



The principle of proportionality and the concept of margin of appreciation in human rights law

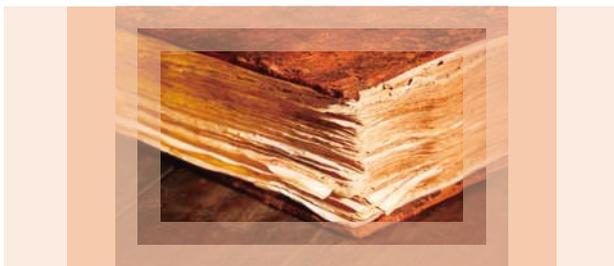
Proportionality has been described as meaning, in plain English, “You must not use a steam hammer to crack a nut, if a nutcracker would do.”¹ In fact, proportionality is a very ancient concept. The Code of Hammurabi, a Babylonian law code dating from about 1722 BC, incorporated the principle of “an eye for an eye, and a tooth for a tooth”. The Magna Carta and the English Bill of Rights of 1689 also embodied the principle of “proportional punishment” under which punishment must be proportional to the crime.

Origin

The notion of proportionality in modern times has its origin in the administrative law of Prussia at the end of the nineteenth century. That was well before the adoption of the International Bill of Human Rights after the Second World War. In the case of *Kreuzberg* decided in 1882, the Police invoked a provision which empowered them to adopt such measures “as are necessary for the maintenance of public order”. The Prussian Court held that in order to meet the principle

of necessity, the measures must not exceed in intensity what was required by the pursued objective. The necessity principle thus evolved into a proportionality principle which later became a constitutional principle binding on the legislature. The Federal Constitutional Court of Germany has since developed the proportionality principle with three elements: (i) Suitability (the measure should be suitable for achieving the desired objective); (ii) Necessity (a less restrictive means should be used if it is equally effective); and (iii) Proportionality in the strict sense (the measure should not be disproportionate to the objective).

The notion of proportionality is now part and parcel of human rights law. The European Court of Human Rights stated that “inherent in the whole of the [European Convention on Human Rights] is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights”². The achievement of such a balance necessarily requires considerations of proportionality.

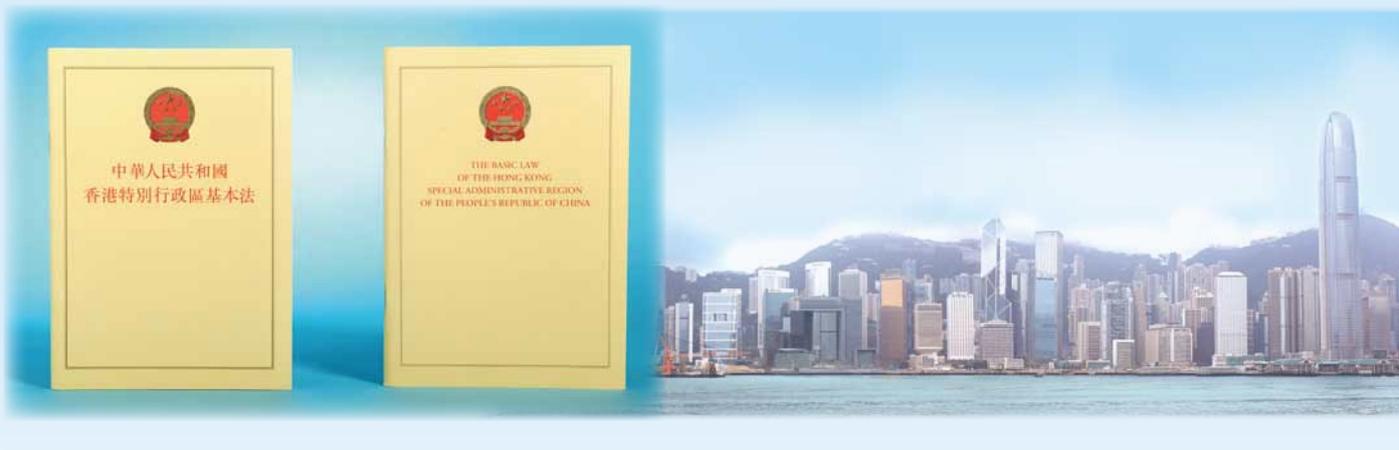


Proportionality and traditional grounds of review

There is an overlap between the traditional grounds of judicial review and the approach of proportionality but the intensity of review is

¹ *R v Goldstein* [1983] 1 WLR 151, 155.

² *Soering v United Kingdom* (1989) 11 EHRR 439.



greater under the latter. The proportionality test may require the reviewing court to assess the balance that the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. It may also require attention to be directed to the relative weight accorded to the competing interests and considerations.³ Where a case does not engage any fundamental rights under the BoR or the Basic Law, the traditional test of *Wednesbury* unreasonableness would apply⁴.

We first discuss proportionality in international human rights treaties, followed by a review of the Hong Kong cases on the proportionality principle and the related concept of “margin of appreciation” in human rights law.

ICCPR

Article 2(1) of the ICCPR imposes an obligation on States parties to respect the Covenant rights and to ensure them to all individuals in their territories. Where a State makes any restrictions on the Covenant rights, it must demonstrate their

necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right⁵.

ICESCR

Article 2(2) of the ICESCR obliges the HKSAR to guarantee that the rights enunciated in the Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Differential treatment based on prohibited grounds will not be viewed as discriminatory if the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality

³ *R v Secretary of State for the Home Department, ex parte Daly* [2001] 2 AC 532, at para. 27.

⁴ *R (British Civilian Internees – Far Eastern Region) v Secretary of State for Defence* [2003] EWCA Civ 473, para. 37.

⁵ UN Human Rights Committee, General Comment No. 31, para. 6.



between the aim sought to be realized and the measures and their effects.⁶ As far as the right to social security under Article 9 of the Covenant is concerned, qualifying conditions for social benefits must be reasonable, proportionate and transparent. Likewise, any restrictions on the right of non-nationals to access non-contributory schemes for income support, including a qualification period, must be proportionate and reasonable.⁷

Convention on the Rights of Persons with Disabilities

Under Article 5 of the Convention on the Rights of Persons with Disabilities, in order to promote equality and eliminate discrimination, States parties have an obligation to take all appropriate steps to ensure that reasonable accommodation is provided to persons with disabilities. "Reasonable accommodation" is defined in the Convention as meaning "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular

case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms".

Hong Kong cases

The CFA noted that the use of the proportionality principle in examining whether a restriction of a fundamental right is necessary in a democratic society is consistent with the approach to constitutional review in other jurisdictions. Although the terms in which the proportionality test is formulated may vary from one jurisdiction to another having regard to matters such as the text of the constitutional instrument in question and the legal history and tradition informing constitutional interpretation in the jurisdiction concerned, the nature of the proportionality principle is essentially the same across the jurisdictions.⁸ We now examine how Hong Kong courts apply proportionality in determining whether restrictions on rights and freedoms are permissible under the BoR and the Basic Law.

⁶ UN Committee on Economic, Social and Cultural Rights, General Comment No. 20, para. 13.
⁷ UN Committee on Economic, Social and Cultural Rights, General Comment No. 19, paras. 24 and 37.
⁸ *Leung Kwok Hung & Others v HKSAR* (2005) 8 HKCFAR 229, para. 34.



Right to freedom of expression

In *HKSAR v Ng Kung Siu and Another*,⁹ the issue before the CFA was whether the statutory provisions which criminalized desecration of the national flag and the regional flag were inconsistent with the guarantee of freedom of speech under BL 27 and freedom of expression under Article 16 of the BoR. The latter requires that any restrictions on the right to freedom of expression must be “necessary” for the prescribed purposes. After noting that the wider the restriction the more difficult it would be to justify, the CFA held that in applying the necessity test, the courts must consider “whether the restriction on the right to freedom of expression is proportionate to the aims sought to be achieved”. The requirement of necessity therefore involves

the application of a proportionality test. The CFA concluded that by criminalizing desecration of the national and regional flags, the statutory provisions constitute a limited restriction on the right to freedom of expression which is proportionate to the legitimate aims sought to be achieved, namely, the protection of the national flag as a unique symbol of the Nation and the regional flag as a unique symbol of the HKSAR. The Court also held in *Chan Hei Ling Helen v Medical Council of Hong Kong* that the proportionality test does not require that the least possible intrusive means of attaining the objective be searched out and adopted as long as it is “from the range of means which impairs [the right] as little as is reasonably possible”.¹⁰

⁹ (1999) 2 HKCFAR 442.

¹⁰ [2009] 4 HKLRD 174, para. 52; citing *Attorney General of Hong Kong v Lee Kwong Kut* [1993] AC 951 at 972D.



Right of peaceful assembly

In *Leung Kwok Hung & Others v HKSAR*,¹¹ the CFA had to consider whether the restrictions on the right of peaceful assembly in the Public Order Ordinance (Cap. 245) were consistent with Article 17 of the BoR which requires that any restrictions must be “necessary in a democratic society” for a prescribed purpose. As the legitimate purposes that may be pursued by any restrictions on the right had been specified in Article 17, the Court held that the proportionality test should be formulated in these terms: “(a) the restriction must be rationally connected with one or more of the legitimate purposes; and (b) the means used to impair the right of peaceful assembly must be no more than is necessary to accomplish the legitimate purpose in question”. The Court concluded that the Commissioner of Police’s statutory discretion to restrict the right of peaceful assembly for the purpose of “public order” satisfied the proportionality test and therefore the necessity requirement of Article 17.

It is interesting to note that the CFA observed that the proportionality test may incorporate an extra requirement, namely, “whether the objective is sufficiently important to justify limiting a

fundamental right”. This extra requirement would be appropriate if the relevant constitutional document prescribes only the general formula of what is reasonably justifiable in a democratic society without specifying the permissible purposes for which a restriction could be imposed. It is unnecessary to consider this requirement if the legitimate purposes for which a restriction may be imposed are set out in the terms of the fundamental right in question.

Right to equality

In *Secretary for Justice v Yau Yuk Lung*,¹² the CFA applied the proportionality test propounded in *Leung Kwok Hung* to determine whether certain offences created by the Crimes Ordinance (Cap. 200) were discriminatory in violation of the right to equality guaranteed by BL 25 and Articles 1 and 22 of the BoR. The Court held that in general, the law should usually accord identical treatment to comparable situations. However, the guarantee of equality before the law does not invariably require exact equality. Differences in legal treatment may be justified for good reason. In order for differential treatment to be justified, it must be shown that: (i) the difference in treatment pursues

¹¹ (2005) 8 HKCFAR 229.

¹² (2007) 10 HKCFAR 335.

a legitimate aim; (ii) the difference in treatment is rationally connected to the legitimate aim; and (iii) the difference in treatment is no more than is necessary to accomplish the legitimate aim. For any aim to be legitimate, a genuine need for such difference must be established. That need cannot be established from the mere act of legislative enactment.

The Court held that the legislature was entitled to decide whether it was necessary to enact a specific criminal offence to protect the community against sexual conduct in public which outraged public decency. But in legislating for such a specific offence, it could not do so in a discriminatory manner. It concluded that section 118F(1) of the Crimes Ordinance was discriminatory as it only criminalized homosexual buggery otherwise than in private but did not criminalize heterosexuals for the same or comparable conduct when there was no genuine need for the differential treatment.

Right to privacy

In *HKSAR v Lam Hon Kwok Popy*,¹³ the CA examined whether the surreptitious recording of a suspect's conversations with an undercover officer was in violation of his right to privacy under Article 14 of the BoR and BL 30. Cheung JA held that the principle of proportionality requires that in considering whether certain acts infringe the law, the Court must also consider other relevant factors, such as the content of the secret recording, the purpose of the privacy infringement (e.g. whether the Government is required to conduct investigation and whether other methods of investigation are inappropriate) and whether the method of investigation is done in accordance

with the law.

The Interception of Communications and Surveillance Ordinance (Cap. 589) now requires that any interception or covert surveillance sought to be carried out by a law enforcement agency must be necessary for, and proportionate to, the desired purpose upon: (i) balancing the immediacy and gravity of the serious crime to be prevented or detected and the value of the information likely to be obtained against the intrusiveness of the interception or covert surveillance; and (ii) considering whether the desired purpose can reasonably be furthered by other less intrusive means.



Right to vote and to be elected

Article 21(b) of the BoR provides that every permanent resident has the right, without unreasonable restrictions, to vote and to be elected at periodic elections. The courts held that it is appropriate to apply the proportionality test in determining whether a restriction on the right is reasonable. The test set out in *Lau San Ching v Apollonia Liu* is as follows: (i) what objectives the restrictions are to be achieved; (ii) whether there is a rational connection between the objectives and the means or restrictions employed; and

¹³ CACC 528/2004, 21 July 2006.



(iii) whether the restrictions are proportionate responses to the achievement of the legitimate objectives.¹⁴ Applying this test, the Court held that the requirement of ten years' ordinary residence in Hong Kong preceding the date of nomination for election constituted an unreasonable restriction on the right to be elected in a District Board election.

The above test was also applied by the Court in *Chan Kin Sum v Secretary for Justice* in deciding that the general, automatic and indiscriminate restrictions on the prisoners' right to vote and to register as an elector could not be justified and were unreasonable for the purposes of Article 21(b) of the BoR.¹⁵ The Court noted that the restrictions drew no distinction as to the type, nature or seriousness of different offences, the length of custodial sentences and the stage of completion of the terms of imprisonment, and had no regard to the degree of culpability save to the extent that the offence in question merited imprisonment or a suspended sentence.

Right to be presumed innocent

The right to be presumed innocent until proved guilty is guaranteed by BL 87(2) and Article 11(1) of the BoR. Where an offence-creating provision derogates from the presumption of innocence by reversing the onus of proof onto the accused, the Court will consider whether the derogation can be justified according to the test set out by the CFA in *HKSAR v Lam Kwong Wai & Another*, namely: (i) whether the derogation is rationally connected

with the pursuit of a legitimate societal aim; and (ii) whether the means employed, the imposition of the reverse legal burden, are no more than is necessary to achieve that legitimate aim.¹⁶ In *Lam Kwong Wai*, the respondents contended that section 20(3)(c) of the Firearms and Ammunition Ordinance (Cap. 238), by placing the legal burden of proof on the accused, was inconsistent with the presumption of innocence. The CFA held that since imposing an evidential burden on the accused would have been sufficient to enable the prosecution to prove a case of being in possession of an imitation firearm for an unlawful purpose without being exposed to the degree of difficulty in proving the purpose of the accused's possession, the reverse onus was disproportionate to a legitimate societal aim even though it was rationally connected with the pursuit of that aim.¹⁷



Right to raise a family freely

In *Li Nim Han v Director of Immigration*,¹⁸ the first applicant contended that the right to raise a family freely guaranteed by BL 37 gave her a right to insist on the Director of Immigration exercising his

¹⁴ (1995) 5 HKPLR 23, para. 67.

¹⁵ [2009] 2 HKLRD 166.

¹⁶ [2006] 3 HKLRD 808, para. 40; applying the formulation in *Leung Kwok Hung & Others v HKSAR* above.

¹⁷ An evidential burden requires only that the defendant must adduce sufficient evidence to raise an issue before it has to be determined as one of the facts in the case. The defendant need only raise a reasonable doubt about his guilt.

¹⁸ HCAL 36/2011, 14 November 2011.



discretion having regard and respect for her family life and that she should not be removed from Hong Kong unless the removal was proportionate, citing the proportionality test adopted by the English courts in immigration cases involving the right to respect for family life under Article 8 of the European Convention on Human Rights.

The Court held that in light of the exception for immigration legislation in section 11 of the Hong Kong Bill of Rights Ordinance (Cap. 383) and the immigration reservations to the ICCPR, the English proportionality approach cannot be incorporated into Hong Kong in a wholesale manner and more weight should be given to the community's interest in maintaining tight immigration control. The Court cautioned that the difference between the situation in Hong Kong and that in the United Kingdom must be borne in mind when one considers whether English cases based on European jurisprudence on immigration matters should be applied in Hong Kong.¹⁹

Concept of Margin of Appreciation

In applying the proportionality principle, the Hong Kong courts have also adopted the concept of margin of appreciation in European jurisprudence which recognizes that national courts are in a

better position than international courts to assess local needs, values and traditions. The concept is both an interpretive obligation to respect domestic cultural traditions and values when considering the scope and meaning of human rights, and a standard of judicial review used when enforcing human rights protections.

The concept is applicable in the domestic context as difficult choices may have to be made by the Executive or the Legislature between the rights of the individual and the needs of society. The Executive and the Legislature are sometimes better placed than the judiciary in assessing the needs of society and making difficult choices between competing considerations, particularly if the constitutional document requires a balance to be struck and the issues involve questions of socio-economic policy. Its use can also be justified by the doctrine of legislative supremacy under which the courts recognize that there is an area of judgement within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with human rights.

The CFA discussed the concept of margin of appreciation in some detail in *Fok Chun Wa &*

¹⁹ Above, paras. 44-47.



Anor v Hospital Authority & Anor.²⁰ It noted that the concept reflects the different constitutional roles of the judiciary on the one hand and the Executive and Legislature on the other. The judiciary is responsible for applying the law but matters of state or community policy, such as socio-economic policy, are predominantly for the Executive or the Legislature.

The CFA pointed out that where limited public funds are involved, the courts have recognized that lines have had to be drawn by the Executive or the Legislature. On the whole, save where the line has been drawn in contravention of core values relating to personal characteristics (such as race, colour or gender) or where it is shown to be manifestly without reasonable foundation, the courts have left it to the authorities to identify the relevant line to be drawn. Furthermore, when a line is drawn between those who are entitled to a benefit and those who are not, the courts will take into account the clarity of the line and the administrative convenience of implementing the policy or scheme thereunder.

In the context of socio-economic policies where a number of alternative, but reasonable, solutions are open to the authorities, the court will not put itself in the place of the Executive or Legislature

to decide which is the best option. The court will only interfere where the option chosen is clearly beyond the spectrum of reasonable options; in other words, the option has clearly gone further than necessary to deal with the problem.

Where the subject matter has to do with fundamental concepts which go to the heart of any society (e.g. the right not to be tortured, right to a fair trial and freedom of expression) in contradistinction to rights associated with purely social and economic policies, the courts will be particularly vigilant to protect the rights associated with such concepts, and much less leeway or margin of appreciation will be accorded to the authority concerned. After all, the courts have the ultimate responsibility of determining whether acts are constitutional or lawful. The courts will intervene where, even in the area of socio-economic or other government policies, there has been any disregard for core-values.

The CFA concluded the discussion by pointing out that the weight to be accorded to the legislative and the executive authority's judgement by the court will vary from case to case depending upon the nature of the problem, whether the Executive and the Legislature are better equipped than the courts to understand its ramifications and the means of dealing with it.

It is important to bear in mind the relevance of the margin of appreciation when considering whether any restrictions on fundamental rights and freedoms are proportionate and justifiable, particularly in circumstances where the issues involve purely socio-economic policy instead of core values relating to personal characteristics.

²⁰ [2012] 2 HKC 413.