would be confined to gauging the incursion in relation to its aim. The balancing of societal and individual interests against each other which lies at the heart of any system for the protection of human rights would not be addressed.[44]

These two observations appear to conflict with one another: If the satisfaction of the fourth step is likely to be achieved once the first three steps are satisfied by the government, what is the point of establishing the fourth step in the first place? An answer is available in *Hysan*: "one may exceptionally be faced with a law whose content is such that its application produces extremely unbalanced and unfair results, oppressively imposing excessive burdens on the individuals affected."[45] It remains questionable, however, whether such a possibility can be said to be sufficient for the importance of the right infringed to be adequately reflected, for the assumption of likely satisfaction of the fourth step on the basis of the third step being satisfied by the government risks failing to "examine the

[38] Alec Stone Sweet, 'The Necessity of Balancing: Hong Kong's Flawed Approach to Proportionality, and Why It Matters' (2020) 50 Hong Kong Law Journal 541, 547.
[39] Vicki C Jackson, 'Proportionality and Equality' in Vicki C Jackson and Mark Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (CUP 2017).
[40] Barak (n 36) 346.
[41] *Hysan* (n 6) [73].
[42] ibid.
[43] *Kwok* (n 21) [61(1)].
[44] *Hysan* (n 6) [78]; *Kwok* (n 21) [47].
[45] *Hysan* (n 41).

importance of the right being pleaded."[46] In light of such a skewed focus, the fourth step is more likely than not to be given brief attention only once the government is adjudged to have satisfied the third step of the proportionality test.[47]

The problem of a skewed fourth step may also be found in English law, with the adoption of a MWRF test in the fourth step being broadly reflective of a similar issue. In *DA*, Lord Reed concluded that the MWRF test continues to apply in the fourth step of a proportionality test on a human rights challenge involving socio-economic matters, as to whether a balance has been struck between the A1P1 rights of the aggrieved applicant (read with ECHR14) and the objectives pursued by the impugned measure.[48] Putting aside the issue of the correctness of this approach as a matter of following Strasbourg jurisprudence,[49] the use of the MWRF standard appears to conflict directly with the notion of "balancing" between an individual right and the aims pursued by the impugned measure. Regrettably, this implication of this approach was not clarified by Lord Reed in *SC*, which focused more on the nature of the MWRF standard as applied under the third step.[50]

These skewed foci raise issues of reasoning and presentation about how a defensible judicial articulation of the ILPVs in making a choice between the competing rights and interests should be made, and how the articulation of ILPVs in the third step affect those to be made in the balancing exercise. A robust understanding in that regard is desirable since, as Sir Philip Sales (as Lord Sales then was) astutely argued, common law adjudication is supported by "its sensitivity to the particular facts of individual cases and from *being able to make localised accommodating of competing values*."[51]

III. The Internal (Legal) Point of View of Judges

Having sketched the analytical conundrums and potential disjunctions inherent in the third and fourth steps of a proportionality test, this paper turns to examine them from the lens of analytical jurisprudence—how these issues ought to be practically resolved in light of the established components of the proportionality test. It will be argued below that the ILPV of judges can be of credible assistance

[46] Sweet (n 38) 554.
[47] Abeyratne (n 23) 53–57; Chan (n 12) 270–271.
[48] See text to n 24 above.
[49] On this point, see Jed Meers, 'Problems with the "manifestly without reasonable foundation" test' (2020) 27(1) Journal of Social Security Law 12, 15–17.
[50] See text to n 27 above.
[51] Sales (n 14) 58 (emphasis added).

in clarifying and making sense of these conundrums, and in turn enable judges to develop clearer processes of reasoning.

A. Introducing the internal (legal) point of view

The concept of an IPV was first articulated by HLA Hart, who defined it as follows: "the view of those who do not merely record and predict behaviour conforming to rules, but *use the rules as standards for the appraisal of* […] *others' behaviour*."[52]

Championed as a "decisive advance for analytical jurisprudence",[53] the IPV is a "hermeneutic concept"[54] that is helpful when one is not only observing the thoughts of actors in a legal system, but also articulating how an individual reasons and operates.[55] This includes judges as well. For example, for a judge to say "it is the law that…" would signify his acceptance of the statement or proposition referred to which is labelled as "the law". This in turn "manifest[s] [his] own acceptance of them as guiding rules", illustrating his IPV vis-à-vis the nature of the legal statement in question.[56] As Scott Shapiro observes, in articulating the IPV, Hart intends to "render the thoughts and discourse of legal actors comprehensive. The [IPV]… [explains a legal activity's] very intelligibility."[57] Considering this methodological injunction in the context of a judge's reasoning process, the articulation of his IPV on the rules and of principles of law he faces—the ILPV—may therefore be of hermeneutic assistance in explicating the reasons and purposes for which certain interpretive and-or adjudicative choices were made.[58] It seeks to make sense and rationalise the adjudicative choices made by a judge when he faces legal rules and principles for which, there are respective reasonably arguable cases that they should be applied, despite gravitating a court towards diametrically opposed outcomes. More importantly, the use of the ILPV as a methodological injunction to illustrate a judge's reasoning process and the choices[59] made therein shifts "attention away from philosophical abstractions

52 HLA Hart, *The Concept of Law* (3rd edn, Clarendon Press 2012) 98 (italics and underline emphasis original; italics emphasis added).

53 Neil MacCormick, *H.L.A. Hart* (Stanford University Press 1981) 32.

54 Brian Leiter, 'Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence' (2003) 48 American Journal of Jurisprudence 17, 41.

55 Hart (n 52) 88–91.

56 ibid 102, 117.

57 Scott Shapiro, 'What is the Internal Point of View?' (2006) 75(3) Fordham Law Review 1157, 1166; Jules L Coleman and Brian Leiter, 'Legal Positivism' in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Philosophy* (Blackwell Publishing 1996) 241, 247.

58 William Lucy, *Understanding and Explaining Adjudication* (Clarendon Press 1999) 58–62.

59 Shapiro (n 57) 1167.

toward a more practical view of law-as-social-activity".[60] The importance of adopting such a practical view, bearing in mind the social dimensions of legal reasoning and application of legal principles, is vividly illustrated by Lord Sales JSC extra-judicially:

> The common law gains from its sensitivity to the particular facts of individual cases and from being able to make localised accommodations of competing values. It can reflect forms of social knowledge embedded in practical experience and local understandings of how to do things well, which may be hard to articulate and state in abstract terms. This sort of knowledge may be ignored where the state tries to proceed by laying down abstract general rules in advance, potentially at great cost to society.[61]

The IPV has been embraced by prominent Anglo-American jurists whose accounts of jurisprudence have an emphasis on adjudication, albeit not in language identical to the preliminary sketch of ILPV in the foregoing paragraph.[62] For Neil MacCormick, the IPV helpfully demonstrates that "the acceptance of rules is not unreasoned, though indeed different people may reason differently for acceptance of the same rule".[63] In considering competing propositions of law, it is appropriate to resort to arguments focusing on the consequence of a certain proposition, such arguments being "essentially evaluative and therefore in some degree subjective".[64] Such a reasoning process does not entail absolute judicial discretion,[65] but instead judges only have "quite restricted freedom of manoeuvre as they try to work through to a reasonably *justifiable* conclusion *justified as a conclusion of law* in the case seen as a *legal case*".[66] Similarly, Ronald Dworkin notes,

60 Allan Hutchinson, 'A Postmodern's Hart: Taking Rules Sceptically' (1995) 58 Modern Law Review 788, 798. In *The Concept of Law*, Hart suggests that the explication of the IPV of a person is not only confined to judges, but also to "any educated man": Hart (n 52) 6.

61 Sales (n 51). As to how the inherently public and justificatory aspect of the common law judicial decision-making both predetermines the form of a judgment must take and creates the community or communities which will evaluate and validate the judgment's legal status, see Douglas E Edlin, *Common Law Judging: Subjectivity, Impartiality and the Making of Law* (University of Michigan Press 2016) 50.

62 Lucy (n 58) 70–75.

63 Neil MacCormick, *Legal Reasoning and Legal Theory* (OUP 1978) 64.

64 ibid 105.

65 In this regard, it is helpful to note that Hart's invocation of "strong discretion" to justify the invocation of judicial power in light of competing interpretations, sketched by the IPV of a judge, is generally seen as ill-substantiated and should at best be "viewed as a dogma": AWB Simpson, 'Common Law and Legal Theory' in AWB Simpson (eds), *Oxford Essays in Jurisprudence: Second Series* (Clarendon Press 1973) 80.

66 Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (OUP 2005) 147 (emphasis added).

from the perspective of interpretation, that in seeking to give an account of social practice, one may choose to report only "the various opinions different individuals in the community have about what the practice demands".[67] In choosing between interpretations on a legal principle, judges should attempt to find the "best" answer portraying the law "in its best light".[68]

The foregoing juristic illustrations for the limits and communication of judicial reasoning suggest that instead of being confined to theoretical discussions in analytical jurisprudence, the ILPV can be instrumental in illustrating how a judge reasons through multiple interpretations of a legal principle. They also demonstrate how, despite the variety of options available, a particular conclusion is reached. That said, it remains that such a choice made is an individual and subjective choice. It is subjective because it is up to the judge himself to decide which option to follow, instead of being bound by, for example, *stare decisis* or the decisions of apex courts. The exercise of choice in adjudication goes to "the manner in which [one] should understand the judicial failure to admit whilst adjudicating that [judges'] decisions are, or at least on some occasions, the result of individual choices rather than the application of pre-existing standards".[69] As a "permits-based (and not chance-based)" function, this choice "cannot be arbitrary".[70] This demand underscores the epicentre of the analytical conundrums sketched since the beginning of Section II—about the justification of opting for one choice over another in public law adjudication, and the quality of justification advanced. More specifically, the question can be posed as follows: How can the ILPV of judges provide a satisfactory answer to the conundrums and communication deficiencies generated by the need to make interpretive and adjudicative choices in public law adjudication?

It is important to first bear in mind that the ILPV is an IPV about law, meaning that it is about articulating the reasons for opting for a relevant and persuasive authority over another. This means that, instead of jumping directly to asserting that one option is to be adopted, the first step in explicating this ILPV should be to elaborate on the relevance and weight to be accorded to each factor relevant to the aforesaid judicial need to make a choice. This exercise would involve considering how the facts fit within the relevant framework of adjudication. It provides a foundation for the hermeneutic basis of the ILPV by clearly demonstrating the basis on which the relevant options are legally rooted. In setting out and elaborating upon these factors, judges do not act in an unconstrained

67 Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 64.
68 ibid 255.
69 Richard Nobles and David Schiff, 'Why Do Judges Talk the Way They Do?' (2009) International Journal of Law in Context 25, 40.
70 Joe McIntyre, *The Judicial Function: Fundamental Principles of Contemporary Judging* (Springer 2019) 93.

manner. Instead, the articulation of these factors can and is likely to be shaped by, amongst others, "the legal language, the corpus of legal rules, concepts, principles, and ideas, legal processes and practices, hierarchical legal institutions, [and] the craft of lawyering".[71] They can "[stabilise] legal meaning and [provide] restraint on the influence of subjective views" of a judge.[72]

After setting out the nature of the factors relevant to the choice a judge needs to make, he would then proceed to explain how they contribute to the decision which he has reached. This involves, of course, explaining why a particular conclusion is reached. If, despite the existence of multiple authorities (all of which can be reasonably argued as relevant and applicable to the choice facing a judge), he simply asserts that one is selected, this clearly falls short of the ILPV's analytical and communication demands. Proffering positive reasons justifying the authority selected would be a good start, but there is no logical guarantee that they can also serve as answers for rejecting an authority which is not selected (and followed). In such a scenario, it cannot be said that the option that is not selected is wrong or inapplicable, for it is not the case that the aforesaid option is wrong as a matter of law. It is simply disapproved because of a judge's subjective choice not to apply it in reaching a conclusion on the relevant issue. Therefore, in articulating the ILPV, instead of trying to sketch the line of reasoning or interpretation so selected as analytically watertight as a matter of law, it would be more practical and indeed more appropriate for the articulation of the ILPV in that regard to be characterised as a matter of justifiability or defensibility. The illustration should focus on showing that the choice made is justifiable or defensible, not that it must be correct.[73]

The qualification of the level of reasoning required as one of justifiability but not offering an absolute answer is critical for acknowledging that the choice is a subjective one—a critical component of the articulation of the ILPV. Both the IPV and its hermeneutic application in the context of adjudication demonstrate that it would be unsatisfactory for a judge to rid himself of subjectivity at the expense of clarity of analysis and communication of his decision to an audience. Instead, subjectivity can be embraced, especially when it comes to instances where there is no clear answer to the relevance, weight and application of legal principles and facts.[74] Illustrating the consideration of competing factors and conclusions, in

71 Brian Tamantha, *Laws as a Means to an End: Threat to the Rule of Law* (CUP 2006) 239.

72 ibid 240.

73 John Bell, 'Discretionary Decision-Making: A Jurisprudential View' in Keith Hawkins (ed), *The Uses of Discretion* (Clarendon Press 1992) 89, 106. Indeed, reasoned judgment is essential to the common law method of judging, allowing a judgment (and points of decision therein) and the process(es) of reaching so be "debated, attacked and defended": David L Shapiro, 'The Defense of Judicial Candour' (1987) 100 Harvard Law Review 731, 737.

74 Peter Cane, 'Consequences in Judicial Reasoning' in Jeremy Horder (ed), *Oxford Essays in Jurisprudence (Fourth Series)* (OUP 2000) 41.

particular those that are unfavourably treated, is conducive to demonstrating to the public that the court has (a) adopted a defensible criterion or merit, (b) demonstrated adequately the factual and legal matrices supporting the application of that norm; and (c) reached the result the judge deems most appropriate.[75]

B. THE ILPV OF JUDGES AND THE ASSOCIATED ADJUDICATIVE CONUNDRUMS IN THE CONTEXT OF THE THIRD AND FOURTH STEPS OF PROPORTIONALITY ANALYSIS: PROVISIONAL ILLUSTRATIONS

The foregoing sections of this paper advance two overarching points. First, adjudicative choices permeate the third and fourth steps of proportionality adjudication, for they involve selecting multiple viable propositions of law and interpretations leading to different (and sometimes diametrically opposed) outcomes. Second, the ILPV can serve as a powerful analytical and communication tool in demonstrating the various interpretive exercises and choices made in the course of adjudication and delivering a judgment, particularly when the answer is not clear-cut from the available authorities and facts.

Placing the ILPV in a proportionality framework demonstrates the analytical and communication difficulties that judges face when conducting proportionality analyses. First, instead of being confined to questions of law only, the formation and the operation of the internal point of view cannot be divorced from questions of facts. This is because under the third and fourth steps of a proportionality test, courts may be required to make specific fact-findings.[76] For example, a court may be tasked to make a finding on the precise degree of impact that the infringement of the right (as established) has on the aggrieved applicant, or the actual reach of the identified objectives of the impugned measure in practice. The involvement of fact-finding exercises adds a further complexity to our problem: the presentation of the ILPV would also have to demonstrate how the relevant fact-finding exercises would impact the articulation of the ILPV in the first place. It is more often than not that instead of having a stand-out answer, adjudicative choices hereunder involve "choosing between *several* legitimate options".[77]

Second, and as illustrated above, in exercising adjudicative discretion in a proportionality test, it is likely that the judge's decision may be infused with subjective views. This may encompass, amongst others, his views on the role of a

[75] Melvin Eisenberg, 'The Principles of Legal Reasoning in the Common Law' in Douglas E Edlin (ed), *Common Law Theory* (CUP 2007) 81, 94.

[76] *R (Kiarie) v Secretary of State for the Home Department* [2017] UKSC 42, [2017] 1 WLR 2380 [46]–[47].

[77] Aharon Barak, 'On Judging' in Martin Scheinin, Helle Krune and Marina Aksenova (eds), *Judges as Guardians of Constitutionalism and Human Rights* (Edward Elgar 2016) 27, 29–30 (emphasis added).

court vis-à-vis the other branches of government and thoughts on the discretion as to the appropriate development of the area of law in question.[78] Appeals to arguments of, for example, common sense should not be seen as of assistance. While such an argument would appear to have strong logical force that is accessible and-or easily acceptable by the audiences of a judgment, such appeals "do not define a distinct method of legal reasoning that can make a plausible claim to intellectual rigour".[79] Similarly, the defensibility of choices as manifested in a judge's ILPV is uncertain in the final step, where "rights do not… enjoy any special or elevated status over public interests, but rather *operate on the same plane as policy considerations*."[80] Since the right infringed by the impugned measure and the legitimate objectives that it pursues are compared head-on with one another, clear articulation of the weight (and importance) to be accorded to each factor contributing to the two aforesaid items of consideration becomes all the more indispensable. The explication of value judgments inherent in the balancing exercise, in light of the aforementioned articulative task, means that the heuristic nature of proportionality analysis is likely to be shaped considerably by such an exercise.

Armed with the foregoing observations, this paper will now turn to the sources of the analytical and communicative conundrums sketched above: (a) the "sliding scale" of intensity of review under the third step; and (b) the balancing exercise and holistic evaluation of the right infringed and the legitimate objectives pursued. Although the cases under examination concern socio-economic policies where discrimination claims are alleged, it will be illustrated that the analytical and communicative challenges that the ILPV can tackle extends to proportionality adjudication in general as well, especially for the final balancing exercise.

[78] Aharon Barak, *Judicial Discretion* (Yale University Press 1989) 72 ("Judicial decision reaches its peak when the judge strikes a balance between competing principles, according to their weight and their strength at the point of confrontation").

[79] Richard Posner, *How Judges Think* (Harvard University Press 2008) 117.

[80] Kai Möller, *The Global Model of Constitutional Rights* (OUP 2012) 10–15 (emphasis added).

IV. No More Than (Reasonably) Necessary: A Choice of Standards

A. Different factors gravitating towards different directions and their relationship with one another

(i) Hong Kong Law: A Straightforward Attachment of Weight to "Suspect" Grounds

Dissecting and evaluating the reasoning process of courts in socio-economic rights cases involving discrimination claims require a brief detour to two pre-*Hysan* HKCFA cases. First, in *Fok Chun Wa v Hospital Authority*,[81] the applicant challenged the respondent's policy of imposing higher fees for non-Hong Kong residents (compared to Hong Kong residents) giving birth in public hospitals on the basis of an infringement of her right to equality (protected under Article 22 of the BL (BL25) Article 22 of the Hong Kong Bill of Rights (BOR22)).[82] Delivering a unanimous judgment, Ma CJ observed that the involvement of socio-economic policies *per se* "does not lead to the consequence that [courts] will not be vigilant when it is appropriate to do so or that the authorities have some sort of carte blanche".[83] The need to attach weight to the identity of the decision-maker and its competence in socio-economic matters does not require uncritical deference towards any decision rendered. Where the unequal treatment "strikes at the heart of core-values relating to personal or human characteristics… the courts would extremely rarely (if at all) find this acceptable [because] these characteristics involve the respect and dignity that society accords a human being".[84] Barring an immediate jump to a conclusion that a more stringent standard of scrutiny should always be applied,[85] it is clear that more weight would be accorded to the nature of the infringed right.

The second case is *Kong Yunming v Director of Social Welfare*,[86] which concerned a challenge brought by a new immigrant from mainland China against the constitutionality of the seven-year residence requirement for receiving welfare assistance under the Comprehensive Social Security Assistance scheme. Following

[81] *Fok Chun Wa v Hospital Authority* (2012) 15 HKCFAR 409.

[82] Hong Kong has a "tripartite" regime of rights-protection. The BL enshrines various fundamental rights and freedoms. Article 39 of the BL provides that provisions of the International Covenant on Civil and Political Rights remain in force and implemented through the BOR, as contained in the Hong Kong Bill of Rights Ordinance (Cap.383).

[83] *Fok* (n 81) [77].

[84] ibid.

[85] CL Lim, 'Judicial Rhetoric of a Liberal Polity: HK, 1997–2012' in Rehan Abeyratne and Iddo Porat (eds), *Towering Judges: A Comparative Study of Constitutional Judges* (CUP 2021) 117, 131–132.

[86] *Kong Yunming v Director of Social Welfare* (2013) 16 HKCFAR 950.

Fok, Ribeiro PJ held that "the adoption of a residence requirement as a criterion of eligibility for social welfare benefits… is generally not regarded as engaging any of the inherently suspect grounds".[87] This in turn justifies the general adoption of the MWRF standard in the third step of a proportionality assessment of socio-economic policies (an area where the government enjoys a "wide margin of discretion")[88] but does not engage "inherently suspect grounds" of discrimination (for example, sex or sexual orientation).[89] Once a "suspect ground" of discrimination is engaged, however, it would automatically be accorded more weight.[90] From the lens of ILPV, this entails that the nature of the right is accorded determinative weight in the reasoning process leading towards the application of a more stringent standard of review.

The ostensibly dominant weight accorded to the nature of the infringed right once a "core value" or "suspect" ground is involved continued in two post-*Hysan* HKCFA judgments concerning discriminatory treatment in violation of the applicants' (amongst others) BL25 and BOR22 on the basis of one's sexual orientation. In *QT v Director of Immigration*,[91] a case concerning the Director's refusal to grant the aggrieved applicant a dependent visa on the basis of his same-sex marriage, the court noted that discrimination on a suspect ground is "especially pernicious"[92] because such a ground concerns a "personal characteristic" on the basis of which any differential treatment would be "particularly demeaning for the victim".[93] The same approach is followed in *Leung Chun Kwong v Secretary for Civil Service*,[94] a case concerning the Secretary's decision not to allow the aggrieved applicant, on the basis of their same-sex orientation, to elect for joint assessment of salaries tax with his partner under the Inland Revenue Ordinance (Cap. 112). Both cases placed significant emphasis (following *Fok*, *Kong*, *Hysan*, and *Kwok*) on the need to attach great weight to a suspect ground of discrimination when elaborating on the relevance and nature of the factors as contextualised within the legal and factual matrices of the case. Now recall the three factors which shape the legal basis for adopting a standard of review. It can be observed that the engagement of a "suspect ground" meant that the nature of the right, as a relevant but not determinative factor, was automatically given predominant weight. No comparative exercise has been carried out to illustrate how, let alone explain why, weight is to be given to the identity and competence

87 ibid [42].
88 ibid.
89 ibid [40]. See also nn 84–85 above.
90 ibid. See also Karen Kong, '*Kong Yunming v Director of Social Welfare*: Implications for Law and Policy on Social Welfare' (2014) 44(1) Hong Kong Law Journal 67, 73–74.
91 *QT v Director of Immigration* [2018] HKCFA 28, (2018) 21 HKCFAR 324.
92 ibid [107].
93 ibid citing *Carson* (n 33) [55].
94 *Leung Chun Kwong v Secretary for Civil Service* [2019] HKCFA 19, (2019) 22 HKCFAR 127.

of the decision-maker who enacted and enforced the impugned measure. The leap in reasoning in the string of HKCFA cases demonstrated that, whilst providing a logical basis for discriminatory measures to be subjected to more intense judicial scrutiny, the current formulation works at the expense of clear communication to the public of the precise nature of the interactions between relevant factors.

Despite the apparent emphasis on the nature of the right engaged in socio-economic right cases involving a "suspect" ground of discrimination, the flexible framework set out in *Hysan* and *Kwok* remains able to allow courts to adopt a more nuanced and elaborate approach in instances where the relevant factors gravitate the court towards diametrically opposed outcomes. Two recent decisions of the Hong Kong Court of First Instance (HKCFI) demonstrate this potential. In *Infinger v Hong Kong Public Housing Authority*,[95] a case concerning the infringement of the same-sex applicant's BL 25 and BOR22 rights as a result of different application requirements imposed on opposite-sex and same-sex applicants for public rental housing, Chow J (as Chow JA then was) observed that while the limited supply of such housing may entitle the decision-maker to have "a wide margin of discretion in the performance of its function and responsibility", this factor "should not… be overly emphasised".[96] The "scarcity of public resources" is only one factor to be taken into account in articulating the applicable standard of scrutiny.[97] Similarly, in *Ng Hon Lam Edgar v Hong Kong Housing Authority*,[98] where the aggrieved applicant challenged the respondent's exclusion of the same-sex spouse from owning a Home Ownership Scheme flat from premium-free transfer of title, Chow JA clarified that the "strength of the legitimate aim" does not have a determinative bearing on applicable standard of scrutiny, and nor does the involvement of indirect discrimination necessarily point to a "lower standard or intensity of review".[99] The impugned measure's irrelevance to the allocation of flats *per se* meant that the public resource factor should be given less weight in articulating the appropriate standard of scrutiny.[100]

The approaches in the two HKCFI decisions canvassed in the foregoing paragraph are, compared to the HKCFA's approaches in *Fok*, *Kong*, *QT*, and *Leung*, more elaborate in demonstrating how and why certain degrees of weight are attached to the relevant factors. While it is true that *Infinger* and *Ng* concerned (unlike the HKCFA cases above)[101] scarce public resources on which the executive and/or legislature are usually seen as possessing even greater expertise in making

[95] *Infinger v Hong Kong Public Housing Authority* [2020] HKCFI 329, [2020] 1 HKLRD 1188.
[96] ibid [42].
[97] ibid.
[98] *Ng Hon Lam Edgar v Hong Kong Housing Authority* [2021] HKCFI 1812, [2021] 3 HKLRD 427.
[99] ibid [64(2)]–[64(5)].
[100] ibid [65].
[101] *Infinger* (n 95) [44].

decisions on them, it is clear that the more nuanced articulation of the relevant factors gravitating a court towards adopting standards of review of different stringency provide clearer analytical and communicative basis for justifying the court's eventual choice. It allows a judge to explicate more intelligibly the contribution of the factors towards his reasoning process in the operation of the "sliding scale" of review. The current approaches exhibited by the HKCFA, compared to the HKCFI approaches, provide less helpful hermeneutic bases for communicating to the audience how the opposing (diametrically or not) factors are handled and given consideration.

(ii) Juxtaposing against English Law: Similar Problems, Less Obvious

Sceptics may criticise that, since the majority of the Supreme Court in *DA* has already firmly concluded that MWRF is the applicable standard in decisions concerning socio-economic matters and welfare benefits, any further exploration of the attachment of weights to the MWRF standard would only be a storm in a teacup. Such an argument fails to appreciate the nuances and flexibility involved when a judge applies the standard in practice,[102] for it rests only on the "primarily precedential"[103] rationale of adopting it. It also oversees the analytical conundrums, from the lens of the ILPV, posed by the standard and possible instances of more stringent scrutiny.

The first case where the MWRF standard and the potential for a more stringent standard of scrutiny are discussed in detail is *Humphreys v Revenue and Customs Commissioners*,[104] a case concerning differential treatment between men and women towards child tax credit. In that case, after holding that the standard applies to state benefit cases,[105] Lady Hale cautioned that it does not mean that the impugned measure "should escape careful scrutiny".[106] Similarly, in the latter case of *R (SG) v Secretary of State for Work and Pensions*,[107] a case concerning a cap on welfare benefits for non-working households which is said to amount to unjustifiable gender discrimination under ECHR14 read with A1P1, Lord Reed cautioned that the economic and political judgment involved in the impugned measure contribute to "major implications for public expenditure"; the measure has also been the "subject of full and intense democratic debate".[108] That said, the

[102] Meers (n 49) 17–20.

[103] Mel Cousins, 'The 'benefit cap' and human rights before the UK Supreme Court' (2020) 27(1) Journal of Social Security Law 23, 27.

[104] *Humphreys v Revenue and Customs Commissioners* [2012] UKSC 18, [2012] 1 WLR 1545.

[105] ibid [17]–[19].

[106] ibid [22].

[107] *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2016] 1 WLR 1449.

[108] ibid [92]–[95], A similar observation was also made by Lady Hale (dissenting as to the application of the test to the facts): [159].

requirement for giving weighty reasons to justify discrimination is consistent with the *Humphreys* approach.[109] These two cases do not go as far as the analytically questionable immediate jump to a more stringent standard of scrutiny seen in *QT and Leung* in Hong Kong. But, on the other hand, they also do not illustrate fruitfully for how the reasoning process through competing factors is to be conducted. In particular, the focus on the "economic terms" of the measure in *SG* has been suggested to contribute to the disproportionate focus on the institutional identity and competence of the decision-maker.[110]

Returning to *DA*, in which both *Humphreys* and *Carmichael* were cited with approval,[111] Lord Wilson stated that under the MWRF approach, the question is to "[inquire] into the justification of the adverse effects of rules for entitlement to welfare benefits by reference to whether they are [MWRF]".[112] Elaborating on the reasoning process under the MWRF standard, Lord Wilson noted that:

> The rationalisation has to be that, when the state puts forward its reasons for having countenanced the adverse treatment, it establishes justification for it unless the complainant demonstrates that it was [MWRF]. But reference in this context to any burden … is more theoretical than real. The court will proactively examine whether the foundation is reasonable.[113]

Two brief points may be made about this conclusion. First, the "unless" formulation, whilst compatible with precedent, falls short of demonstrating a clear degree of analysis that ought to be demonstrated in relation to the weight to be accorded to competing factors under the test. The question of competing factors remains live, for the MWRF standard has never been a hard-and-fast rule and admits some degree of flexibility. Second, and on a related note, the lack of elaboration as to the assignment of weight to competing factors risks succumbing to the opaqueness in reasoning displayed in *QT* and *Leung*. Both approaches appear to adhere to a jump to a conclusion about the applicable standard of review, despite their observations on the need for more nuanced considerations to the contrary. This neglected need for more nuanced consideration is also supported by Lord Carnwath's observations in the same case, that the submissions were complicated with "conflicting factual and statistical evidence, much of it produced for the first time in this court".[114]

[109] ibid [11]. See also ibid [125] (Lord Carnwath).
[110] Campbell (n 3) 1204.
[111] *DA* (n 24) [61]–[62].
[112] ibid [59].
[113] ibid [66].
[114] ibid [123].

Indeed, post-*DA* decisions continued to illustrate the relevance and pertinence of articulating the weight accorded to each factor deemed relevant to the formulation of the standard of review under the third step. In *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department*,[115] Hickinbottom LJ cautioned that the reasoning process leading up to the application of the MWRF standard is not "a simple binary question".[116] Instead, the court will examine the basis of the impugned differential treatment (for example, race, nationality, gender), the objective of the impugned measure, and the factual context in which it was enforced.[117] This approach, whilst not elevating the application of the test into "a debate about the precise content of stringency of the MWRF test in a case when it unquestionably applies",[118] illustrates that the MWRF test ought not be treated as a straightforward application exercise. Beneath a general approach that the MWRF test applies in socio-economic matters lies a hybrid of considerations including, but not limited to, the assessment undertaken by the decision-maker(s) in relation to the enactment and enforcement of the impugned measure and the need to give great weight to the engagement of a suspect ground of discrimination.[119] In contrast to the Hong Kong approach sketched above, the engagement of a suspect ground of discrimination does not automatically entail significant weight being given to that factor at the expense of paying insufficient attention to (or failing to articulate so) factors relating to, for example, the institutional competence and expertise of the decision-maker. The English approach therefore enables more room for a wider picture to be painted for a judge's ILPV on how the factors identified to be relevant to the choice of standard of scrutiny are accorded respective weight (if any).

B. Justifying the choice of standard: the reasoning process

Having identified the content of the relevant factors and their significance in the case at hand, a judge would then proceed to justify his choice of the standard of review adopted. As will be demonstrated below, the issue of analytical clarity and expression of choice is of no less importance here, for it rationalises and makes coherent the factors identified in the prior step explained above.

[115] *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2020] EWCA Civ 542, [2021] 1 WLR 1151.

[116] ibid [136].

[117] ibid.

[118] *R (Delve and another) v Secretary of State for Work and Pensions* [2020] EWCA Civ 1199, [2021] 3 All ER 115 at [90].

[119] *Joint Council* (n 115) [148(iv)].

(i) Hong Kong Law: Moving Away from a Logically Desirable but Analytically Questionable Jump to NMRN

The analytical incoherence generated by the automatic conferral of significant (if not predominant) weight to a "suspect" ground of discrimination in socio-economic rights cases in *QT* and *Leung* extends to the standard-justifying process as well. In both cases, the HKCFA stated unequivocally (albeit in *obiter dicta*) that once an individual is subject to differential treatment on a suspect ground, a court should apply the NMRN standard.[120] These approaches, whilst not necessarily incompatible with the reference to a "sliding scale" of review, exhibit the same weaknesses in reasoning and communication (as explained above) of an insufficient consideration of countervailing factors gravitating a court towards a more relaxed standard of scrutiny. The starting point of affording great weight to a suspect ground has therefore resulted in the application of a more stringent standard of review which, despite being able to offer stronger protection to aggrieved individuals, risks sacrificing clarity in communicating to the audience the steps of analysis adopted by a court when considering the countervailing factors in play.

The interwovenness of the assignment of weight to factors relevant to the operation of the sliding scale and the reasoning process justifying the standard adopted can also be observed in the HKCFI cases examined above. In *Infinger*, after noting the diametrically opposed tensions posed by the engagement of a suspect ground of discrimination on the one hand and the involvement of scarce public resources on the other,[121] Chow J set the applicable standard of review at "somewhere in the middle of the continuous spectrum of reasonableness, and the intensity of review should be set accordingly".[122] In *Ng Hon Lam Edgar*, a case with a fact pattern similar to that of *Infinger*, Chow JA held that the applicable standard of review "should be somewhere between the middle and high end of the intensity of review in the continuous spectrum of reasonableness".[123]

The analytical and communicative ambiguity reflected in the conclusions reached in *Infinger* and *Ng Hon Lam Edgar* illustrates two points. First, the existence of competing factors gravitating a court towards diametrically opposed intensities of scrutiny means that imprecise articulation of the weight to be conferred upon each factor would undermine the legal support those factors may provide for a judge's reasoning process. Once a judge gets off on a murky starting point, the reasoning process of the judge is more likely to be seen as an ill-substantiated and abrupt demonstration of a holistic consideration of the factors by selecting a

[120] *QT* (n 91) [105]–[108]; *Leung* (n 94) [22].
[121] *Infinger* (n 95) [42]–[43].
[122] ibid [44].
[123] ibid [66].

middle point. Both mistakes fall short of the analytical and communicative demands posed by the ILPV. The second point, related to the first, is that in instances where the competing factors are diametrically opposed to one another by themselves (instead of just gravitating towards diametrically opposed outcomes), it is all the more pertinent for a judge to acknowledge the existence of a judgment on his part on the respective weights to be attached to them. By explicating the inescapable need to make, for example, a value judgment in assigning weight to each factor, the heuristic value of the standard of scrutiny can be preserved. This falls short of completing a gapless picture for the application of law to the facts, but it at least preserves the communicative clarity on the part of the judge which, as stressed above, is an indispensable matter that a presentation of reasoning process ought to safeguard jealously.

(ii) English Law: MWRF but Developing a More Nuanced Potential

As argued above, *DA*'s confirmation of the applicability of MWRF in socio-economic policies cases ought not be interpreted as diminishing the need for judges to explicate the factors that may be said to gravitate a court towards different standards of review. The heavy characterisation of economic and political judgments involved in the cases canvassed above in turn affects explanations about why, despite a party's arguments to the contrary, the MWRF standard is adopted. In *R (Delve and another) v Secretary of State for Work and Pensions*, the appellant challenged unsuccessfully the judge's application of the MWRF standard for assessing the equalisation of state pension ages for women with that of men made via revisions to a series of Pensions Acts between 1995 and 2014. On the appropriate scope of deference, the court stated that the Pensions Acts deal with "matters of the *highest economic and social importance* aiming to ensure intergenerational finances" aimed at, amongst others, "[making] pensions at a time of great pressure on public finances, and [reflecting] changing demographics, life expectancy and social conditions".[124] They concern measures which "dealt with controversial matters of huge political weight and clearly fall within the macro-political field".[125] These observations flow from its earlier observation that the *Joint Council* does not demand a court to illustrate with precision all the factors in play. Similarly, in *R (Drexler) v Leicestershire County Council*,[126] dismissing the appellant's appeal, the court held that the respondent's home-to-school transport policies for pupils with special educational needs, which differentiated between pupils aged 5 to 15 (free transport) and pupils aged 16 to 18 (subsidised transport only), did not

[124] *Delve* (n 118) [92] (emphasis added).
[125] ibid [93].
[126] *R (Drexler) v Leicestershire County Council* [2020] EWCA Civ 502, [2020] ELR 399.

amount to a breach of ECHR14, read together with art.8 and Article 2 of Protocol no 1 to the ECHR. The court observed that in the alleged instances of discrimination involving public expenditure issues, following *Carson*, "very weighty reasons" would have to be given by the government to justify the alleged instance of discrimination.[127] Simultaneously, however, courts have to recognise the "relative institutional competence" of the executive or the legislature on the one hand and the courts on the other, in the context of matters of public expenditure; these matters, calling for "political judgment", mean that the decisions rendered or measures enacted must be "[afforded] appropriate weight and respect".[128]

In contrast to the straightforward exercises that *Delve* and *Joint Council* demonstrate, the Supreme Court's approach in *SC* represents a turn to a more nuanced and complex reasoning process, which is more conducive to the explication of the ILPV. Writing for a unanimous seven-member court, Lord Reed modified the court's previous adoption of the MWRF standard as applied in, amongst others, *Humphreys*, *SG*, and *DA*. The revisions "reflect the nuanced nature of the judgment which is required".[129] Although the position remains that the government's decision in social and/or economic matters will generally be respected unless it is MWRF, the judgment clarifies, importantly, that the intensity of scrutiny may be strengthened depending on the circumstances of each case.[130] When a suspect ground of discrimination is engaged, "very weighty reasons will *usually* have to be shown, and the intensity of review will *usually* be correspondingly high".[131] Instead of being fixated with the label of the standard adopted,[132] it is important to

> […] *avoid a mechanical approach* to these matters, based simply on the categorisation of the ground of the difference in treatment. A more flexible approach will give appropriate respect to the assessment of democratically accountable institutions, but will also take appropriate account of such other factors as may be relevant… the courts should generally be very slow to intervene in areas of social and economic policy such as housing and social security; but, *as a general rule*, differential treatment on grounds such as sex or race nevertheless require cogent justification.[133]

[127] ibid [55].
[128] ibid [56].
[129] *SC* (n 25) [158] (emphasis added); see also *R (Pantellerisco) v Secretary of State for Work and Pensions* [2021] EWCA Civ 1454 [58].
[130] *SC* (n 27).
[131] ibid (emphasis added).
[132] See also text to nn 25–27 above.
[133] *SC* (n 25) [159] (emphasis added).

Compared to the previous more straightforward approaches in the United Kingdom and the HKCFA's approaches in *QT* and *Leung*, *SC* provides greater room for tackling more delicately legal and factual nuances brought by the competing factors affecting adjudicative exercises in the third step. It directs a judge to flesh out more clearly how the relevant factors may be said to have an impact on the weight to be given to one another. This in turn enables the ILPV of judges and the making of any value judgments therein to be explicated in a clearer manner, manifesting the heuristic potential of the third step. The departure from fixation with a "precise definition" of MWRF, and direct engagement with the underlying question (that is, the scope of the margin of judgment), provides greater guidance on explicating what consideration is given to each relevant factor and their contribution towards the judge's reasoning process leading up to adopting a standard of review.

C. Towards a more delicate articulation of reasons

The foregoing comparative analysis between the approaches to the third step reveals a general shift from straightforward applications of legal standards to more delicate formulations. As a matter of a judge's legal analysis and communicating to the audience his reasoning process, such a move provides an opportunity for improving the heuristic and communicative potential of the third step. This is because, as Nicola Lacey observes, lawyers' inclination to "construct the world in terms of dichotomized categories" is less likely to correspond to common-sense understandings, or how the interested parties perceive the reasoning process in the first place.[134] The departure from clear-cut standards towards a more holistic and flexible operation of the "sliding scale" therefore enables judges to explicate to the public more clearly how the competing factors gravitating a court towards different standards of review are handled. Not only would this be helpful in improving the communicative potential of the proportionality framework,[135] it would also provide more solid legal ground and analytical support for the balancing exercise to be undertaken in the final step of a proportionality test.

Critics may complain that the paper's demands on the clarity of reasoning and communication are quibbles, for it is the application of the correct standard *per se* that is key. This is most cogently illustrated in Binnie J's concurring

[134] Nicola Lacey, 'The Jurisprudence of Discretion: Escaping the Legal Paradigm' in Hawkins (n 73) 363, 371.

[135] See text to n 10 above.

judgment in *Dunsmuir v New Brunswick*[136] on the need to avoid excessive "lawyerly arguments" in judicial review:

> 133. […] The disposition of a [judicial review] case may well turn on the choice of standard of review. If the litigants do take the plunge, they may find the court's attention focused not on their complaints, or the government's response, but on lengthy and arcane discussions of something they are told is the pragmatic and functional test. Every hour of a lawyer's preparation and court time devoted to unproductive 'lawyer's talk' poses a significant cost to the applicant.…the law of judicial review should be pruned of some of its unduly subtle, unproductive, or esoteric features.
>
> 145. […] While a measure of certainty is inherent in the subject matter and unavoidable in litigation (otherwise there wouldn't be any), we should at least…(ii) get the parties away from arguing about the tests and back to arguing about the substantive merits of their case.

The apex authorities in both Hong Kong and the United Kingdom (barring *SC*) may be seen as providing support for this scepticism. With regard to the interwovenness of the articulation and conferral of weight to each relevant factor and the reasoning process leading up to a judge's conclusion on the adoption of a standard of scrutiny, however, such criticism inappropriately ignores the contributive hermeneutic and communicative roles played by the ILPV. Binnie J's criticism about the potential over-complication of legal arguments in judicial review ought to be treated with caution in the present context. While it does suggest that counsel appearing before a court should not be too fixated in articulating the precise wording for the standard of review to be applied, it does not diminish the importance on the part of judges to explicate his conclusion as to the adoption of a particular standard of review and justifying it in light of: (a) the unique facts of the case; and (b) the relevant precedents. As will be demonstrated below, clear explications of the reasoning process in the third step may also have an impact on a court's reasoning process under the balancing exercise.

[136] *Dunsmuir v New Brunswick* [2008] 1 SCR 190.

V. Balancing Exercise: A Deceptively Simple Orchestration of the Competing Interests

As illustrated in Section II(B) above, the balancing exercises in socio-economic rights adjudication under both Hong Kong and English law are skewed. Despite the difference in the precise reasons behind these exercises, the commonality between the skewedness may be summarised as follows: despite the apparent adoption of a "balancing" exercise, the government's position is likely to be generally preferred—in that the aggrieved applicant would face a higher hurdle to satisfy than a traditional balancing test (in the sense that both ends of the balance are accorded equal weight). This in turn risks mystifying the heuristic potential of the balancing exercise, for the so called "balance" does not, in effect, afford equal consideration to both sides of it.

A. The impact of the skewed approaches in Hong Kong law and English law: same, same but different

The expressly skewed nature of the balancing exercises in Hong Kong law has resulted in a lack of clarity of expression on the competing rights and concerns involved. The two HKCFI judgments canvassed above, *Infinger* and *Ng Hon Lam Edgar*, exemplify this problem. In *Infinger*, Chow J concluded that, "for the same reason" that he employed to conclude that the impugned differential treatment is not justified, a fair balance has not been struck by the differential treatment under the policy in question, and hence the policy was unlawful.[137] While this conclusion on the facts of the case is correct (the government having failed to pass the third step), this reasoning is analytically problematic. The fact that the fourth step is where the infringed right is given full consideration vis-à-vis the legitimate aims of the policy means that it ought to be given independent articulation and elaboration as to its contribution to a judge's reasoning, instead of being subsumed under the third step.

In a similar but slightly different vein, Chow JA in *Ng Hon Lam Edgar* identified one factor on each side of the balance: (a) there would only be a "very limited increase in the number of HOS flats which may become additionally available to heterosexual couples to purchase as a result of the [Spousal Policy]"; and (b) the "unfair or unreasonableness" inflicted upon the applicant as a result of the policy in question.[138] He then immediately proceeded to conclude that the impugned policy operates on the aggrieved applicant "with such oppressive

[137] *Infinger* (n 95) [51(4)]–[51(5)].
[138] *Ng Hon Lam Edgar* (n 98) [76].

unfairness that it cannot be regarded as a proportionate means of achieving the [legitimate aim]".[139] While the notion of "oppressive unfairness" follows the language in *Hysan*,[140] the observation about the limited nature of achievements brought by the legitimate aim falls short of illustrating how it contributes to the value judgment made about the "oppressive" and/or "unfair" nature of the impugned treatment. The conclusion reached in this balancing exercise is therefore, with respect, not much different from a bare assertion of the cardinal importance of the right of equality based on the unfairness inflicted upon him, without illustrating as to how the other side of the balance (legitimate aims) contribute to this process of reasoning.

The extension of MWRF into the balancing exercise under English law in the context of socio-economic rights have produced problems that are similar to, but not as extensive as, those observable in *Infinger* and *Ng Hon Lam Edgar*. A key post-*DA* judgment where step four was considered in detail was *Joint Council*. This case concerned a scheme under the Immigration Act 2014, which imposed an obligation on landlords to take measures to provide private accommodation to tenants who were disqualified from obtaining so as a result of their immigration status. The government successfully challenged the lower court's decision the scheme was incompatible with ECHR14 (read with Article 8 of the ECHR). In adopting the MWRF standard at the balancing stage of the proportionality test and concluding that the impugned differential treatment is justified,[141] the court discussed in painstaking detail the relevant interests and why the individual rights engaged are not as important as others. After noting that "very considerable deference" should be given to Parliament's assessment of public interest and that the precise impact of the policy in question is difficult to quantify,[142] the court held that Parliament was aware of the risks of discrimination by landlords in implementing the scheme; it would, therefore, be improper to speculate what the Parliament might have expected.[143] After stating that "discrimination in all its forms is, of course, abhorrent", the court countenanced that the discrimination (and its risks) on the facts of the case emanate not from the policy itself but from the landlords, that is, private individuals' execution of the scheme.[144] In particular, the court also noted expressly at multiple junctures that the design and enforcement of the welfare scheme—a matter for Parliament—means that "great weight" should usually be given to it as the decision-maker.[145]

[139] ibid.
[140] *Hysan* (n 6) [78].
[141] *Joint Council* (n 115) [134].
[142] ibid [143]–[145].
[143] ibid [147].
[144] ibid [148(i)]–[148(ii)], [149(iii)], [150].
[145] ibid [146]–[147], [148(iv)], [149(iv)].

Compared to *Infinger* and *Ng Hon Lam Edgar*, *Joint Council* provides a fruitful example of how clear explications of the ILPV when articulating the weight to be attached to factors on each side of the balance, in light of the skewed focus, illuminate a judge's reasoning process. Such skewed focus of the balancing exercise highlights two matters. First, the apparent conflict between a "balance" and the skewed focus need to be addressed. Secondly, and more importantly, it is pertinent for a court to communicate to its audience how the infringed right remains being given adequate consideration in terms of its (alleged) importance vis-à-vis the legitimate aims pursued by the impugned measure. Conclusions reached in the third step (sliding scale) may be of assistance in characterising the nature of the legitimate objectives vis-à-vis the impugned right. But, to merely follow the conclusions reached in the third step (as in *Infinger*) would be an inappropriate simplification of the relations between the infringed right and legitimate aims pursued that a court is required to sketch under the fourth step.

B. Defending against skewness: the criticality of clear articulation of the relationship between competing forces of tension

The skewed focus of the balancing exercises sketched above ostensibly conflicts with the notion of a "balancing" exercise—in the sense that matters influencing the judge's decision about whether the impugned measure satisfies the proportionality test should be treated as, at least on their own, equal considerations. This, on its own, is not sufficient for a satisfactory articulation of the judge's ILPV in the reasoning process, for it is his explanation for: (a) why certain factors are seen as more important than others on the balancing scale; and (b) why, despite factors suggesting the contrary, the opposite conclusion is reached. Absent any changes to the formulations of the aforesaid balancing exercises, the ILPV would serve as a useful methodological injunction remedying the ostensibly disproportionate focus on and preference for maintaining the validity of the impugned measure.

The plurality of values that exist under this step means that, in assigning weight to each identified factor relevant to the balance, subjectivity on the part of a judge is inescapable.[146] Mere references to consequences and evaluative

[146] Indeed, both Dworkin's and MacCormick's account of adjudication, briefly canvassed above, acknowledge and envisage a version of value pluralism that there exists a multiplicity of values, some of which conflict with one another: Neil MacCormick, 'Contemporary Legal Philosophy; The Rediscovery of Practical Reason' (1983) 10 Journal of Law and Society 1, 13–14; Ronald Dworkin, *A Matter of Principle* (Clarendon Press 1985) 143–145. Traces of such plurality are evident in the choices open to a Judge to opt from in the third and fourth steps of a proportionality analysis, as analysed above.

considerations on the part of the judge are more likely than not to be sufficient. This is because they only provide general predictions as to what one might expect to find in the judge's reasoning process, but not the reason that the judge deems most compelling for justifying his adoption of a particular conclusion.[147] On the other hand, express acknowledgement of the legal value judgment involved—whilst unlikely to lead to an outcome that each litigating party would be satisfied with—would at least render the reasoning process a lot more transparent than, for example, a bare claim that the reasons adopted in the third step are equally applicable to the reasoning process under the balancing exercise. The diversity of views embodied in the various rights and interests relevant to the balancing exercise, whether in its skewed form or in a MWRF form, allows a judgment to be demonstrated as being "sensitive to the frictions and stresses of [law's] intellectual sources".[148] Not only does this help to illustrate that the balancing exercise does properly reflect the competing concerns in question (each being valid in their own ways), it also "fosters public discourse"[149] in clarifying the relationship between the infringed right and the objectives of the impugned measure.

VI. Conclusion

Diametrical oppositions of rights and interests in the proportionality analysis calls for a high degree of clarity when defending adjudicative choices . The comparative analysis of approaches in Hong Kong and English law above has demonstrated the potential confusion brought by a lack of sufficient revelation of one's ILPV. Although stronger protection for the rights of aggrieved individuals would certainly contribute towards more robust protection of human rights, this ought not to come at the expense of clarity in analysis and reasoning, for it would risk an impression on the part of the audiences of not affording sufficient consideration for countervailing factors that call for a different standard of review. Clearer spelling out of the process of judicial reasoning, as observable from *Infinger*, *Ng Hon Lam Edgar*, and *SC*, are commendable approaches towards ensuring that justice is not only done, but also seen to be done.

In light of the phenomena of "entirely associating the integrity of a legal system with the outcome…of cases determined by the courts",[150] it is all the more

[147] William Lucy, 'Adjudication for Pluralists' (1996) 16(3) Oxford Journal of Legal Studies 369, 383–385.

[148] Dworkin (n 67) 88–89.

[149] Barak (n 36) 463.

[150] Geoffrey Ma, 'Criticism of the Courts and Judges: Informed Criticism and Otherwise' (2018 Supreme Court of Queensland Oration, Queensland, 21 May 2018) § 24 <https://www.hkcfa.hk/en/documents/publications/speeches_articles/index.html> accessed 20 February 2022.; Baroness Chakrabarti CBE, 'Walking the Tightrope of Independence in a Constitutionally Illiterate World' in Jeremy Cooper (ed), *Being a Judge in the Modern World* (OUP

desirable for judges to, instead of shying away from such concerns behind a veil of following precedents *per se*, illustrate how they reason through the well-known elements of a proportionality test and the choices they have made therein. The ILPV serves as a practical and accessible tool for judges to demonstrate their critical awareness of reasoning through the choices that they make in adjudication and attempt to admit and defend the subjectivity therein at the same time. Its encouragement of frank admission of subjectivity and emphasis on the defensibility of legal choices made in the course of reasoning and adjudication serves to enhance the transparency of legal reasoning and explicate accessibly the very intelligibility of the law to the general public. That said, its inevitable downside is that it falls short of offering a panacea for individual or governmental dissatisfaction against adverse outcomes in proportionality assessments.

2016) 37, 42. An example of such a quick jump to conclusion may be found in the Government's hostile reaction to the declaration of incompatibility granted in *R (F) v Secretary of State for the Home Department* [2010] UKSC 17, (2011) 1 AC 331 against Part 2 of the Sexual Offences Act 2003 (i.e. the Sexual Offences Register).