Introduction

Proportionality (*Verhältnismäßigkeit*)[1] is a continental public law concept that originated in Germany and has been adopted both by the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR). It concerns the relationship between the ends of public action and the means, be they administrative or legislative, used to attain them and thereby informs and controls the implementation of public policy by administrative authorities. The proportionality principle specifies that measures adopted by public authorities should not exceed the limits of what is appropriate and necessary in order to achieve legitimate objectives in the public interest. When there is a choice between several appropriate measures, recourse should be made in accordance with the least onerous, and the disadvantages caused to individual citizens should not be disproportionate to the aims pursued. Simply put, administrative measures must not be more drastic than necessary for achieving the desired result. Therefore, the principle ensures substantive fairness in the exercise of any discretionary power. Its rationale is based on the idea of basic rights and individual freedoms so that if individual rights are to be taken seriously, then the state may only impose restrictions that are justified by a legitimate purpose and are absolutely necessary.[2]

Owing to the growth of administrative power over the last century, implementing proportionality has become a major challenge for the legal

1. Literal translation: relativity.

2. Nigel Foster and Satish Sule, *German Legal System and Laws* (4th edn, OUP 2010) 184–185.

systems of most economically (and politically) developed countries and regions, including the United Kingdom (UK) and Hong Kong. The modern administrative state undertakes tasks and manages programmes on an unprecedented scale to satisfy the needs of the complex societies in which we live. As the range of tasks they perform has increased, these administrations must adopt effective means of policy implementation to achieve their objectives since the justification for the very existence of public administration is to realise collective goals through programmes of state action.

To achieve these goals, executives have a number of different tools at their disposal, including the use of coercive and discretionary powers to collect and distribute wealth and limited resources for promoting the public good. In doing so, however, there is the potential for arbitrary or unfair action against individual citizens. This is largely because it is impossible for the administration, be it democratically elected or not, to fulfil social needs without interfering with individual interests owing to the commonly agreed principle that individual interests have to be subordinate to the collective good.

Although furthering public interest is the overriding aim of most administrations, public power, in particular discretionary power, should be reasonably exercised in the interest of the public as a whole and not in the interest of any individual or group of individuals alone. Following this principle will prevent private concerns from obstructing the overall mission. However, men, as James Madison once put it, may not always behave like angels,[3] and thus, unfettered discretion, even in the hands of the most compassionate administrator, tempts tyranny.[4] As Lord Acton put to Bishop Mandell Creighton in 1887, 'power tends to corrupt; absolute power corrupts absolutely'.[5] Even when administrators perform legitimate social functions without intending unjust enrichment for themselves or prejudice to others, they may still exercise power that may adversely affect the interests of individual citizens. These effects occur because an individual's behaviour is largely controlled by their role and situation,

3. Rabinder Singh, 'The Place of the Human Rights Act in a Democratic Society' in Jeffrey Jowell and Jonathan Cooper (eds), *Understanding Human Rights Principles* (Hart Publishing 2001) 199.

4. Jeffrey Jowell, 'Administrative Law' in Vernon Bogdanor (ed), *The British Constitution in the Twentieth Century* (OUP 2003) 373.

5. John Acton, *Essays on Freedom and Power* (The Beacon Press 1949) 364.

rather than their personal characteristics and traits. This phenomenon as well as their subordinates' obedience to follow orders, whether right or wrong, are reflected in the Stanford Prison Experiment and the Milgram Experiment, two psychological trials performed in the early 1960s and 1970s (see Chapter One).

Human nature being what it is, there is always a risk that a government may exceed the limits of its powers, betray the trust of people, or be incompetent. Therefore, it is necessary for people to be able to hold governments accountable. Although the supervision of the executive was traditionally under the hands of the legislature — Parliament in the UK and the Legislative Council (LegCo) in Hong Kong — this task has become more complicated than ever before because of the exposure of individuals to the growing governmental regulations that affect them. In parliamentary systems like that in the UK, although the legislature is supposed to hold the executive accountable, there has long been concern that this legislative supervision is ineffective because of the political bond between the government and the majority in Parliament. Moreover, Parliament in the UK has also been increasingly dominated by organised political parties, whereas the LegCo in Hong Kong is largely controlled by pro-Beijing government members. These attributes have significantly undermined the government's legislative capacity to provide adequate checks and balances on the executive.

Against this background, there have been indications that courts have taken on a compensatory role by acting as a substitute for this legislative oversight. That is, the courts have sought to check the executive branch via judicial review, by requiring the executive authorities to exercise their power fairly, reasonably, and consistently with a scheme that the UK Parliament or Hong Kong LegCo has prescribed in the enabling legislations. As most constitutional and human rights norms, be they civil and political rights or socio-economic rights, are not absolute and are subject to limitation, balancing, and regulation, the courts have, for the purpose of carrying out these obligations, developed principles to scrutinise the exercise of legislative and executive powers. Some of the typical tests or standards that have been developed include those that ask whether the powers have been exercised in a way that is reasonable, rational, and proportionate.

This book explores how proportionality can offer a more structured and intensive approach to scrutinise administrative decisions compared to the

traditional approaches currently in force in the UK and Hong Kong — namely, *Wednesbury* unreasonableness (i.e., a decision is unreasonable only when it contains something so absurd that no sensible person could ever dream that it lay within the powers of the authority)[6] and *GCHQ* irrationality (i.e., a decision is irrational when it is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it; based on a decision involving Government Communication Headquarters (GCHQ).[7] Compared to the proportionality principle, these two approaches have long been criticised to be too deferential to the administrative authorities because they hold that a court should not interfere with an executive decision unless the decision is so unreasonable or outrageous in its defiance of logic or accepted moral standards that no sensible person or reasonable authority would have come to it.[8]

Moreover, proportionality has also been adopted under European Union (EU) law via the European Communities Act 1972 (ECA 1972) (as at 31 January 2020, the day of Brexit)[9] and the European Convention on Human Rights (ECHR) and implemented in the UK through the enactment of the Human Rights Act 1998 (HRA 1998). It is also incorporated in the International Covenant on Civil and Political Rights (ICCPR) through the Bill of Rights Ordinance (BORO) and in the constitutional or legislative review adjudications in Hong Kong, thanks to the judges' consideration of jurisprudence from other common law jurisdictions as stipulated in the Basic Law.[10] Therefore, in view of the rise of the administrative state and its resulting growth in state activities and discretionary powers, there has been a growing appeal for proportionality to be fully recognised and adopted as a new ground of judicial review in both the UK and Hong Kong. It is believed that this principle could serve as a check-

6. *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All ER, [1948] 1 KB 223, 229 (CA) (Lord Greene MR).

7. *Council of Civil Service Unions v Minister for the Civil Service* [1983] UKHL 9, [1985] 1 AC 374, 410E (Lord Diplock).

8. Ibid., 410E. See also the *Wednesbury* case (N6) [1948] 1 KB 223, 229 (CA) (Lord Greene MR).

9. That said, I argue, in Chapter Seven of this book, that EU law and its institutional forces are still, and will, be able to exert some degree of influence on the UK's decision-making and its jurisprudence.

10. Basic Law, Art 84.

and-balance mechanism to save individual citizens or minorities from being exploited by the majoritarian government.

In common law jurisdictions, such as the UK and Hong Kong, the proportionality principle has not been well received in the context of judicial review applications challenging domestic laws and policies, particularly those challenging policy formulations (and their implementation) related to polycentric socio-economic rights issues. This is largely because many believe that the use of proportionality marks an undesirable shift in the constitutional role of courts and that judges are 'constitutionally un-qualified' and 'institutionally ill-equipped' owing to their lack of democratic mandate [11] and their lack of expertise, experience, etc.[12] to adjudicate on matters of social or economic policy traditionally decided by the executive branch. However, this principle is enshrined in the ECA 1972, in the ECHR (via the HRA 1998 in the UK), and in the ICCPR (via the BORO in Hong Kong), and is, coupled with other socio-economic rights as stated in the International Covenant on Economic, Social, and Cultural Rights (ICESCR), further entrenched in Hong Kong by the Basic Law.

As consistency of law is one of the elements under the rule of law that is, if being fulfilled, capable of guiding human behaviour,[13] there is no justification why all judicial review cases should not be assessed consistently. In the UK, there have been arguments that if the courts are to insist upon the strict division of legal tests between challenges based on EU law and human rights law, on one hand, and those based on domestic law, on the other, then an apparent difference in the legal protection of individuals is created, which is difficult to justify.[14] Similar arguments have been made in Hong Kong.[15] To provide consistent legal protection for individuals, EU law and human rights law have,

11. See, for example, *R v Secretary of State for the Home Department, ex p Brind* [1991] 696 (HL) 766–767.
12. Ibid.
13. Peter Wesley-Smith, *Constitutional and Administrative Law in Hong Kong* (Longman Asia 1995) 15.
14. *R v Secretary of State for the Home Department, ex p McQuillan* [1995] 4 All ER 400, 422h (Sedley J); Gordon Slynn, *European Law and the National Judge* in Butterworths Lectures 1991–1992 (Butterworths 1993) 27–28; Robert Thomas, 'Continental Principles in English Public Law' in Andrew Harding and Esin Örücü (eds), *Comparative Law in the 21st Century* (Kluwer 2002) 131.
15. Johannes Chan, 'Administrative Law' in Simon Young and Yash Ghai, *Hong Kong's Court of Final Appeal: The Development of the Law in China's Hong Kong* (CUP 2014) 438.

in reality, acted as a pressure on judges in the UK to develop proportionality as a general principle and thereby close the gap between domestic law and EU law and international human rights standards. The same argument also applies in Hong Kong, insofar as judges are authorised to consider the precedents of other common law jurisdictions.[16]

There have been various scholarly enquiries concerning proportionality in UK law, EU law, and the ECHR. There has also been much discussion about whether the proportionality principle should be recognised as an independent ground for judicial review in common law jurisdictions, such as the UK, or whether the terrain of substantive review should continue to be divided between the *Wednesbury* unreasonableness test, the *GCHQ* irrationality formula, and the proportionality principle, with the latter confined to rights-based cases and those concerning EU law.[17] Thus, this is not the first in-depth comparison of the case law of UK courts with that of the CJEU and the ECtHR, but it is the first to compare the case law of these entities with that of Hong Kong. Moreover, the aim of this book is to contribute to and further the debate concerning these topics. This book also aims to increase the awareness of administrative decision-makers of their legally bound obligations authorised by the legislature when discharging their public duties as a way to enhance their effectiveness and efficiency in policy making as well as its implementation. The topics addressed will ultimately help these policy-makers pay due respect to (and thereby protect the interests of) individuals and minorities.

16. Basic Law, Art 84.

17. Mark Elliott, 'The Human Rights Act 1998 and the Standard of Substantive Review' (2001) 60 *CLJ* 301; Michael Taggart, 'Reinventing Administrative Law' in Nicholas Bamforth and Peter Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart Publishing 2003) Ch. 12; Philip Joseph, *Constitutional and Administrative Law in New Zealand* (3rd edn, Brookers 2007) [21.7.5]; Michael Taggart, 'Proportionality, Defence, *Wednesbury*' (2008) *NZLR* 423; Murray Hunt, 'Against Bifurcation' in David Dyzenhaus, Murray Hunt, and Grant Huscroft (eds), *A Simple Common Lawyer — Essays in Honour of Michael Taggart* (Hart Publishing 2009) Ch. 6; Tom Hickman, *Public Law after the Human Rights Act* (Hart Publishing 2010) Ch. 9; Paul Craig, 'Proportionality, Rationality and Review' (2010) *NZLR* 265; Tom Hickman, 'Problems for Proportionality' (2010) *NZLR* 303; Jeff King, 'Proportionality: A Halfway House' (2010) *NZLR* 327; Dean Knight, 'Calibrating the Rainbow of Judicial Review: Recognizing Variable Intensity' (2010) *NZLR* 393; David Mullan, 'Proportionality — A Proportionate Response to an Emerging Crisis in Canadian Judicial Review Law?' (2010) *NZLR* 233; Paul Craig, *Administrative Law* (7th edn, Sweet & Maxwell 2012) 664–675.

Insofar as the judiciary is concerned, there has been a tendency for many judges in common law jurisdictions to refer to the government as being somehow removed from the courts, without acknowledging that the judiciary is in fact as much a part of government as the executive and legislature. This tendency has led to an 'exaggerated level of judicial respect' [18] towards the executive and legislature. If the courts continue in this manner, in the name of upholding the separation of powers, they will undermine the foundational rationale for the separation of powers, which prevents the over-accumulation of power in one governing body. As the concept of governance — a broader notion than government, whose principal elements include the constitution, the legislature, the executive, and the judiciary — involves the 'interaction between these formal institutions and those of civil society' [19] and corresponds to some traditional political theories, such as social contract theory, an idea of constitutional dialogue has emerged. This dialogue, as well as concomitant dialogic judicial review, the purpose of which is to encourage co-operative engagement amongst the different branches of government, including the judiciary, and people from different roles in civil society, needs to be assessed in the context of rights protection. In this regard, this book also contributes to these debates by recommending approaches the UK and Hong Kong courts should adopt if they are to fully recognise and adopt the proportionality principle in their jurisdictions. This book also attempts to show the importance of adopting a robust approach to enforce socio-economic rights and highlights how these rights, if properly interpreted and understood, will support collaboration between various branches of the government and the international community as they address the most fundamental interests of individuals.

Throughout this book, a functional comparative approach has been adopted to evaluate the extent to which proportionality has been integrated into UK and Hong Kong laws. This assessment is conducted by comparing the case laws of the CJEU and the ECtHR with those of the UK and Hong Kong courts. As the CJEU and the ECtHR introduced the proportionality principle at almost

18. Hugh Corder, 'Comparing Administrative Justice Across the Commonwealth: A First Scan' in Hugh Corder (ed), *Comparing Administrative Justice Across the Commonwealth* (JUTA 2008) 6.

19. Gavin Drewry, 'The Executive: Towards Accountable Government and Effective Governance?' in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (6th edn, OUP 2007) 189–190.

the same time as the UK and Hong Kong courts,[20] the jurisprudence of the former is used for the purpose of comparison. Further reasons for using the jurisprudence of the CJEU and the ECtHR arise from the duty on the UK courts to apply this principle when they are enforcing EU law as well as the ECHR and from their persuasive effect in Hong Kong courts. In this environment, it is necessary to examine whether the application of the proportionality principle as a matter of EU law and the ECHR has had any influence on domestic law, in both the UK and Hong Kong.

In **Chapter One**, I first examine how the growth of administrative power over the last century has resulted in the augmentation of state activities and of discretionary powers and how the simultaneously emerging civil society has responded to the increasing scale and complexity of modern government. Similar to Madison, I propose that human beings may not always behave like angels, and thus uncontrolled discretionary powers, even in the hands of the most compassionate administrator, tempt tyranny. In this chapter, I also highlight the need to regulate the growth of the executive authority and indicate that this need is indeed the underlying premise of a participatory democracy, particularly one that emphasises accountability and justification — from a 'culture of authority' to a 'culture of justification', as advocated by the late Etienne Mureinik. To achieve this, I believe the courts need to take on a compensatory role by acting as an alternative for this failing legislative oversight to, via judicial review, hold the executive accountable.

In **Chapter Two**, I examine the conceptual nature of proportionality, explore its application in different jurisdictions (both international and regional), trace its origin, and ascertain its methodologies. Parallel to the proportionality principle is the doctrine of margin of appreciation (which the CJEU and the ECtHR must grant to their Member States when judicially reviewing their decisions) and deference, discretionary area of judgment, etc. (which the domestic courts of the Member States must grant to administrative decision-makers and the

20. In this regard, Aharon Barak has provided a chart showing the migration of proportionality to different jurisdictions; see Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (CUP 2012) 181–183. However, Barak is wrong to state that the principle of proportionality migrated to Hong Kong in 1999. In fact, it migrated in 1991; see *R v Sin Yau Ming* (1991) 1 HKPLR 88 (CA), [1992] 1 HKCLR 127, 162–164.

legislature when judicially reviewing their policies and choices). Thus, these doctrines are discussed at length in this chapter.

In **Chapter Three**, I examine the basis of the *Wednesbury* formula (and its near-synonymous companion, *GCHQ* irrationality), as well as the rationale behind its development, the extent to which it has been fused with the proportionality principle, and its influence in Hong Kong. A comparative analysis between the pros and cons of the *Wednesbury* test and the proportionality analysis was conducted to determine whether the UK and Hong Kong have provided rubric for judicial review of irrationality in their administrative law. There have long been allegations that the full recognition of the proportionality principle would be incompatible with the distinction between appeal and review and that the courts are unelected and lack the expertise, experience, etc. required (i.e., they are constitutionally unqualified and institutionally ill-equipped) to adjudicate on matters concerning politically and economically sensitive disputes. This is especially true for polycentric socio-economic rights disputes, which involve prioritising and allocating scarce resources. As these issues affect the application of proportionality, their discussion in this chapter is essential to fully understand this principle.

In **Chapter Four**, I focus on the development of international and regional human rights in recent decades. This chapter includes a discussion of the evolution of socio-economic rights adjudication and the rejection of non-justiciability of socio-economic rights as well as the new tripartite theory of obligations — duties to avoid, protect, and aid — of the state and our evolving understanding of the separation of powers. I argue that these theories, when taken together, make the courts constitutionally and institutionally competent to deal with socio-economic rights issues.

In **Chapter Five** and **Chapter Six**, I examine the application of the proportionality principle by the CJEU and the ECtHR, respectively, to demonstrate how the principle has contributed to constructively controlling and guiding the EU (and its Member States) as well as signatories of the ECHR in the implementation of EU law and the ECHR, respectively. The case law survey presented here also provides an indication of what factors the CJEU and the ECtHR consider relevant when determining how strictly they should examine the challenged measures, what degree of justification should be required of

state authorities (be they legislative, administrative, or judicial), and when they should defer to the discretion of primary decision-makers. Recently, socio-economic rights have been treated as essential corollaries of civil and political rights (i.e., an integrated approach) and are protected through the expansive application of equality or non-discrimination provisions.[21] Thus, Chapter Six also examines compatibility of the ECtHR's jurisprudence with this trend.

In **Chapter Seven** and **Chapter Eight**, I examine the extent to which the principle of proportionality has been integrated into and re-formulated in the UK and Hong Kong, respectively. As proportionality has been applied in respect of directly effective EU law (via the ECA 1972) and of the ECHR (via the HRA 1998) in the UK and in respect of the ICCPR (via the BORO) and of the constitutional or legislative review adjudications as empowered by the Basic Law (effective from 1 July 1997) in Hong Kong, particular attention will be paid to these regimes. As European jurisprudence prefers to treat socio-economic rights as essential corollaries of civil and political rights and protect them with an integrated approach and through the expansive application of equality or non-discrimination provisions by imposing positive duties on state authorities, these two chapters also analyse how the principle has contributed to such realisation and explore the possible application of the principle in cases other than the above regimes. In Chapter Eight, particular attention is given to poverty and the level of social welfare provided, as well as the enforcement of socio-economic rights, in Hong Kong after the change of sovereignty in 1997. Unlike Britain, Hong Kong has been experiencing growth in 'legal mobilisation', in which its citizens, especially minorities and political dissidents, have started invoking their legal rights. They largely do this via litigations to defend or develop their rights against the government. Since 1997, this legal mobilisation has gained more traction, particularly in response to the lack of democratic development, resulting in civil disobedience movements as well as anti-government protests in 2014, 2016, and 2019.

In **Chapter Nine**, I provide a broader conclusion for my arguments. This chapter also includes a global assessment of how the UK and Hong Kong

21. Ida Koch, 'The Justiciability of Indivisible Human Rights' (2003) 2 *NJIL* 3, 25; Paul O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge 2012) 179.