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The Dialogue Between Public Law and Private Law in Vietnam Under the Migration of the Proportionality Doctrine to Asia

Nam Giang Do¹  and Dat T. Bui² 

¹University of Law, Vietnam National University, Hanoi, Vietnam and ²University of Law, Vietnam National University, Hanoi, Vietnam

Corresponding author: Dat T. Bui; Email: buitiendat2001@yahoo.com

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Abstract

Under the migration of the proportionality doctrine to Asia, the dialogue and interaction between public law and private law have deepened and become more fruitful. The proportionality doctrine, usually accompanied by a general human-rights-limitation clause in the constitution, has made human rights reasoning come into the making of private law more directly and extensively. The proportionality principle also equips the judiciary with an analytical tool to assess the constitutionality of the state's law or actions that limit the constitutional rights of involved parties.

This Article discusses the dialogue between public law and private law under the migration of the proportionality doctrine to several Asian jurisdictions, with a focus on Vietnam. The dialogue can be identified in three aspects: (i) dialogue as the impact of public law on private law; (ii) dialogue as the interaction between public law and private law; (iii) dialogue as the politico-legal interaction between lawmakers and courts. Among Asian jurisdictions, the Vietnamese legal system has arguably witnessed an inadvertent migration of the proportionality doctrine, and therefore provoking interesting and useful debates on the effect of constitutional rights in private law in both theoretical and practical aspects.

Keywords: Migration of proportionality; constitutionalization of private law; horizontal effect; dialogue between public law and private law; *ex-ante* proportionality review by the legislature; *ex-post* proportionality review by the judiciary

A. Introduction

Although the conceptual divide between public law and private law¹ is primarily theoretical and increasingly blurred, this differentiation is still helpful in several aspects. In terms of conceptualization, public law—constitutional law, administrative law, and criminal law—deals with public relations between the state and the individuals and between public authorities, while private law—civil law, commercial law, and labor law—addresses private relations between individuals. Regarding legal education and research, the differentiation between public law and private law creates two groups of legal areas, each with its own theories, values and ways of reasoning. In terms of rights, constitutional rights are among the foundational issues of public law.

¹See generally LAW COMMISSION OF CANADA, NEW PERSPECTIVES ON THE PUBLIC–PRIVATE DIVIDE (2003), <https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=6613b2bdea6eeb8c8a4428200e2232c0c9da11e2> (discussing the divide between public law and private law).

In contrast, private law has traditionally followed a separate conception of rights—such as personality rights—which is not necessarily based on constitutional rights.

Over the past seven decades—post-World War II era—we have witnessed a theoretical and practical interaction between public law and private law. With the rise of constitutionalism in the world, thoughts on constitutionalism and fundamental rights have penetrated into private law. The effect, application, and impact of constitutional rights in private relations—the horizontal effect of constitutional rights/the constitutionalization of private law²—have shown the increasingly closer relationship between private law and the constitution. Along with the trend of changing functions of the state,³ the state has been reducing its direct delivery of service. But the government has been increasingly expanding public law values—such as human rights—to the ambit of private law, as a way of guaranteeing that the private sphere should serve the public interests, along with private interests. The rise of the welfare state, such as in Germany, Italy, South Korea, etc., also supports this expansion. It is worth noting that the support of Asian cultures for a “total constitution”⁴ may be the foundation for the “totalizing effect”,⁵ which includes both the vertical effect and the horizontal effect of constitutional rights.⁶ This means that the Asian context is in favour of the notion of constitutional rights that have a “totalizing effect” in all areas of law—regardless of whether they are public law, private law, or hybrid public-private law.

Under the migration of the proportionality doctrine to Asia, the dialogue and interaction between public law and private law have deepened and become more fruitful. First, the proportionality doctrine has made human rights reasoning come into the making of private law more directly and extensively. The proportionality principle is often accompanied by a general human-rights-limitation clause—proportionality clause—in the constitution, which requests that the law-making process—including private law legislation—employ the *ex-ante* proportionality review of limitations on constitutional rights. Interestingly, the Vietnamese law has incorporated not only a general human-rights-limitation clause in the 2013 Constitution,⁷ but also a general civil-rights limitation clause in the Civil Code 2015.⁸ Second, the proportionality doctrine also equips the judiciary with an analytical tool to assess the constitutionality of the state’s law or actions that limit the constitutional rights of involved parties. Therefore, the proportionality analysis further fosters the dialogue between *ex-ante* proportionality review—conducted by the legislature and relevant stakeholders of the law-making process—and *ex-post* proportionality review—conducted by the judiciary. It can be seen that *ex-ante* proportionality review by the legislature typically reflects the ultimate goals of public interest values, while *ex-post* proportionality review by the court is often initiated to protect private rights and interests.

The legal discourse of several East Asian and Southeast Asian countries has shown that the topics of the effect of constitutional rights in private law and the application of the proportionality

²See generally Stephen Gardbaum, *The “Horizontal Effect” of Constitutional Rights*, 102 MICH. L. REV. 387 (2003); ANDRÁS SAJÓ & RENATA UITZ, *THE CONSTITUTION IN PRIVATE RELATIONS EXPANDING CONSTITUTIONALISM* (2005).

³See generally WORLD BANK GROUP, *WORLD DEVELOPMENT REPORT 1997: THE STATE IN A CHANGING WORLD* (1997), <https://hdl.handle.net/10986/5980>; WORLD BANK GROUP, *WORLD DEVELOPMENT REPORT 2017: GOVERNANCE AND THE LAW* (2017), <https://hdl.handle.net/10986/25880>.

⁴Mattias Kumm, *Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law*, 7 GERMAN L.J. 341, 344 (2006).

⁵Lord Philip Sales, Just. of the Sup. Ct. of the U.K., Cambridge Freshfields Lecture: Constitutional Values in the Common Law of Obligations (Mar. 10, 2023) (utilizing the phrase “totalizing effect”).

⁶WENCHEN CHANG, KEVIN YL TAN, LI-ANN THIO & JIUNN RONG YEH, *CONSTITUTIONALISM IN ASIA: CASES AND MATERIALS* 80 (2014).

⁷HIEU PHAP NUOC CONG HOA XA HOI CHU NGHIA VIET NAM [CONSTITUTION OF THE SOCIALIST REPUBLIC OF VIETNAM] Nov. 28, 2013, art. 14(2) (“Human rights and citizen’s rights shall only be restricted by law in necessary circumstances for the reasons of national defence, national security, social order and security, social morality, and public health.”).

⁸BO LUAT DAN SU [CIVIL CODE] art. 2(2) (Viet.) (“Civil rights may not be limited unless it is prescribed by a law in case of necessity for reasons of national defense, national security, social order and safety, social morality and community well-being.”).

principle in private law contexts have attracted inadequate attention.⁹ Put in a broader context, it can also be seen that the interaction between public law and private law in Asia has been under-explored and, therefore, deserves more scholarly consideration. In this context, this Article discusses the dialogue between public law and private law under the migration of the structured proportionality doctrine to a few jurisdictions—such as in South Korea, Hong Kong, and Taiwan—and even under the migration of the *ad hoc* proportionality to numerous systems—such as in Japan, Thailand, Malaysia and Indonesia—or a kind of proportionality-like analysis in Singapore and Vietnam. Among the general discussion on various Asian jurisdictions, the case of Vietnam is the focus of this Article. This is because there has been arguably an inadvertent migration of the proportionality doctrine to the Vietnamese legal system¹⁰—in both constitutional law and civil law—and therefore provoking interesting and useful debates on the effect of constitutional rights in private law in both theoretical and practical aspects.

The contribution and arguments of this study are manifested in parts of the Article as follows. After the Introduction, Section B explores the migration of the proportionality doctrine to Asia and its relevance to the horizontal effect of constitutional rights in private law. This section discusses models of the “migration” of the proportionality doctrine to several Asian jurisdictions and the relationship between the proportionality principle and the horizontal effect. Next, Section C offers an overview of the dialogue between public law and private law in the era of human rights around the world generally. This section also provides reflections on the dialogue between public law and private law in the migration of proportionality in Asia. The dialogue can be identified in three aspects: (i) dialogue as the “impact” of public law on private law; (ii) dialogue as the “interaction” between public law and private law; (iii) dialogue as the politico-legal “interaction” between lawmakers and courts. Then, Section D examines an interesting case study of Vietnam in the context of the dialogue and interaction of constitutional law and private law in the world and Asia.

B. The Migration of the Proportionality Doctrine to Asia and its Relevance to the Horizontal Effect of Constitutional Rights in Private Law

1. What is the “Migration” of the Proportionality?

According to comparative law scholarship, the influence of foreign constitutional doctrines and ideas on a legal system typically could be in the forms of legal transplantation, reception of law, diffusion of law, borrowing of law, etc. In the past two decades, the phenomenon of the “migration of constitutional ideas” has become “a new metaphor in comparative constitutional law.”¹¹ Arguably, the notions of transplantation, reception, diffusion, borrowing, and migration are intertwined to some extent. However, the notion of migration, as understood by Neil Walker, has some differences from the above notions:

Migration . . . is a helpfully ecumenical concept in the context of the inter-state movement of constitutional ideas. Unlike other terms current in the comparativist literature such as “borrowing”, or “transplant” or “cross-fertilization”, it presumes nothing about the attitudes of the giver or the recipient, or about the properties or fate of the legal objects transferred. Rather, as we shall develop in due course, it refers to all movements across systems, overt or covert, episodic or incremental, planned or evolved, initiated by giver or receiver, accepted or

⁹E.g., Hin Ting Liu & Joshua Chan, “Horizontal Effect” of the Hong Kong Basic Law, 45 COMMON L. WORLD REV. 101, 101 (2016) (“One area of Hong Kong law which has received surprisingly little attention is how far its human rights provisions reach into the private sphere. This issue is commonly known as ‘horizontal effect.’”).

¹⁰Dat T. Bui & Tien-Duc Nguyen, *The Inadvertent Migration of Proportionality and the Role of Ex-Ante Constitutional Review in the Vietnamese Lawmaking Process*, 13 THEORY & PRAC. LEGIS. 1, 9–14 (2024).

¹¹SUJIT CHOUDHRY, *THE MIGRATION OF CONSTITUTIONAL IDEAS* 1 (Sujit Choudhry ed., Cambridge Univ. Press 2006).

rejected, adopted or adapted, concerned with substantive doctrine or with institutional design or some more abstract or intangible constitutional sensibility or ethos.¹²

The migration of proportionality—among constitutional ideas generally—has been discussed mainly in the context of Europe, Israel, South Africa, Australia, and several Asian jurisdictions.¹³ The main reason for this migration is because proportionality is normative reasoning/argumentation on rights. As Carlos Bernal argues, in political philosophy, the “core idea underlying proportionality is that limitations on constitutional rights must not be excessive or go beyond what is necessary.”¹⁴ Therefore, proportionality is “normatively necessary for the adjudication of constitutional rights” and is a “normative justification for borrowing proportionality.”¹⁵

II. Models of the Migration of the Proportionality Doctrine to Asia

Scholars have identified three models of proportionality analysis applied by Asian courts: (i) structured proportionality—South Korea, Taiwan, Hong Kong; (ii) anemic and *ad hoc* proportionality—Japan, Thailand, Malaysia, Indonesia; (iii) doctrinal equivalents of proportionality—Bangladesh, Philippines.¹⁶ In contrast, Singapore is deemed to reject proportionality.¹⁷ It should be noted that, recently, there has been a phenomenon of *ex-ante* proportionality-like analysis in the Vietnamese lawmaking process.¹⁸ The migration of the proportionality principle to the Vietnamese constitutional law could be inadvertent,¹⁹ but, interestingly, under the support of the human-rights-limitation clause of the 2013 Constitution, this broad-brush form of proportionality analysis has been applicable in Vietnam.

III. Multi-level Migration of Proportionality

Legal scholarship tends to approach proportionality as a constitutional principle, a method of analysis, or a doctrine. For the case of Vietnam, it is useful to observe the migration of the proportionality in three levels: (i) human-rights-limitation clause—as a constitutional provision; (ii) proportionality analysis—as a constitutional principle; and (iii) proportionality doctrine—as a constitutional theory.

1. The Migration of the Human-Rights-Limitation Clause—As a Constitutional Provision

The setting of constitutional rights in the 2013 Vietnamese Constitution reflects a feature of the mixed constitution, which incorporates competing ideological frameworks—Confucianism, socialism, liberalism, and universalism.²⁰ In this context, the constitutionalization of a human-

¹²Neil Walker, *The Migration of Constitutional Ideas and the Migration of the Constitutional Idea: The Case of the EU*, in THE MIGRATION OF CONSTITUTIONAL IDEAS 316, 320 (Sujit Choudhry ed., 2006).

¹³See generally AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS (Doron Kalir trans., Cambridge Univ. Press 2012); Carlos Bernal Pulido, *The Migration of Proportionality Across Europe*, 11 N.Z. J. PUB. & INT'L L. 483 (2013) [hereinafter *Proportionality Across Europe*]; Carlos Bernal-Pulido, *The Migration of Proportionality to Australia*, 48 FED. L. REV. 288 (2020); PO JEN YAP, PROPORTIONALITY IN ASIA (Cambridge Univ. Press 2020); MORDECHAI KREMNITZER, PROPORTIONALITY IN ACTION: COMPARATIVE AND EMPIRICAL PERSPECTIVES ON THE JUDICIAL PRACTICE (Mordechai Kremnitzer, Talya Steiner & Andrej Lang eds., Cambridge Univ. Press 2020).

¹⁴*Proportionality Across Europe*, *supra* note 13, at 489.

¹⁵*Id.* at 488.

¹⁶YAP, *supra* note 13, at 18–26.

¹⁷*Id.* at 27.

¹⁸Bui & Nguyen, *supra* note 10, at 14–26.

¹⁹*Id.* at 9.

²⁰Ngoc Son Bui, *Vietnam's Mixed Constitution and Human Rights*, 16 L. & ETHICS HUM. RTS. 295, 309 (2022); Tien-Duc Nguyen & Pasquale Viola, *Constitutional Rights in Socialist East Asia*, 40 NORDIC J. HUM. RTS. 306, 315–16 (2022).

rights-limitation clause in Article 14(2)²¹ for the first time is a sign of the migration of the universalist constitutional paradigm, in which human rights protection is of top priority. Studies on the due process doctrine in Vietnam claim that the spirit of Article 14(2) of the 2013 Constitution, to some extent, embraces the notion of substantive due process, as theorized in the U.S. constitutional law.²² Through a comparative lens, this constitutional provision reflects a *general clause of human-right-limitation* under international human rights law such as the Universal Declaration of Human Rights—1948—and the International Covenant on Civil and Political Rights—1966. The clause can be arguably considered a *proportionality clause*—a manifestation of the proportionality doctrine. In Vietnamese legal culture, the explicit incorporation of the human-rights-limitation clause in the Constitution is a very important step for the recognition, application and development of the proportionality principle.

2. The Migration of the Proportionality Analysis—As a Constitutional Principle

The introduction of the human-rights-limitation clause, which is based on international human rights law, in the 2013 Vietnamese Constitution has *inadvertently* fostered the migration of the proportionality principle into Vietnamese constitutional law. The ordinary understanding of Article 14(2) focuses on preventing arbitrary restrictions on human rights by infra-legislative documents—in other words, regulations by administrative agencies—rather than a true *proportionality* clause. In this vein, as observed by Jack Tsen-Ta Lee, the constitutional phrase “citizens have the right . . . according to law,” used in the 1992 Vietnamese Constitution, could open the floodgate for excessive and arbitrary limitations on constitutional rights.²³ Lee suggested that the Vietnamese Constitution needs to guarantee the legitimacy and essence of limitations on basic rights and freedoms in a democratic society.²⁴ Drafters of the 2013 Constitution seemed to accept this proposal and borrowed ideas of limitation from foreign constitutions and international human rights instruments to design Article 14(2). This clause is deemed as a feature of universal constitutional design, a departure from the conception of “rights regulated by the state” in the socialist constitutional design.²⁵

The introduction of the rights limitation clause intended to serve several tasks and objectives. First, constitutional rights must only be limited by legislation—acts—of the National Assembly to prevent the arbitrary circumvention of rights that could be made by infra-legislation—regulations—from the administrative agencies. Second, the reasons for the limitation must be based on national defence, national security, social order and security, social morality, and public health. Third, the limitation on rights must be necessary—rather than “proportionate” in the expression of the proportionality doctrine.²⁶ Fourth, because Article 14(2) incorporates the human-rights-limitation clause from international human rights law into the Constitution, it demonstrates Vietnam’s commitment to human rights protection.

²¹HIẾN PHÁP NƯỚC CỘNG HÒA XÃ HỘI CHỦ NGHĨA VIỆT NAM [CONSTITUTION OF THE SOCIALIST REPUBLIC OF VIETNAM] Jan. 1, 2014, art. 14(2) (“Human rights and citizen’s rights shall only be restricted by law in necessary circumstances for the reasons of national defence, national security, social order and security, social morality, and public health.”).

²²See, e.g., Dat T. Bui, *A Quest for Due Process Doctrine in Vietnamese Law: from Soviet Legacy to Global Constitutionalism*, 9 CHINESE J. COMPAR. L. 178, 188–94 (2021).

²³Jack Tsen-Ta Lee, *The Doctrine of Proportionality in Interpreting Constitutional Rights: Comparison between Canada, the United Kingdom and Singapore and Implications for Vietnam* 355 (Institution of Econ. & Institution of Culture, Educ., Sci. & Tech. in the 1992 Vietnamese Constitution: Values and the Demand for Amendment [Che dinh kinh te va che dinh van hoa, giao duc, khoa hoc va cong nghe trong Hien phap Viet Nam 1992 – Nhung gia tri va nhu cau sua doi, bo sung], Conference Paper, 2012).

²⁴*Id.* at 358.

²⁵Bui, *supra* note 20, at 309.

²⁶The Assessment Report of the Housing Bill No. 03/BCTD-BTP [Bao cao tham tra Du an Luat Nha o, so 03/BCTD-BTP], at 6 (Jan. 6, 2023) (Viet.) (emphasizing these three requirements/criteria by highlighting some key words in Article 14(2): (i) “*luat*” (law); (ii) “*can thiet*” [necessary]; (iii) “*quoc phong, an ninh quoc gia, trat tu, an toan xa hoi, dao duc xa hoi, suc khoe cua cong dong*” [national defense, national security, social order and security, social morality, and public health]).

3. *The Migration of the Proportionality Doctrine—As a Constitutional Theory*

Although the general clause of human-right-limitation in Article 14(2) received extensive attention, the drafting of the 2013 Constitution saw elements of the proportionality analysis/principle—or more conceptually, the proportionality doctrine—to be little discussed. This means that while the constitution drafters wished to make Article 14(2) as a gatekeeper for preventing arbitrariness of human rights limitation and ensuring the constitutionality of legislation, they failed to envision the structured method of achieving those ends. In other words, the entrenchment of the human-right-limitation clause is a symbolic adherence to international human rights instruments, rather than a genuine interest in the proportionality doctrine. However, the manifestation of this provision is dynamic. After the 2013 Constitution came into effect, claims for preventing arbitrary limitations on human rights based on unreasonable, disproportionate, unconstitutional grounds have been gradually invoked by multiple actors in the quality assessment of bills.²⁷ Article 14(2) has been a lever provoking the discussion on the serious reception of the proportionality principle/doctrine into Vietnamese law.

IV. *The Proportionality Doctrine and the Horizontal Effect*

The official recognition of the effect of constitutional rights in private law is typically attached to jurisdictions accept the proportionality doctrine—European Court of Human Rights, Germany, South Africa, Hong Kong, etc. This phenomenon is understandable because the horizontal effect may be really effective when the proportionality consideration of the rights of private parties could play a role. This may also explain why the U.S. system, which employs the tier-based constitutional-rights review instead of proportionality, still relies on the state action doctrine rather than the *official* recognition of constitutional rights application in private relations.²⁸

C. *Reflections the Dialogue Between Public Law and Private Law Under the Migration of Proportionality*

1. *The Dialogue Between Public Law and Private Law in the Era of Human Rights*

1. *Human Rights Are the “Connecting Bridge” Between Public Law and Private law*

As noted in the Introduction, to some extent the “divide between the public and private spheres has been dwindling.”²⁹ However, this public law-private law divide is still meaningful in several aspects. These two areas of law usually offer different paradigms of conceptualization, theories, doctrines, reasoning, *et cetera*, but, in some parts we can see the exchange of theories and

²⁷See generally Dat T. Bui, *Hien phap hoa nguyen tac gioi han quyen con nguoi: can nhung chua du* [The Constitutionalization of the Principle on Human Rights Limitation: Necessary but Insufficient], LEGIS. STUD. J. 3 (2015); TUAN MINH NGUYEN ET AL., GIOI HAN CHINH DANG DOI VOI CAC QUYEN CON NGUOI, QUYEN CON DAN TRONG PHAP LUAT QUOC TE VA PHAP LUAT VIET NAM [LEGITIMATE LIMITATIONS ON HUMAN RIGHTS AND CITIZENSHIP IN INTERNATIONAL LAW AND VIETNAMESE LAW]s(Hong Duc Publ’g House 2015) [hereinafter LEGITIMATE]; GIANG LINH NGUYEN, CO SO LY LUAN VA THUC TIEN VE HAN CHE QUYEN CON NGUOI O VIET NAM HIEN NAY [THEORETICAL AND PRACTICAL FOUNDATIONS FOR HUMAN RIGHTS LIMITATION IN VIETNAM TODAY] (Soc. Sci. Publisher 2022) [hereinafter THEORETICAL].

²⁸See generally Mattias Kumm & Victor Ferreres Corneli, *What is So Special about Constitutional Rights in Private Litigation? A Comparative Analysis of the Function of State Action Requirements and Indirect Horizontal Effect*, in THE CONSTITUTION IN PRIVATE RELATIONS: EXPANDING CONSTITUTIONALISM 241, (András Sajó & Renata Uitz eds., 2005); see also Stephen Gardbaum, *Where the (State) Action is*, 4 INT’L J. CONST. L. 760, 773–74 (2006)

([I]ndirect effect was rejected in the U.S. because of its commitment to a more categorical mode of rights reasoning . . . [but in reality,] the United States is no less horizontal in its approach than most countries . . . [and] [f]ar from rejecting or limiting indirect horizontal effect, the United States actually adheres to its strong form. That is, all law—including private law statutes and court-made common law at issue in private litigation—is fully, equally, and directly subject to the Constitution.).

²⁹Liu & Chan, *supra* note 9, at 102.

reasoning as well as a common development trend between the two. Furthermore, the middle-ground or hybrid public-private laws such as labor law, land law, consumer protection law, and administrative litigation law obviously facilitate the public law-private law dialogue.

It can be argued that human rights are the “connecting bridge” between public law and private law.³⁰ The phenomenon of “constitutionalization of private law”³¹ best illustrates this argument. The entrenched recognition of the constitutionalization of private law in German constitutional law could be a current trend in numerous jurisdictions in the world. Indeed, it is well observed that:

The constitutionalization of private law is fostered by a conception of the *system of rights as an objective order of values*, and of constitutional rights not only as *subjective public rights* but also as *objective legal principles* in the terms of German constitutional case law. *The constitution becomes a normative blueprint for the whole society.*³²

A system of constitutional rights essentially facilitates the dialogue between public law and private law, for two reasons. First, it has been well accepted that in the age of global constitutionalism, “human rights provisions reach into the private sphere”³³ and this results in the “expansive effect of constitutional rights” in private law.³⁴ Second, numerous constitutional rights are relevant to both the public sphere and private relations—for example, the right to privacy and the right to freedom of expression. Research has explored the right to privacy and its relevance to freedom of expression, freedom of contract, “employees” and “employers” interests in labor relations, intellectual property law, tort law, et cetera.³⁵ Stefan Vogenauer claims that “privacy provides one of the most graphic examples of the so-called ‘constitutionalization’ of private law, the idea that the whole body of private law of many jurisdictions is increasingly informed by the respective constitution and its underlying values.”³⁶

D. The Horizontal Effect: A Revisited Discussion

The scholarly discussion on the constitutionalization of private law³⁷ has much relevance to the doctrines such as the horizontal effect of constitutional rights in private law,³⁸ positive obligations,³⁹ and state action.⁴⁰ Essentially, these reflect the relationship between constitutional rights and private law, or the constitution and private law.⁴¹ Tracing the seven-decade history of

³⁰Quan Van Nguyen, Nam Giang Do & Dat Tien Bui, *Hien phap va luat tu: Kinh nghiệm từ một số quốc gia châu Âu và gợi ý cho Việt Nam* [The Constitution and Private Law: Experiences from European Countries and Implications for Vietnam], VIET. J. LEGAL SCI. 87, 99 (2024).

³¹Kumm, *supra* note 4, at 344.

³²Marian Ahumada, *The Recurring Debate on the Horizontal Effect of Fundamental Rights. Constitutional Approaches*, in FUNDAMENTAL RIGHTS CHALLENGES: HORIZONTAL EFFECTIVENESS, RULE OF LAW AND MARGIN OF NATIONAL APPRECIATION 3, 9 (Cristina Izquierdo-Sans ed., 2021) (emphasis added).

³³Liu & Chan, *supra* note 9, at 101.

³⁴Ahumada, *supra* note 32, at 7.

³⁵See e.g., KATJA S. ZIEGLER, HUMAN RIGHTS AND PRIVATE LAW: PRIVACY AS AUTONOMY (Hart Publ’g 2007); Nam Giang Do & Khoi Trong Dao, *Tort Law Reform in Vietnam: Unveiling the Dialogue between the Courts and the Legislature*, 1 TORT L. REV. 210, 210–23 (2023) (examining tort law in Vietnam).

³⁶Stefan Vogenauer, *Foreword to HUMAN RIGHTS AND PRIVATE LAW: PRIVACY AS AUTONOMY* 5 (Katja S. Ziegler ed., Hart Publ’g 2007).

³⁷Kumm, *supra* note 4, at 344.

³⁸See generally Gardbaum, *supra* note 2.

³⁹See generally Malu Beijer, *The Limits of Fundamental Rights Protection by the EU: The Scope for the Development of Positive Obligations* (2017) (Ph.D. dissertation, Radboud University Nijmegen) (Intersentia).

⁴⁰Gardbaum, *supra* note 28, at 773–74.

⁴¹See generally ZIEGLER, *supra* note 35.

the horizontal effect research, we can see three waves of scholarly debate. The first wave happened in Germany in 1950s and 1960s. In this period, there was a demand for the adjustment of private law, which had been “largely developed in the 19th century,” to “the requirements modernity” in “an industrial mass society in which the state willy-nilly had acquired the responsibility for maintaining the appropriate equilibrium between liberal and social principles that is necessary for the thriving of a just society.”⁴² The second wave is the revisiting of the horizontal effect from two decades ago, mostly in the context of European countries, with a series of important academic contributions.⁴³ The third wave—the “recurring debate on the horizontal effect”—which has happened in the recent decade, is characterized by discussing new developments and challenges of the horizontal effect doctrine and its practice⁴⁴ as well as offering a closer look at the use of proportionality in private law cases.⁴⁵ In the third wave, research has begun to pay more attention to Asian jurisdictions such as Hong Kong,⁴⁶ Japan,⁴⁷ South Korea,⁴⁸ China,⁴⁹ and Vietnam.⁵⁰ The third wave would be a continuation to the “revival”⁵¹ of the horizontal effect of constitutional rights worldwide.

The use of numerous terminologies regarding this legal phenomenon is not always clear and even causes confusion.⁵² Recent research reveals that “[t]he eminently academic nature of this debate and its extension through time have led to the development a specific, specialized jargon” such as complicated “[t]erms like state action, *Drittwirkung* (or third-party effect), horizontal effect, optimization commands, duty to protect, constitutional torts, and pairs of opposites as direct vs. indirect effect, subjective public rights vs. order of objective values, or negative vs. positive rights.”⁵³ Many of these terms indeed reflect kinds of jargon⁵⁴ or even metaphor.⁵⁵

The most debated expression is “horizontal effect,” which results from a bipolar of the “vertical effect” and the “horizontal effect” of constitutional rights. Arguably, instead of the focus of this bipolar, it should be more helpful if the “horizontal effect” is conceptualized as the impact of the constitution—including constitutional rights and constitutional values—on private law.⁵⁶ It is accepted that “[c]ontemporary constitutionalism has regarded the expansive effect of fundamental rights beyond the classic sphere of vertical relations as inevitable in transitional processes.”⁵⁷

⁴²Ulrich Preuß, *The German Drittwirkung Doctrine and Its Socio-Political Background*, in *THE CONSTITUTION IN PRIVATE RELATIONS: EXPANDING CONSTITUTIONALISM* 23, 27–28 (András Sajó & Renata Uitz eds., 2005).

⁴³See generally DANIEL FRIEDMANN & DAPHNE BARAK-EREZ, *HUMAN RIGHTS IN PRIVATE LAW* (Hart Publ’g 2001); Gardbaum, *supra* note 2; SAJÓ & UITZ, *supra* note 2; ZIEGLER, *supra* note 35.

⁴⁴Ahumada, *supra* note 32, at 3, 9.

⁴⁵See generally Stephen Gardbaum, *Positive and Horizontal Rights: Proportionality’s Next Frontier or a Bridge Too Far?*, in *PROPORTIONALITY: NEW FRONTIERS, NEW CHALLENGES* 221 (Vicki C. Jackson & Mark Tushnet eds., 2017); FRANZ BAUER & BEN KÖHLER, *PROPORTIONALITY IN PRIVATE LAW* (Mohr Siebeck Tübingen ed., 2023).

⁴⁶See generally LIU & CHAN, *supra* note 9.

⁴⁷See generally Jun Shimizu, *The Historical Origins of the Horizontal Effect Problem in the United States and Japan: How the Reach of Constitutional Rights into the Private Sphere Became a Problem*, 70 AM. J. COMPAR. L. 780 (2022).

⁴⁸See generally Trevor T. W. Wan, *Constitutionalization of Happiness: A Global and Comparative Inquiry*, 24 GERMAN L.J. 1209 (2023).

⁴⁹See generally Alec Stone Sweet, Chong Bu & Ding Zhuo, *Breaching the Taboo? Constitutional Dimensions of the New Chinese Civil Code*, 18 ASIAN J. COMPAR. L. 319 (2023).

⁵⁰See generally Dat Tien Bui & Do Giang Nam, *The Horizontal Effect: Conceptualisation and Application of Constitutional Rights in Private Law*, 40 VNU J. SCI. 61 (2024).

⁵¹Renata Uitz, *Yet Another Revival of Horizontal Effect of Constitutional Rights: Why? And Why Now?—An Introduction*, in *THE CONSTITUTION IN PRIVATE RELATIONS: EXPANDING CONSTITUTIONALISM* 1, 1 (András Sajó & Renata Uitz eds., 2005).

⁵²See generally Halton Cheadle, *Third Party Effect in the South African Constitution*, in *THE CONSTITUTION IN PRIVATE RELATIONS: EXPANDING CONSTITUTIONALISM* 58 (András Sajó & Renata Uitz eds., 2005).

⁵³Ahumada, *supra* note 32, at 6.

⁵⁴*Id.*

⁵⁵See generally Michel Troper, *Who Needs a Third Party Effect Doctrine? – The Case of France*, in *THE CONSTITUTION IN PRIVATE RELATIONS: EXPANDING CONSTITUTIONALISM* 115, 118 (András Sajó & Renata Uitz eds., 2005).

⁵⁶Gardbaum, *supra* note 45, at 237.

⁵⁷Ahumada, *supra* note 32, at 9.

1. Three Fashions of the Dialogue Between Public Law and Private Law in the Age of Proportionality as a Key Feature of Global Constitutionalism

In the age of proportionality as a key feature of global constitutionalism,⁵⁸ the dialogue between public law and private law can be reflected in three fashions: (i) dialogue as the “impact” of public law on private law; (ii) dialogue as the “interaction” between public law and private law; (iii) dialogue as the politico-legal “interaction” between lawmakers and courts.

1. Dialogue as the “Impact” of Public Law on Private Law

The effect of constitutional rights and the impact of constitutional rights on relations between private actors is one of the important topics that attract scholarly attention around the world. Private law has always followed a separate mindset of rights, which is not necessarily related to the constitution. And with the rise of constitutionalism in the world, thinking about constitutionalism and fundamental rights has spilled over into private law. It can be seen that the modern history of the horizontal effect has more than 60 years of developments since the *Lüth* case⁵⁹ decided by the German Federal Constitutional Court in 1958.

Lüth is a symbolic case as it marked a theoretical and practical impact of public law on private law over the past seven decades. This impact also manifests the state’s increasing intervention in private life and private relations to fix the market’s shortcomings. Arguably, the changing function of state has supported positive obligations of the state to protect human rights and the expansive effect of fundamental rights into private law. Compared to the notion of classic liberal state, in the current era of regulatory state, the state has more regulations on private relations. As a result, the autonomy of private law relations cannot be absolute and private law must serve public interests and social justice. As Katja S. Ziegler claims,

“[w]hereas the concept of autonomy is more associated with the liberal state in the classic sense, this collection of papers shows that this is no longer the case. While retaining this meaning, it has acquired a further content more linked to ideas of social justice and substantive freedom which today one can include in the meaning of autonomy.”⁶⁰

The impact or effect of constitutional rights in private law seems to be a one-way influence of public law’s conceptualization and reasoning on fundamental rights on the ambit of private law. This impact may be manifested in four ways: (i) impact via scholarly discussion and legal scholarship; (ii) impact via lawmaking—*ex-ante* proportionality review of legislation; (iii) impact via constitutional review—*ex-post* proportionality review of legislation and regulations; (iv) impact via private law trials—where courts develop reasoning and make judgments by interpreting constitutional values and constitutional rights.

2. Dialogue as the “Interaction” Between Public Law and Private Law

From the traditional one-way influence of public law on private law over the past seven decades, we can witness the interaction between these two ambits of law in recent time. In the context of American administrative law, Cass R. Sunstein raised the issue of the so-called “privatization of public law,” where there has been “a revival of private-law ideas, coexisting with administrative regulation.”⁶¹ Very recently, the Chinese Civil Code 2020 shows an

⁵⁸Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT’L L. 72, 74 (2008).

⁵⁹BVerfGE, 1 BvR 400/51, Jan. 15, 1958, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1958/01/rs19580115_1bvr040051en.html (Ger.).

⁶⁰ZIEGLER, *supra* note 35, at 10.

⁶¹Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1481 (1988).

interesting phenomenon of the Civil Code as the amendment to the Constitution.⁶² This means that in special contexts, the change of private law may influence public law, regardless this change in Chinese civil law has been influenced by constitutionalism. We also see the consistency of the 2013 Vietnamese Constitution and the Vietnamese Civil Code 2015 in terms of the inclusion of the rights-limitation clauses—in other words, to some extent, they are proportionality clauses.

The embracement of the rights-limitation clause in both public law and private law could provoke two versions of proportionality analysis in constitutional law and in civil law. This also suggests reconsidering the relationship between fundamental rights in the constitution and the alleged non-fundamental rights in private law legislation—for example, the Civil Code. Not only that, we can also see the interaction between public law reasoning—such as proportionality, constitutional values, and principles—and private law one—such as personality rights and autonomy. A useful question can be raised here: How does private law reasoning interact with public law reasoning?

3. Dialogue as the Politico-legal “Interaction” Between Lawmakers and Courts—Constitutional Dialogue

The horizontal effect essentially triggers “not only the general understanding of the effect of rights in the constitutional system, but also to a large extent the distribution of tasks between the legislature and the judiciary.”⁶³ The current practices of the legislature and the judiciary in many jurisdictions suggest that proportionality analysis plays a key role in interpreting and reasoning about constitutional rights in private law. It is helpful to highlight the connection between the “direct applicability and immediate effect of constitutional provisions,” the “role of the legislature and the judiciary in interpreting and defining fundamental rights,” and the “guarantee of constitutional rights and remedies.”⁶⁴

Po Jen Yap noticeably claims that the proportionality analysis “provides the forum for a constitutional dialogue on rights to take place between courts and lawmakers.”⁶⁵ This also means that there is a politico-legal dialogue between *ex-ante* proportionality review by legislators—with a public law perspective—and *ex-post* proportionality review by courts in private law cases—with a mix of public law and private law perspectives. This dialogue may answer the question that Barak raises: “What is the rule where the components of proportionality are not satisfied at the time of enactment, but they are satisfied at the time the statute is examined in court?”⁶⁶

II. Proportionality and the Horizontal Effect: Challenges

In the practice of the courts in several countries, proportionality has been used in quite a noticeable percentage of cases.⁶⁷ Aharon Barak suggests that proportionality can be used in

⁶²Sweet et al., *supra* note 49, at 332–35.

⁶³Ahumada, *supra* note 32, at 5.

⁶⁴*Id.*

⁶⁵YAP, *supra* note 13, at 15.

⁶⁶Aharon Barak, *A Research Agenda for the Future*, in PROPORTIONALITY: NEW FRONTIERS, NEW CHALLENGES 322, 333 (Vicki C. Jackson & Mark Tushnet eds., 2017).

⁶⁷See Talya Steiner, *Comparative and Empirical Insights into Judicial Practice: Towards an Integrative Model of Proportionality*, in PROPORTIONALITY IN ACTION: COMPARATIVE AND EMPIRICAL PERSPECTIVES ON THE JUDICIAL PRACTICE 542, 608 (Talya Steiner, Andrej Lang & Mordechai Kremnitzer eds., 2020)

(“[In Israel,] proportionality is largely confined to the traditional domain of public law, with 89.5 per cent of proportionality cases dealing with public law . . . [In Germany and Poland,] public law also accounts for the majority of proportionality cases, with 58 and 52 per cent, respectively . . . [In Canada,] proportionality practice

both the vertical effect and the horizontal effect.⁶⁸ However, quite surprisingly, “the courts did not employ proportionality analysis in these landmark horizontal effect cases.”⁶⁹ This reality may explain the fact that the worldwide discussion on proportionality has focused extensively on public law cases and almost ignored private law cases. It is argued that there are five main reasons for the little use of proportionality analysis in private law cases: conceptualization,⁷⁰ normativity,⁷¹ lack of familiarity,⁷² inapplicability,⁷³ and redundancy.⁷⁴ The South African court has used the one-step “reasonableness” test instead of the proportionality test in private law cases. Therefore, Gardbaum suggests that “[f]raming the task as balancing the independent and separate values served by private law against the objective values of the constitution, and utilizing private law doctrines and channels to import the latter, is more helpful and systemically coherent than utilizing a limitation of constitutional rights analysis.”⁷⁵

E. The Dialogue and Interaction of Constitutional Law and Private Law in Vietnam: Debates and Comparative Perspectives

1. Vietnamese Version of “Total Constitution”: A Support for Direct or Indirect Horizontal Effect?

There might be six factors supporting the horizontal effect in Vietnam: (i) The theory of the socialist constitutional law supports the “total constitution” and the “totalizing effect” of constitutional rights; (ii) A legal principle: Constitutional rights are applicable when the Court examines and judges private disputes; (iii) International human rights law supports the horizontal effect; (iv) The 2013 Vietnamese Constitution and the Civil Code 2015 provide foundations for the horizontal effect of constitutional rights; (v) Constitutional values can be applied in private law adjudication; (vi) Asian constitutional culture supports the horizontal effect of constitutional rights.⁷⁶

Additionally, the first factor above has created a doctrine of positive constitutional obligations under the Constitution. The 2013 Constitution places obligations of human rights protection on

boasts a strikingly large share of criminal law cases (43 per cent) . . . [In South Africa,] the branch of law that draws most proportionality cases is private law (43 per cent).”).

⁶⁸Barak, *supra* note 66, at 334 (“[A] complete application of proportionality both where two constitutional rights clash (horizontal conflict) and where a constitutional right clashes with the public interest (vertical conflict) should be ensured.”).

⁶⁹Gardbaum, *supra* note 45, at 240.

⁷⁰*See id.* at 244

(“[P]roportionality is a relational concept, mostly limited to instrumental, means–end action and . . . not all positive (or indeed, horizontal) rights cases involve or assess this type of situation, especially where two duties conflict with each other. The root or core application of proportionality across these areas is to situations of *prima facie* prohibitions on government conduct, to things they ordinarily cannot do . . . and not what they must do.”).

⁷¹*See id.* at 244 (“Courts may sense that there is something affirmatively inappropriate about applying the basic structure of rights analysis under proportionality, conceived in the context of more conventional civil and political rights against the state, to certain protective duties and positive socio-economic rights.”).

⁷²*See id.* at 241 (“Precisely because these are newer rights issues, courts are relatively unfamiliar with them and so have not yet had the time to establish any standard approach.”).

⁷³*See id.* at 241 (“At least with respect to social and economic rights, the notion of a “minimum core” excludes the possibility of further limiting a right and so the standard framework for assessing them.”).

⁷⁴*See* KAI MÖLLER, THE GLOBAL MODEL OF CONSTITUTIONAL RIGHTS 179 (Oxford Univ. Press 2012) (“[P]roportionality is generally applied only with regard to negative civil and political rights in the vertical dimension.”).

⁷⁵Gardbaum, *supra* note 45, at 246.

⁷⁶Bui & Nam, *supra* note 50, at 68.

the State generally,⁷⁷ on the National Assembly,⁷⁸ on the Government,⁷⁹ on the People's Courts,⁸⁰ and on the People's Procuracies.⁸¹ This point is important as the doctrine of positive obligations is closely related to the doctrine of horizontal effect. As Stephen Gardbaum claims, the conceptualization of positive obligations has no overlap with direct horizontal effect, but it has "significant analytical and practical overlap" with and essentially a "source" of indirect horizontal effect.⁸² Thus, the recognition of positive obligations in the Vietnamese Constitution could understandably lead to the indirect horizontal effect.

Furthermore, the 2013 Constitution even goes further than positive obligations and indirect horizontal effect, as it confirms that "[e]veryone is obliged to respect others' rights"—Article 15(2)—and, "[t]he exercise of human rights and citizens' rights may not infringe upon national interests and others' rights and legitimate interests"—Article 15(4). These constitutional provisions, which to some extent are comparable to the horizontal effect provisions in the South African Constitution and the Indian Constitution, could be the foundation of the direct impact/effect of constitutional rights in private relations in Vietnam. The expressions in Article 15(2)(4) may be akin to the Asian culture's willingness to support the direct horizontal effect. As Chang and others comment on the duties of a "good citizen": "[C]ertain duties may be imposed either 'vertically' by the state on behalf of society, or *horizontally*, with *respect to the right of others*" and these expressions of constitutional duties may "blur ... the liberal public-private divide and extending the sphere of legitimate state concern."⁸³

It is also important to note that the 2013 Constitution for the first time recognizes the human-rights-limitation principle—proportionality principle⁸⁴—and the Civil Code 2015 echos with this constitutional spirit in the "recognition, respect for, protection and guarantee of civil rights" generally and in civil-rights limitation principle particularly.⁸⁵ Article 2 and Article 10 of the Civil Code make the confirmation as follows: (1) Article two—recognition, respect for, protection, and

⁷⁷HIEU PHAP NUOC CONG HOA XA HOI CHU NGHIA VIET NAM [CONSTITUTION OF THE SOCIALIST REPUBLIC OF VIETNAM] Nov. 28, 2013, art. 3

("The State shall guarantee and promote the People's right to mastery; recognize, respect, protect and guarantee human rights and citizens' rights; and pursue the goal of a prosperous people and a strong, democratic, equitable and civilized country, in which all people enjoy an abundant, free and happy life and are given conditions for their comprehensive development.").

⁷⁸*Id.* art. 70 ("The National Assembly has the following tasks and powers: 1. To make and amend the Constitution; to make and amend laws."); *see also* Act on Promulgation of Normative Legal Documents art. 4 (2015) (Viet.) (further clarifying that, under Article 15 of the Constitution, the National Assembly shall promulgate laws to prescribe "human rights, basic rights and obligations of citizens that must be prescribed by law according to the Constitution, restrictions on human rights and citizenship; crimes and punishments").

⁷⁹HIEU PHAP NUOC CONG HOA XA HOI CHU NGHIA VIET NAM [CONSTITUTION OF THE SOCIALIST REPUBLIC OF VIETNAM] Nov. 28, 2013, art. 3 ("The Government has the ... [power] [t]o protect the rights and interests of the State and society, human rights and citizens' rights; and to ensure social order and safety.").

⁸⁰*Id.* art. 102 ("The People's Courts have the duty to safeguard justice, human rights, citizens' rights, the socialist regime, the interests of the State, and the rights and legitimate interests of organizations and individuals.").

⁸¹*Id.* art. 107 ("The People's Procuracies have the duty to safeguard the law, human rights, citizens' rights, the socialist regime, the interests of the State, and the rights and legitimate interests of organizations and individuals, thus contributing to ensuring the strict and unified observance of the law.").

⁸²Gardbaum, *supra* note 28, at 768–69.

⁸³CHANG ET AL., *supra* note 6, at 80 (emphasis added).

⁸⁴HIEU PHAP NUOC CONG HOA XA HOI CHU NGHIA VIET NAM [CONSTITUTION OF THE SOCIALIST REPUBLIC OF VIETNAM] Nov. 28, 2013, art. 14

("[1] In the Socialist Republic of Vietnam, political, civic, economic, cultural and social human rights and citizen's rights are recognized, respected, protected, and guaranteed in concordance with the Constitution and the law. [2] Human rights and citizen's rights shall only be restricted in imperative circumstances for the reasons of national defence, national security, social order and security, social morality, and the health of the community.").

⁸⁵*See* GOVERNMENT OF VIETNAM, TO TRINH VE DU AN BO LUAT DAN SU SUA DOI [AMENDMENTS PROJECT: PROPOSAL REPORT FOR THE CIVIL CODE] NO. 287/TTr-CP, 9–10 (2014) (Viet.).

guarantee of civil rights; in the Socialist Republic of Vietnam, all civil rights shall be recognized, respected, protected and guaranteed in accordance with the Constitution and law; civil rights may not be limited unless it is prescribed by a law in case of necessity for reasons of national defense, national security, social order and safety, social morality, and community well-being; (2) Article Ten—Limitations on performance of civil rights; individuals and legal persons may not abuse their civil rights to cause damage to others, violate their obligations, or realize an illegal purpose; in case an individual or a legal person fails to comply with Clause 1 of this Article, the court or another competent agency may base itself on the characteristics and consequences of the violation to not protect a part or the whole of their rights, order compensation for any damage, or apply other sanctions as prescribed by a law.

From international experiences, these developments can be foundations for the horizontal effect of constitutional rights in Vietnamese law. In practice, rights-limitation clauses in the 2013 Constitution and the Civil Code 2015 could facilitate the dialogue between constitutional law and civil law, as analyzed in Section D (II) and Section D III).

II. Ex-Ante Proportionality Review: The Case Study of the Effects of the Human-Rights-Limitation Principle on the Reform of the Doctrine of the Illegality of Contract Under the Civil Code 2015

It is well-established that a legislative ideology of distinction between public law and private law exists in the law-making process in Vietnam. Constitutional rights have vertical effects in the area of public law: The exercise of state power is directly bound by fundamental rights. According to the spirit of Clause 2, Article 14 of the 2013 Constitution, all laws may only limit a fundamental right if they meet the constitutional requirement of “proportionality.” After a decade of discussion, it is well-established that the principle of proportionality means that (i) the statutory limitation to a fundamental right must serve a legitimate end, (ii) it must be suitable to achieve the desired end, (iii) it must be the least restrictive means of doing so, and (iv) it must be proportionate.⁸⁶

The more complicated issue arises when the making of norms is related to the area of private law—typically such as the Civil Code, or mixed legislation which bears the nature of both public law and private law—typically such as housing law. The question in this case is whether the legislature is bound by the provisions of Clause 2, Article 14, and must comply with the principle of proportionality when promulgating regulations limiting fundamental rights in the field of private law—an example being the debate about the bill on housing provisions on the time limit for apartment ownership.⁸⁷

Legislative practices in Vietnam in recent years illustrate a heterogeneous picture. On the one hand, the legislature has seriously considered the human-rights-limitation principle in Clause 2, Article 14 of the 2013 Constitution, when making private law’s norms in numerous legislative documents. The most typical example can be found in the debate on personality rights in the drafting process of the Civil Code 2015. Notably, a provision of the drafted Civil Code expressly stipulated that an individual name must not exceed twenty-five characters. However, invoking Clause 2, Article 14 of the 2013 Constitution, the legislature finally disapproved this proposal because the Constitution does not provide any legitimate reasons for limiting such personality rights.⁸⁸ On the other hand, this approach has yet to be consistently taken in the making process of other legislation. When assessing legal documents that have effects of limiting the right of freedom

⁸⁶LEGITIMATE, *supra* note 27, at 183; THEORETICAL, *supra* note 27, at 71.

⁸⁷BO XAY DUNG [MINISTRY OF CONSTRUCTION], *Quy định hạn số huu chung cư không vi hiến [Regulations on apartment ownership limits are not unconstitutional]* (Sept. 15 2022), <https://vnexpress.net/bo-xay-dung-quy-dinh-han-so-huu-chung-cukhong-vi-hien-4511645.html>.

⁸⁸*Quy định đặt họ và tên không được qua 25 chữ cái, có vi hiến? [Is the proposal of that a full name must not exceed 25 letters unconstitutional?]*, PHÁP LUẬT TP HCM ONLINE (May 12, 2015), <https://plo.vn/phap-luat/quy-dinh-dat-ho-ten-khong-duoc-qua-25-chu-cai-co-vi-hien-553222.html>.

to conduct business in Vietnam, the authors argued that the legislature had not paid due attention to applying the principle of proportionality and the spirit of Clause 2, Article 14 of the 2013 Constitution.⁸⁹

Against such background, one of the most typical cases signalling that the effects of the human rights limitation principle have reached the core of private law is the continuous debates in Vietnam on the recent reform of the doctrine of the illegality of contracts. As a classic doctrine of contract law, the existence of the doctrine of illegality as the limitation of the freedom of contract is a common phenomenon in countries throughout the world; however, the biggest difference among these countries lies in the scope and substance of “illegality.”⁹⁰ In Vietnam, shortly after the promulgation of the Civil Code 1995, a number of scholars have criticized the scope of the provisions on contracts tainted by illegality as too broad, which has led to the uncontrollable invalidation of contracts.⁹¹ In such a context, a new wave of expediting legal reform to expand the scope of the principle of freedom of contract has occurred and continued for about 20 years, which were marked by two milestone achievements: the Civil Code 2005 and the Civil Code 2015.

As compared to the Civil Code 1995 and Civil Code 2005, the Civil Code 2015 has been renovatively designed to minimize the limits of state intervention into the freedom of contract. To be more specific, the provisions on the purpose and content of the civil transactions—Point c Paragraph 1 Article 117—or civil transactions for infringement of a prohibition provided by legislative acts—Article 123—in the Civil Code 2015 use the word “legislative acts” (*luat*) instead of “law” (*phap luat*) as used in the previous Civil Codes 1995 and 2005. Paragraph 2 of Article 123 defines “[t]he prohibition provided by legislative acts as the provisions of legislative acts which do not permit a subject to perform specific acts.” Accordingly, in accordance with the Civil Code 2015, only when the legislative acts provide for a prohibition, the parties must comply and are not allowed to agree otherwise.⁹²

The analysis of the *travaux préparatoire* of the Civil Code 2015 revealed the reform of the provisions on illegality was justified by the constitutional law discourse. In particular, it is argued that such a provision was to institutionalize Paragraph 2 of Article 14, 2013 Constitution on limitation-human-right clause.⁹³ To put it differently, with the promulgation of the 2013 Constitution, the Civil Code 2005 must be amended—otherwise it would be unconstitutional.⁹⁴ However, this argument is not incontrovertible as Article 14(2) of the 2013 Constitution only applies for fundamental rights as prescribed by the Constitution, which is not the case for the right to freedom of contract. Having said that, the drafters of the Civil Code 2015 seemed to be convinced by the arguments as proposed by a number of scholars that the freedom of contract is a constituent element of the right of freedom to doing business, which is enshrined under Article 50 of the 2013 Constitution.⁹⁵ As analysed above, such a reform is praised as an important progress of applying the principle of the freedom of contract in Vietnam. The essence of such reform is to

⁸⁹See generally Nam Giang Do & Dat Tien Bui, *Hai lan song hien dinh quyen tu do kinh doanh o Viet Nam: Noi dung, y nghia va dinh huong bao ve quyen* [Two waves of Constitutionalization of the Right of Freedom to Conduct a Business in Vietnam: Features, Significance and Recommendations for Right Guarantee], 2 VIET. J. OF HUM. RTS. L. 30 (2021).

⁹⁰HEIN KÖTZ, EUROPEAN CONTRACT LAW 123 (Oxford Univ. Press 2nd ed. 2017).

⁹¹LIEN THE HOANG & GIAO DUC NGUYEN, BINH LUAN KHOA HOC BO LUAT DAN SU 1995, [SCIENTIFIC COMMENTARY ON THE 1995 CIVIL CODE] 268 (Nat'l Pol. Press 2001) (Viet.).

⁹²TUAN MINH NGUYEN, BINH LUAN KHOA HOC BO LUAT DAN SU NAM 2015 [SCIENTIFIC COMMENTARY ON THE 2015 CIVIL CODE OF VIETNAM] 166 (Jud. Press 2016).

⁹³TUNG TRUNG DINH, BINH LUAN KHOA HOC BO LUAT DAN SU NAM 2015 [SCIENTIFIC COMMENTARY ON THE 1995 CIVIL CODE OF VIETNAM] 233 (Tung Trung Dinh ed., Jud. Press 2021); Chien Quoc Ngo, *Ban ve quy dinh giao dich dan su vi pham dieu cam cua luat trong Bo luat Dan su nam 2015* [On the provisions of 2015 Civil Code on civil transaction infringing prohibition provided by legislative acts], 8 STATE & L. REV. 20–21 (2016).

⁹⁴This observation is supported by the authors' informal discussions with several scholars who were directly involved in the 2015 Civil Code drafting process. For privacy reasons, the informants remain anonymous.

⁹⁵DAI VAN DO, BINH LUAN KHOA HOC NHUNG DIEM MOI CUA BO LUAT DAN SU NAM 2015 [COMMENTARY ON NEW PROVISIONS OF THE 2015 CIVIL CODE] 145 (Hong Duc Press, 2nd ed. 2016) (Viet.).

limit the scope of the subjects that can intervene into the freedom of contract.⁹⁶ To be more specific, the law-making procedure at central level is carefully designed with different steps of assessment to ensure that the legislature make thorough consideration of the demands, purpose, and the suitable means to limit the freedom of contract. This is obviously much more trustworthy than the law-making process at local level. As a result, this would reduce remarkably the instances of promulgating a prohibition that arbitrarily limits the freedom of contract.⁹⁷

However, it must be accepted that this approach is not entirely convincing from a recent discourse on the nature of Article 14 of the 2013 Constitution. Some Vietnamese commentators contested that in essence, Paragraph 2, Article 14 of the Constitution focuses on the principle of proportionality when limiting human rights through a four-stage process: (i) legitimacy; (ii) rational connection; (iii) necessity; and (iv) balancing—proportionality in the narrow sense.⁹⁸ In that sense, even when a legal document that is not a legislative act but merely a regulation by the Government, for instance, can limit human rights as long as it complies with the doctrine of proportionality.⁹⁹ Echoing such a new way of interpretation, different Vietnamese courts in their decisions put forward the argument that, instead of a rigid approach based on a “pure formality” criteria that is infringement of a prohibition provided by legislative acts, a more flexible approach should be taken to put more focus on the substance criteria such as (i) the purpose of the legislature in regards to the prohibition provided by legislative acts; (ii) the awareness of the parties about illegality; and (iii) the degree of seriousness of the infringement.¹⁰⁰ In the recent draft Precedent No. 10/2024, the Supreme People’s Court signals its willingness to reconsider the effect of the contract infringing a prohibition provided by legislative acts, even though such prohibition is obviously provided under a regulation issued by the provincial authorities as far as they are delegated the power to implement law by the central government.¹⁰¹

Accordingly, it is evident that the spirit of the human rights limitation clause under constitutional law has migrated to the heart of Vietnamese private law. While the reception of the proportionality principle in the field of private law is still not consistent, its potential positive effects on facilitating the legislature’s “culture of justification” during the law-making process cannot be ruled out.¹⁰² In the current context of Vietnam, where judicial review is still absent, it is of utmost importance that the legislature consistently consider fundamental rights when making private law’s norms. The role of lawmakers is vital: Once lawmakers consider the horizontal effects of fundamental rights when drafting new private law provisions, constitutional values will permeate the field of private law most effectively. In this sense, fundamental rights function as instructions for the legislatures to realize constitutional values in private law legislation.

⁹⁶QUANG NHAT TRUONG, PHAP LUAT VE HOP DONG– CAC VAN DE PHAP LY CO BAN [CONTRACT LAW: FUNDAMENTAL LEGAL ISSUES] 242 (Dan tri Press 2020) (Viet.).

⁹⁷Ngo, *supra* note 93, at 20–21.

⁹⁸See generally GIANG LINH NGUYEN, CO SO LY LUAN VA THUC TIEN VE HAN CHE QUYEN CON NGUOI O VIET NAM HIEN NAY [THEORETICAL AND PRACTICAL FOUNDATIONS FOR HUMAN RIGHTS LIMITATION IN VIETNAM TODAY] (Soc. Sci. Publisher 2022) (Viet.); TUAN MINH NGUYEN ET AL., GIOI HAN CHINH DANG DOI VOI CAC QUYEN CON NGUOI, QUYEN CONG DAN TRONG PHAP LUAT QUOC TE VA PHAP LUAT VIET NAM [LEGITIMATE LIMITATIONS ON HUMAN RIGHTS, CITIZENS’ RIGHTS IN INTERNATIONAL LAW AND VIETNAMESE LAW] 184 (Hong Duc Publ’g House 2015) (Viet.).

⁹⁹Dat T. Bui, *Nguyen tac gioi han quyen con nguoi: Y nghia, nhu cau giai thich va dinh huong ap dung* [The Human-rights-limitation Principle: Significance, Interpretation and Application] 10 LEGIS. STUD. J. 13, 16 (2017) (Viet.).

¹⁰⁰Decision No. 06/2012/KDTM-GĐT [Judge’s Council, Sup. People’s Ct.] (May 30, 2012) (Viet.); Decision No. 02/2013/KDTM-PT [Da Nang People’s Ct.] (Jan. 18, 2013) (Viet.); see also 1 AN LE VIETNAM, PHAN TICH VA BINH GIAI [DUNG TIEN LUU, VIETNAMESE PRECEDENT – ANALYSIS AND COMMENTARY, VOLUME 1] 36 (Judicial Press 2023) (Viet.).

¹⁰¹See TOA AN NHAN DAN TOI CAO [CASE PRECEDENT WEBSITE], TRANG TIN DIEN TU VE AN LE [SUPREME PEOPLE’S COURT], <https://anle.toaan.gov.vn/webcenter/portal/anle/chitietanleduthao?dDocName=TAND332629> (last visited Oct. 10, 2024) (providing debate on recent draft Precedent No. 10/2024).

¹⁰²Moshe Cohen-Eliya & Iddo Porat, *Proportionality and the Culture of Justification*, 59 AM. J. COMPAR. L. 463, 463 (2011).

III. Ex-Post Proportionality Review: The Case Study of the Effect of the Human-Rights-Limitation Principle on the Validity of a Non-Competition Clause in Labor Contract

In addition to its reception in the *ex-ante* law-making process, the proportionality principle has also migrated to private law via *ex-post* review by the judiciary. Similarly to the development of judicial practice in other countries worldwide, the Vietnamese courts have recently faced this basic issue: “How and to what extent should the fundamental rights be invoked to resolve the private law’s disputes?”¹⁰³

In a recent judgment related to disputes about the validity of “non-competition clauses” in labor contracts, it seems to be the very first time in the history of Vietnamese courts that they are willing to discuss the relevance of a constitutional right in a private law case. In such a landmark case for the dialogue between public law and private law, the plaintiff invoked the right to the profession as stipulated under Article 35 of the 2013 Constitution to argue that such “non-competition clauses” would be invalid because they had the effect of depriving the plaintiff of her right to the profession.¹⁰⁴ Surprisingly, the Vietnamese courts have immediately accepted the plaintiff’s position and ruled that the “non-competition clauses” violated the above constitutional rights and, therefore, were absolutely invalid.¹⁰⁵

Based on the above analysis of paradigms of constitutional rights in private law, it seems to signal that numerous Vietnamese courts through these judgments adhere to the paradigm of *direct horizontal effect*.¹⁰⁶ In that sense, constitutional rights—specifically the right to profession—have a direct binding effect on private actors in labor relations. The Constitution thus directly secures the employee’s fundamental rights not only in a legal relationship with the State but also in its relationship with the employer—the other private party.¹⁰⁷

However, Vietnamese courts seem to have overlooked the fact that the employer also has the fundamental right—the right to freedom of contract and has a legitimate reason to include “non-competition clauses” into their employment contracts with the employee. Indeed, declaring the “non-competition clauses” clause invalid through merely invoking the constitutional right of employees will undoubtedly face criticism from scholars—who emphasized that it would unduly interfere with the right to freedom of contract of the parties.¹⁰⁸ The reasoning of these judgments cannot be justified for a simple reason that both parties are entitled to invoke their fundamental rights equally, and thus, balancing between conflicting equal interests would be required to find a proportionate result. Therefore, a fully direct application of fundamental rights without considering the principle of proportionality is unfeasible. In this context, although the Courts invoked constitutional rights to interfere in the contractual relationship between parties, they failed to apply the constitutional interpretation techniques to justify their verdict.

In the current context of Vietnam, a more feasible paradigm of influences of fundamental rights on Vietnamese private law would be the paradigm of indirect horizontal effect. As widely accepted in numerous countries, the “indirect horizontal effect” reflects the “impact of

¹⁰³THE INFLUENCE OF HUMAN RIGHTS AND BASIC RIGHTS IN PRIVATE LAW 8 (Verica Trstenjak & Petra Weingerl eds., Springer 2016); Ruochen Xi & Xiang Zhang, “Fundamental Rights and Private Law” in *China*, 22 CHINA J. OF HUM. RTS. 109, 110 (2023).

¹⁰⁴See Anh Hong Vu, *Bao dam quyen lao dong va viec lam trong Hien phap va phap luat Viet Nam [Ensuring the rights to labour and profession in the Constitution and Laws in Vietnam]*, 3 LEGIS. STUD. J. 35 (2024) (providing the historical development of the right to profession under Vietnamese law).

¹⁰⁵Judgment No. 03/2023/LĐ-PT [Thanh Hoa Prov. People’s Ct.] (Jan. 10, 2023) (Viet.).

¹⁰⁶Nguyen Le Thu, *Effect of Constitutional Rights on Labour Law in Some Countries and Vietnam*, 40 VNU J. SCI.: LEGAL STUD. 55 (2024).

¹⁰⁷*Id.* at 32.

¹⁰⁸Dai Van Do & Anh Ngoc Le, *Thoa thuan khong canh tranh sau khi cham dut hop dong lao dong – Kinh nghiệm của nước ngoài cho Việt Nam [Non-Compete Agreement after Terminating of Labour Contracts – Foreign Experiences for Vietnam]*, 9 VIET. J. OF LEGAL SCI. 61, 63 (2019).

constitutional rights and constitutional values on private law and private litigation.”¹⁰⁹ Stephen Gardbaum argues that “[t]o the extent that *constitutional rights modify pre-existing private law and thereby affect the outcome of private litigation*, this gives them an indirect effect on private actors as compared with the *ex ante* position.”¹¹⁰

In this paradigm, fundamental rights such as the right to profession present themselves to the judiciary as guiding principles or as a source of inspiration for interpreting and applying private law. In resolving a “hard case” in which private law has not provided a fair result, the judges, with their interpretative power, need to find a way to fill such normative gaps. The judges, thus, are under a duty to concretize constitutional value and thereby seek to provide proportionate outcomes in such disputes.

Accordingly, the paradigm of indirect horizontal effect implies that courts have a duty to develop private law in a way that takes constitutional values into account. The most critical significance of the indirect horizontal effect paradigm is that, on the one hand, it provides a mechanism to allow constitutional values to penetrate private law. On the other hand, it still leaves room for judges to strike a balance of interests between private parties and thus produce proportionate results in private law disputes.

F. Conclusion

Over the past three decades, the reception of proportionality in various Asian jurisdictions has been self-evident, in line with the global migration of the proportionality doctrine. While proportionality has attracted much research, attention, and interest, the topic of the horizontal effect of constitutional rights in private law has been under-explored, particularly in the Asian context. The global experience shows that proportionality and horizontal effect have a close connection, because the horizontal effect may be really effective when the proportionality consideration of the rights of private parties could play a role. The authors believe the migration of the proportionality doctrine to a legal system could facilitate dialogue between public law and private law in numerous ways. Notably, the proportionality analysis further fosters the dialogue between *ex-ante* proportionality review by the legislature and *ex-post* proportionality review by the judiciary.

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¹⁰⁹Gardbaum, *supra* note 45, at 237.

¹¹⁰*Id.* at 239 (emphasis added).