

Conflict of fundamental rights and the double proportionality test

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by the Hon Mr Justice Andrew Cheung PJ*

1. I would like to thank the Faculty of Law for the honour of inviting me to give this year's lecture in the Common Law Lecture Series.¹ It is a particular honour for me to do so as I first started my legal studies at this University exactly 39 years ago. And as you all know, the Law Faculty celebrates its 50th anniversary this year.

2. In the half a century past, one area of law that has witnessed tremendous development is the law of human rights. In Hong Kong, fundamental human rights are constitutionally guaranteed under the Basic Law, and via article 39 of the Basic Law, the Hong Kong Bill of Rights also. These fundamental rights may either be absolute or non-absolute. An absolute right cannot be restricted or otherwise interfered with. Such is the fundamental importance of the right that no justification of any derogation is permitted. The right to be free from torture, for example, is one such absolute right. However, many fundamental rights are non-absolute. The right to freedom of expression and the right to privacy, to take two examples, are non-absolute rights. For a non-absolute right, any restriction or interference will amount to an

* LLB (HKU), PCLL (HKU), LLM (Harv), Permanent Judge of the Hong Kong Court of Final Appeal.

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infringement of the right unless it can be justified. The courts in Hong Kong, in line with European and UK jurisprudence, have long adopted the proportionality test in determining whether a restriction or interference is justified in the case of a non-absolute right.

3. The proportionality test is a four-stage test. It requires the restriction in question to be justified in terms of four matters: first, the restriction must serve a legitimate aim. Second, there has to be a rational connection between the legitimate aim and the restriction. Third, the restriction must be no more than is necessary to achieve the legitimate aim. Fourth, the benefits of achieving the legitimate aim must not be disproportionate to the encroachment and inroads made into the fundamental right concerned, and in particular, the restriction must not impose an unacceptably harsh burden on the individual involved.

4. Unless it can be justified under the proportionality test, a restriction of a non-absolute right is an infringement of the right and carries with it the same consequence as a breach of an absolute right. An infringement may lead to the grant of one or more of the various public law remedies by the court, including damages under the Hong Kong Bill of Rights Ordinance.² Where statutory provisions are involved, an infringement may require the reading down of the provisions to make them rights-compatible, and if that cannot be achieved, the statutory provisions will be struck down as being unconstitutional.

5. It is fair to say that the proportionality test, as developed by case law over the years, has served society well in terms of the protection of fundamental human rights and also in terms of striking a fair balance between

² Cap 383.

individual freedoms and public interests. That said, it does not prevent us from taking a more critical look at the test, identifying its nature and recognizing its limitations.

6. First and foremost, it is important to note that by nature, the proportionality test is a test which aims to minimize the restriction on the fundamental right involved. Put another way, it is a test which seeks to maximize protection of the right where possible. The third stage of the test, namely, that the restriction on the fundamental right must be no more than is necessary to achieve the legitimate aim, sums up the nature of the test. That this is so may be explained by the fact that historically, the test has been developed and applied mostly in cases involving a contest between an individual and the state, with the individual challenging some governmental restriction on his fundamental right. In order to protect the individual against such restriction, particularly when the right in question involves civil liberties or political freedoms, and in order to accord to the individual the full measure of his right, an approach which seeks to minimize restrictions, and thus maximize protection of the right, as embodied by the proportionality test, naturally suits the court's purpose well.

7. That the proportionality test sounds well in theory and works satisfactorily in practice is aided by a further fact, namely, generally speaking, only individuals have fundamental rights. The state, or the government, or, for that matter, public authorities, do not. So almost by definition, in a litigation involving some fundamental right, it is almost always an individual suing or challenging the government or a public authority for alleged encroachment on his fundamental right. There is no question of the government or public authority making a claim of any fundamental right of its own. The court, naturally, looks at matters from the perspective of the individual, and asks, in

terms of the proportionality test, whether the government or public authority can justify the restriction on the individual's right.

8. This is, of course, not to say that the government or public authorities do not seek to justify a restriction by reference to policies, aims, objectives, public benefits, the common good of society, and so forth, although they do not possess any fundamental rights in their own right. Nor does it mean that the court does not take all this, when relevant and relied on, into account. As explained, under the proportionality test, the court requires the government to identify the legitimate aim which it seeks to achieve by means of the restriction in question, and subjects both the aim and the means to close scrutiny.

9. And as has been seen, the fourth stage of the proportionality test seeks to conduct a sort of cost-benefit analysis to ensure that the public benefits to be achieved are not disproportionate to the burden on the individual concerned in terms of the restriction on his fundamental right.

10. So far so good. However, the fact that the government or a public authority has no fundamental right of its own does not necessarily mean that the legitimate aim it seeks to achieve by means of the restriction in issue does not involve any fundamental rights of other individuals in society. Moreover, regardless of the legitimate aim that the government may choose to rely on to justify its restriction, the fact that the government does not enjoy any fundamental rights of its own and can only justify its restriction by reference to its legitimate aim does not necessarily mean that other people's fundamental rights are not directly or indirectly involved or otherwise affected by the outcome of the challenge against the restriction in question.

11. If and where the fundamental rights of other people are in one way or another involved in or affected by a piece of litigation between an individual and the government or a public authority concerning the restriction of the individual's fundamental right, questions arise as to whether the application of the proportionality test will produce a result that sufficiently takes into account and protects all fundamental rights involved. In other words, where rights of people other than the individual challenging the government's restriction are involved, the single application of the proportionality test may not achieve the right result that discharges the court's responsibility to protect all fundamental rights guaranteed under the Basic Law and the Hong Kong Bill of Rights – including, but not limited to the fundamental right of the individual suing the government or public authority for protection. The reason for this is simple. There are many fundamental rights guaranteed under the Basic Law and the Bill of Rights. They cover different subject matters, yet are applicable to all. Therefore, depending on the facts, and more particularly, depending on the restriction involved as well as the legitimate aim concerned, these rights, when engaged, may pull in different directions. The simple, single application of the proportionality test in protection of the fundamental right asserted by the individual suing may therefore only give an incomplete picture of what is at stake and may not necessarily yield a fair and just result that protects all of the competing fundamental rights affected.

12. A conflict of fundamental rights and the proper approach to resolve the conflict were brought to the forefront in the well-known case of *Campbell v MGN Ltd.*³ That case involved the supermodel Naomi Campbell, who was struggling with drug addiction at the material time. The defendant newspaper, the Mirror, published articles which disclosed her drug addiction and the fact

³ [2004] 2 AC 457.

that she was receiving therapy through a self-help group, gave details of group meetings she attended and showed photographs of her in a street as she was leaving a group meeting. Ms Campbell sought damages against the newspaper for the tort of breach of confidence. By a three-two majority, she won in the House of Lords. Although it was a private law case, and although the result was a split decision, the House of Lords essentially treated the case as one concerning a contest between Ms Campbell's right to privacy protected under article 8 of the European Convention of Human Rights and the freedom of expression enjoyed by the press guaranteed under article 10 of the European Convention. Both are non-absolute rights that can be restricted for the purpose of necessary protection of the rights of others. In such circumstances, the House of Lords recognized that the competition between these two fundamental rights could only be resolved by conducting a balancing exercise. As Lord Hope of Craighead, a member of the majority, observed:⁴

“The effect of these provisions [articles 8 and 10] is that the right to privacy which lies at the heart of an action for breach of confidence has to be balanced against the right of the media to impart information to the public. And the right of the media to impart information to the public has to be balanced in its turn against the respect that must be given to private life.”

13. Baroness Hale of Richmond, another member of the majority, was more detailed in terms of how the balancing exercise should be done: in paragraph 140 of the judgment, she pointed out that the application of the proportionality test was more straightforward when only one Convention right was in play. It was much less straightforward when two Convention rights were in play, and the proportionality of interfering with one had to be balanced against the proportionality of restricting the other. In the next paragraph, she said:

⁴ Paragraph 105.

“This involves looking first at the comparative importance of the actual rights being claimed in the individual case; then at the justifications for interfering with or restricting each of those rights; and applying the proportionality test to each.”

14. After conducting a balancing exercise, that is, looking at the dispute from the perspective of each of the two Convention rights engaged and balancing them against each other, the majority came down in favour of Ms Campbell, whereas the minority was in favour of the press.

15. As a matter of principle, this balancing test adopted in *Campbell* must be the test to be preferred when more than one fundamental right is in issue, particularly in the private law context. As Professor Hugh Collins of Oxford University pointed out:⁵

“The balancing exercise in private law often assumes a rather different character. This change results from the problem that in many cases both parties can claim that their fundamental rights are at stake. It is not a matter of assessing whether the government’s case for the need to override a right in the pursuit of a compelling public interest is established, but rather how to measure competing rights against each other. ...

.....

If the test of proportionality developed in public law is inappropriate in those cases where both parties to a private law dispute are protesting about an interference with their rights, what is the correct formulation of the test? The simple answer is that the rights need to be balanced against each other. But this answer is not as informative as one might hope. Given that there are competing interests, rights, and policies on both sides of the argument in a private law dispute, the correct approach appears to be a double proportionality test. In other words, the case for interference with the separate rights of each party needs to be assessed separately according to a test of proportionality. The legitimate aim that may justify such an interference with a fundamental right is likely in a private law context to include the protection of the fundamental right of the other party.”

16. Admittedly, Professor Collins was focusing on the horizontal application of fundamental rights between individuals in the private law sphere and indeed *Campbell* was at least in form, a private law case. But, importantly,

⁵ H Collins, “On the (In)compatibility of Human Rights Discourse and Private Law”, in H Micklitz (ed), *Constitutionalization of European Private Law* (OUP, 2014) pp 49-51.

the case pointed the way forward to the resolution of a contest between competing fundamental rights, even in a non-private law context.

17. That contest duly made its way to the House of Lords in the October of the same year as *Campbell* was decided, in the case of *Re S*.⁶ It was a non-private law case arising from a court order by a family judge prohibiting the identification of the name or school of a 5-year old boy and preventing any publication in a report of the criminal trial of the name or photograph of his mother or his deceased brother. In the criminal trial, the mother was charged with the murder of the infant's brother by poisoning. The gagging order was obviously made for the welfare and protection of the boy whose brother was murdered allegedly by their mother. A local newspaper and subsequently three national newspapers intervened to ask for a variation of the gagging order. The judge acceded to the application and relaxed the order. The boy's appeal to the Court of Appeal was dismissed, as was his appeal to the House of Lords. Lord Steyn, giving the lead judgment of the House, recognized that although the matter arose out of a court order, it involved a contest between the infant's right to privacy protected under article 8 of the European Convention, and the freedom of expression of the press guaranteed under article 10, in relation to both of which the state, and the courts as well, have a positive duty to protect under the Convention. Borrowing from the approach of the House in *Campbell*, Lord Steyn distilled four relevant principles for the resolution of this conflict of rights:⁷

“First, neither article has *as such* precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the

⁶ [2005] 1 AC 593.

⁷ Paragraph 17.

proportionality test must be applied to each. For convenience I will call this the ultimate balancing test.”

18. After balancing the competing article 8 and article 10 rights, the court resolved the conflict in favour of the press and dismissed the appeal accordingly.

19. This “ultimate balancing test” was elaborated on by Sir Mark Potter in *Re W*,⁸ in these terms:

“... each Article propounds a fundamental right which there is a pressing social need to protect. Equally, each Article qualifies the right it propounds so far as it may be lawful, necessary and proportionate to do so in order to accommodate the other. The exercise to be performed is one of parallel analysis in which the starting point is presumptive parity, in that neither Article has precedence over or “trumps” the other. The exercise of parallel analysis requires the court to examine the justification for interfering with each right and the issue of proportionality is to be considered in respect of each. It is not a mechanical exercise to be decided upon the basis of rival generalities. An intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary before the ultimate balancing test in terms of proportionality is carried out.”

20. With this realisation that the proportionality test cannot be simplistically applied to resolve a dispute when a fundamental right other than the one asserted by the individual suing is also involved, and that rather the ultimate balancing test involving the double application of the proportionality test to the rights involved respectively is the appropriate approach, it is necessary to ask in any given public law case, whether some competing fundamental rights other than the one relied on by the individual suing are engaged. In some cases, a conflict of competing fundamental rights is obvious. In others, the presence of some competing fundamental rights may be less noticeable. This could be due to a number of reasons.

⁸ [2005] EWHC 1564 (Fam), paragraph 53.

21. First, in our adversarial system of litigation, the court's perspective is inevitably shaped by the claim or challenge made by the individual against the government or the public authority concerned. The court naturally looks at matters from the perspective of the applicant, and focuses on the fundamental right that he relies on. The proportionality test only reinforces that approach by requiring the government to answer the claim by reference to a legitimate aim and the necessity of the means adopted. That is a very focused, intense approach which carries with it the risk of losing sight of other possible competing rights that may be involved in the case.⁹

22. Secondly, whilst one may expect the government or the public authority to rely on any applicable competing fundamental rights, not of itself because it does not have any, but of others, when it formulates the legitimate aim to justify the restriction under challenge pursuant to the proportionality test, that may not always be the case in practice. For instance, the government's or public authority's legitimate aim may or may not coincide with the competing fundamental right that may be involved. Moreover, the government or public authority may never have thought of the competing right in question at all, or may not have designed or articulated its policy and objective in terms of that competing right as such. Thus, for instance, in a systemic challenge against eligibility restrictions for some social welfare benefits on the basis of article 36 of the Basic Law which protects the right to social welfare, it may not be

⁹ In *Lai Man Lok v Director of Home Affairs* [2017] 3 HKLRD 338, para 48, Chow J perceptively pointed out:

"I pause to observe that there is sometimes a tendency, whenever a constitutional challenge is being raised by a person against a decision made by the Government or other public authorities, to focus solely on the constitutional rights of that person without regard, or sufficient regard, being paid to the rest of the public whose constitutional rights may well also be engaged and are equally entitled to protection. In a pluralistic society that Hong Kong is, the proper exercise of one's rights must have regard to the rights of others, including the right to hold different views. And when the court is being asked to judge whether there has been infringement or violation of that person's constitutional rights, particularly in the context of any proportionality analysis, it must take into account the rights of all members of the public and strike a proper balance amongst their competing rights."

immediately apparent that a legitimate aim which seeks to protect the financial well-being and long-term sustainability of the social welfare scheme concerned may involve other people's constitutional rights to social welfare, equally protected under article 36, in case the welfare scheme should run out of funds. Likewise, hidden behind a legitimate aim to maintain public order or safety may be other people's constitutional rights to freedom of peaceful assembly and freedom of expression, when the facts concern, say, the disruption by protesters or counter-protesters of a lawful public meeting of others.

23. Thirdly, sometimes the proper identification of all the competing rights involved in a case may simply be a difficult task.

24. Perhaps a good illustration of the difficulty that may be encountered in identifying the competing rights involved in a given dispute is provided by the case of *Preddy v Bull* or *Hall v Bull*.¹⁰ The facts of the case were simple enough. Mr and Mrs Bull owned and operated a small hotel in Cornwall. They were a devout Christian couple who sincerely believed that the only divinely ordained sexual relationship is that between a man and a woman within the bonds of matrimony. In the hotel they operated, therefore, double-bedded accommodation was only available to heterosexual married couples, whereas twin-bedded and single rooms would be let to any person regardless of marital status or sexual orientation.

25. Mr Preddy and Mr Hall were civil partners registered under the Civil Partnership Act 2004 (and the case took place at a time before same sex marriage was permitted in the UK). They made an on-line registration for a double-bedded room in Mr and Mrs Bull's hotel, and only found out the hotel's

¹⁰ [2013] 1 WLR 3741.

policy upon arrival. They were refused accommodation in the hotel and had to leave to find alternative accommodation at another one. With the support of the Equality and Human Rights Commission, they sued Mr and Mrs Bull for discrimination on the grounds of sexual orientation in contravention of regulations 3 and 4 of the Equality Act (Sexual Orientation) Regulations 2007 made pursuant to section 81(1) of the Equality Act 2006 or for indirect discrimination. The UK Supreme Court unanimously upheld their claim. The majority of the court held that this was a case of direct discrimination, and no justification would be entertained. As a fallback position, the majority took the view that even if this was a case of indirect discrimination capable of justification, the discrimination could not be justified. The minority considered the case to be one of unjustified indirect discrimination.

26. For our present purpose, the interest of this case lies in the fact that the Supreme Court recognized that the case involved a conflict of fundamental rights. First, there was the obvious right of Mr Preddy and Mr Hall against discrimination on the grounds of sexual orientation as protected under the Equality Act and regulations. On the other hand, there was the right, as recognized by the court, of Mr and Mrs Bull to manifest their religion, as protected under article 9.2 of the European Convention. For the reasons they gave, the court resolved the conflict of rights and came down in favour of the homosexual couple.

27. However, as has been pointed out, the case actually involved more than those two rights. For the homosexual couple, it can be said that their right to privacy under article 8 of the European Convention was engaged. Moreover, article 14 of the Convention is a right against discrimination. Together, they would give the homosexual couple a right under the Human Rights Act, which the court must take into account in considering Mr and Mrs Bull's argument that

in protection of their religious right, the relevant regulations had to be read down in order to be rights-compatible.

28. On the other hand, so far as Mr and Mrs Bull were concerned, apart from the right to manifest their religion under article 9.2 of the European Convention which their counsel relied heavily on in defence of the case, as Lady Hale later acknowledged in a highly illuminating talk entitled “Are we a Christian country? Religious freedom and the law” in the Oxfordshire High Sheriff’s Lecture 2014, what could also be at stake was the right to conscience protected under article 9.1 of the European Convention.

29. Pausing here, it should be explained that the right to freedom of conscience, a right protected also under article 32(1) of the Basic Law, is a distinct right from the right to freedom of religion, although they do overlap insofar as one’s conscience is moulded by one’s religious belief. In the landmark case of *Eweida v United Kingdom*¹¹ involving the right to manifest one’s religion at work, the 3rd applicant was a borough registrar of births, deaths and marriages. She refused to conduct civil partnership ceremonies after the coming into effect of the Civil Partnership Act 2004 on the grounds of her religious belief. She failed before the European Court on her claim of infringement of her right to manifest her religion protected under article 9.2 of the European Convention. In a strongly worded dissent, two of the Strasbourg judges argued that this was not so much a case of freedom of religious belief as one of freedom of conscience. In short, they took the view that the registrar could not be forced to do something, ie conduct the ceremonies, against her own conscience in the fear of losing her job.

¹¹ (2013) 57 EHRR 8.

30. More recently, in *Commodore of the Royal Bahamas Defence Force and others v Laramore*,¹² the Privy Council held that the Bahamas armed force could not infringe the freedom of conscience of a Muslim soldier by requiring him, at the risk of disciplinary proceedings, to remain present and take off his cap during the conduct of Christian prayers at colours parades.

31. The significance of the right to freedom of conscience, at least in the European context, is that it is an absolute right protected under article 9.1 of the European Convention, whereas the right to manifest one's religion is a non-absolute one protected under article 9.2 of the Convention. The former cannot be restricted, whereas the latter may be if the proportionality test is satisfied. In that sense, the right to freedom of conscience is a stronger right than the right to manifest one's religion.

32. Returning to the case of Mr and Mrs Bull, apart from their rights to manifest their religion which their counsel relied on and which the Supreme Court dealt with, were their protected rights to freedom of conscience not also engaged if they were forced to provide doubled-bedded accommodation to Mr Preddy and Mr Hall in order to be able to continue running their hotel in the UK lawfully?

33. In any event, it would seem that there was another fundamental right that may have been involved in their case. That is, the Christian couple may also have suffered indirect discrimination in terms of their social right to freedom to conduct their own business, a right protected under article 16 of the EU Charter of Fundamental Rights, on the grounds of their religion. In other words, they are disadvantaged as hotel keepers when compared with other hotel

¹² [2017] 1 WLR 2752.

keepers who are not of the Christian faith, as a result of the Equality regulations in question.

34. Finally, it has also been suggested that Mr and Mrs Bull's right to exclude unwelcome people from their private property, a right that I will presently come to when I examine a local case involving a conflict between that right and some other fundamental right, was also involved.¹³

35. It is not for me to suggest whether the result in *Preddy v Bull* would have been different had all these other rights been taken into account in the balancing exercise. My reference to the case is simply to illustrate my point that even in a fairly straightforward dispute, it may not always be an easy task to identify all the competing rights that may be involved.

36. When a case does involve competing fundamental rights, how should a court in Hong Kong resolve the dispute?

37. One is tempted to answer this by adopting immediately what Lord Steyn has said in *Re S*, that is, the ultimate balancing test or the double proportionality test. However, it has to be remembered that the first of Lord Steyn's four propositions states that neither of the two Convention rights involved in the case has as such precedence over the other. As Resolution 1165 of the Parliamentary Assembly of the Council of Europe (1998), paragraph 11, pointed out, the Convention rights to privacy and to freedom of expression are not in any hierarchical order, since they are of equal value in a democratic society. However, this may or may not be the position as regards other Convention rights. One example is where an absolute right is involved in a

¹³ Collins, *op cit*, p 52.

conflict of rights, in which case it must take precedence over other rights involved.

38. Moreover, so far as the position in Hong Kong is concerned, since everything stems from the Basic Law and even the entrenched constitutional status of the Hong Kong Bill of Rights is derived from article 39 of the Basic Law, whether the competing rights that may be involved in a given case stand in any hierarchal order to each other must be a matter of construction of the Basic Law and the Bill of Rights. Indeed, this was what the court in the local case of *HKSAR v Au Kwok Kuen*¹⁴ sought to find out. In that case, certain protesters against some government housing policy demonstrated outside the residential multi-storey building in which a high ranking government official resided. Some of them entered the common areas of the residential property without permission, seeking a meeting with the high ranking official and the presentation of a petition to him. Despite police intervention, they reached as far as the ground floor entrance to the residential block. Eventually, some of the protesters were charged with and convicted of taking part in an unlawful assembly, contrary to section 18(3) of the Public Order Ordinance.¹⁵ On appeal, counsel for the protesters argued that they were simply exercising the right of freedom of expression and demonstration, even when they were within the boundary of the private residential property. As their rights conflicted with the owners' rights to their residential property, a proportionality test or balancing exercise had to be conducted in order to determine the extent or limits of the individuals' rights of assembly and rights to freedom of expression whilst within the owners' private property. Counsel contended that this was a fact-sensitive exercise, which must depend on the entire circumstances of each individual case. No hard and fast rule could be laid down. On the facts of that

¹⁴ [2010] 3 HKLRD 371.

¹⁵ Cap 245.

case, counsel could not point to where physically within the private residential property must the protesters stop, in order not to overstep the legal boundary and render the exercise of their constitutional rights unlawful.

39. That argument did not find favour with the court. At paragraphs 21 and 22 of the judgment, the court observed:

“21. ... I do not believe that the law is as uncertain and the result as unpredictable as counsel’s arguments would suggest. Such a result is not only unsatisfactory from the perspective of a private residential owner, who would not be able to tell in advance which part of his property is free from intrusion by others in the exercise of their “lawful” constitutional right of assembly and right to freedom of expression, but it is also unsatisfactory to those seeking to exercise their constitutional rights. For they would be in danger of exceeding the legal limits of their constitutional rights once they enter into private residential premises.

22. I do not believe that this represents the state of the law.”

40. The court then went on to consider the various provisions of the Basic Law including in particular, article 29 which says that the homes and other premises of Hong Kong residents shall be inviolable. After considering relevant case law as well as local circumstances, the court concluded that the right of peaceful assembly and the right to freedom of expression stop, so far as physical or geographical limits are concerned, at the boundary of a private residential property belonging to others, in the absence of any permission to enter.

41. This is not the place to debate about whether the answer given by the court, as a matter of construction of the Basic Law, regarding the physical limits of the right to freedom of expression and demonstration, is correct or not. My present purpose of referring to the *Au* case is to point out that before one can apply the ultimate balancing test, a prior question that must be tackled is

whether the rights in question rank equally among themselves. If not, the ranking must first be taken into account.

42. Assuming that there is no ranking issue so that the competing rights are all of the same status and none of them “trumps” the others, for the reasons given above, the right approach to resolve a situation of competing rights would appear to be the ultimate balancing test, that is, the application of the proportionality test to each of the competing rights involved in turn.

43. Does it mean that it is wrong not to apply the ultimate balancing test or the double proportionality test, but simply the single proportionality test? It should be noted that in the UK, save for cases involving conflicts between the right to privacy and the freedom of the press where the ultimate balancing test was resorted to, in other cases of conflicts, the conflicts were either not recognised as such, or where they were so recognised, the conflicts were resolved by the application of the single proportionality test or some general balancing exercise. In Hong Kong, in *HKSAR v Fong Kwok Shan Christine*,¹⁶ a case involving an attempt to exercise one’s right to freedom of expression in government-owned premises, namely, the public gallery above a conference room where a subcommittee of the Legislative Council was in session, the Court of Final Appeal observed tentatively, without the benefit of full arguments, that where competing rights relating to private property were involved, very substantial weight had to be given in the proportionality balance in recognition of the property rights of the private property owners involved when applying the proportionality test.¹⁷ The court observed at paragraph 69:

“where private property is concerned, special elements involving the constitutional protections of private property and privacy in the home

¹⁶ (2017) 20 HKCFAR 425.

¹⁷ Paragraphs 58-61.

enter the equation, weighing heavily in favour of validating restricted access although this may be subject to rare possible exceptions.”

44. It must be accepted that at least in practice, with some modification, the single proportionality test may well be capable of resolving a conflict between competing fundamental rights, just as the ultimate balancing test does. This can be achieved, as suggested tentatively in the *Fong* case, by giving sufficient weight to the competing rights of others under the third and fourth stages of the proportionality test. After all, the concept of “no more than is necessary” is a rather elastic concept. In applying the single proportionality test, the court may, if the facts so warrant, conclude that it is necessary to restrict the fundamental right engaged in order to afford to others the full measure of their competing rights.

45. In my view, however, at least in a complicated case, an express recognition that the court, in the situation just described, is actually conducting a balancing exercise of the competing fundamental rights involved is the preferable approach. First, it acknowledges that the competing rights involved are all fundamental rights, equally deserving of full protection and minimum intervention. Applying the single proportionality test which by nature seeks only to give maximum protection to the fundamental right asserted by the individual suing would obscure the fact that other competing fundamental rights are also engaged which equally deserve maximum protection. This is all the more unsatisfactory when the application of the single proportionality test to one right but not others is entirely contingent upon the happenstance of the identity of the right-holder bringing the challenge. The effects of “preferential framing” – as the use of the single proportionality test to resolve a conflict of

rights has been called¹⁸ – may, at worst, lead to an unjustified skewing of judicial reasoning in favour of one of the competing rights involved and result in an incorrect outcome. At the very least, the impression that the court unfairly favours one right or one right-holder over others may be conveyed to the public at large, including those whose rights are or would be affected.

46. Secondly, applying the proportionality test to each of the competing rights in turn would ensure a principled and structured approach to conducting the balancing exercise. It would help ensure that in weighing the competing rights, no considerations that are relevant are omitted from the equation, and no questions that should be asked are not asked.

47. This latter reason is also a reason why the ultimate balancing test, involving the repeated application of the proportionality test to each of the rights concerned, is preferable to simply adopting a general balancing approach, including in particular a general balancing approach which essentially asks the question of whether a decision one way or the other would deprive the right-holder of the “essence” of his fundamental right. The former would provide the court with the necessary structure and discipline when conducting the balancing exercise, eliminating or reducing the risk of omitting from the balancing equation some relevant considerations, or of failing to ask the right questions in terms of the four stages involved in a proportionality test. It would also avoid the subjectiveness and intuitiveness that are necessarily involved in adopting a general balancing approach.

¹⁸ Smet, *Resolving Conflicts between Human Rights: The Judge's Dilemma* (Routledge, 2016) pp 35-39, 126-138.

48. One final observation worthy of mention is that in case the court is not satisfied, especially in a public law dispute with wide ramifications or of public importance, that all competing fundamental rights involved have been correctly identified or argued (even after taking into account submissions made by any interested parties), it is suggested that the Secretary for Justice in her role as the protector of public interest may be called upon to assist the court to identify the relevant competing rights and submit arguments in protection of them. Where, as is often the case, the respondent in the public law litigation is already represented by the Department of Justice, the Secretary for Justice would simply have to wear two hats. There are, of course, no restrictions against the Secretary for Justice instructing outside counsel to represent her so as to discharge her responsibility of protecting the public interest, where it is considered appropriate to do so.

49. Thank you very much for your attendance today.