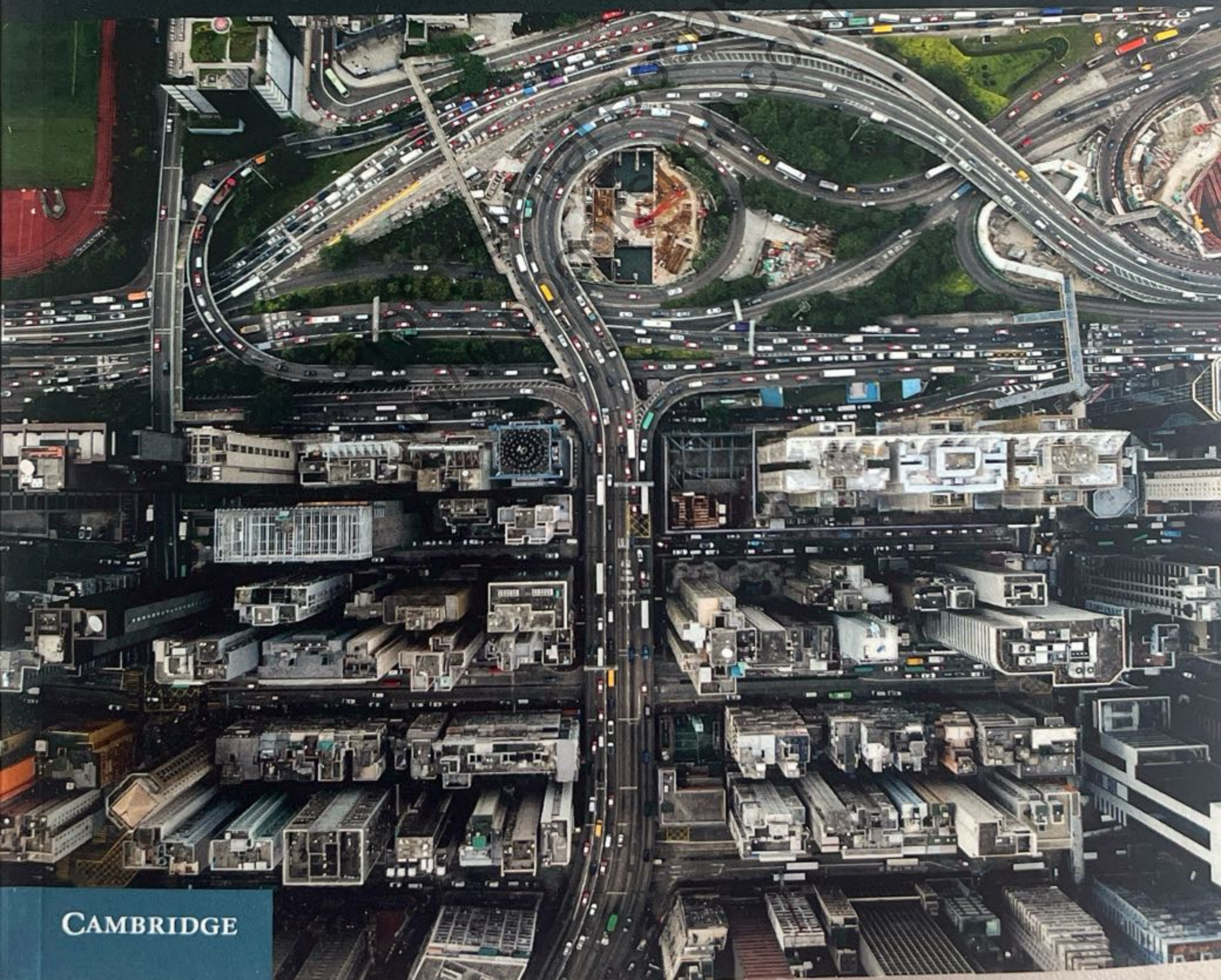


# ADMINISTRATIVE LAW IN HONG KONG

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CAMBRIDGE

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## Constitutional Foundation under PRC Sovereignty

### PRC Constitution and the Basic Law

When tracing the formal constitutional foundation of judicial review in the PRC sovereignty, the starting point is the PRC Constitution. Article 31 of the PRC Constitution provides for the establishment of special administrative regions:

The State may establish special administrative regions when necessary. Systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in light of special conditions.<sup>9</sup>

This formally provides the legal and constitutional basis for the establishment of the HKSAR.<sup>10</sup> The Basic Law was adopted by the Seventh National People's Congress (NPC) on 4 April 1990, taking effect on 1 July 1997.

The Basic Law has two incarnations, the first of which is that of an ordinary legislative act passed by the NPC. In this incarnation, the Basic Law can be modified or repealed by a legislative act of the NPC. However, at the SAR level, the Basic Law is a constitutional act which is putatively the most supreme expression of law in the jurisdiction (other than the PRC Constitution). It serves as a constitutional text by organising and delineating the institutions of the state, and formally regulating the status of all other laws in the jurisdiction, including legislation, common law and customary law. It also upholds the principle of "one country, two systems" and provides for significant autonomy for the HKSAR from the rest of the PRC for a period of fifty years from its becoming effective.<sup>11</sup>

Though the dual interpretations of the Basic Law as a constitutional act and a legislative act are not mutually exclusive, they are clearly in tension. The point is to a fragility in the status of the Basic Law which does not provide the most solid constitutional foundation in which to ground judicial review. Moreover, whilst some provisions of the Basic Law may appear to provide constitutional support for judicial review, there is no explicit provision for judicial review in the Basic Law. Article 8 provides that:

The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendments by the legislature of the Hong Kong Special Administrative Region.

<sup>9</sup> PRC Constitution, Art.31. The Chinese text is as follows: "国家在必要时得设立特别行政区。在特别行政区内实行的制度按照具体情况由全国人民代表大会以法律规定。"

<sup>10</sup> In addition to the Macau SAR.

<sup>11</sup> Basic Law, Arts.2 and 5. Similar guarantees appear in the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong (19 December 1984).

This may be said to provide constitutional support for judicial review inasmuch as judicial review is an aspect of the common law. However, Article 8 does not specifically relate to judicial review, and if this provision is relied upon as providing the constitutional foundation of judicial review, it is liable to be undermined should Article 8 be amended or repealed. Similarly, Article 35(2) of the Basic Law might also be said to provide constitutional support for judicial review:

Hong Kong residents shall have the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel.

Though this might include judicial review, its purview appears wider and would presumably include other proceedings against executive bodies including those in contract, tort, unjust enrichment and enforcement of property rights. It also does not address the possibility of judicial review against non-executive bodies. It is of course more preferable than not for constitutional protection for judicial review to be capable of being found in the Basic Law. However, the reality is that an attempt to source the constitutional foundation for judicial review from the Basic Law is an oblique exercise and an attempt to divine meaning from an ambiguous text.

### Judicial Review and "One Country, Two Systems"

The principle of "one country, two systems" is attributed to Deng Xiaoping, leader of the PRC from 1978 to 1989. It purports to describe the constitutional relationship between the PRC and the Hong Kong SAR (and also between the PRC and the Macau SAR), simultaneously providing for the unity and integrity of the sovereign space (one country) and diversity in legal, political and social systems (two systems). Though the term did not feature in the Sino-British Joint Declaration, it appears in the preamble to the Basic Law. It was a way of constitutionally integrating Hong Kong into the PRC without severely disrupting, and by allowing for continuity in, the law, legal system, governance, institutions and way of life in Hong Kong.

In the context of judicial review (or any litigation), the principle means that one cannot appeal beyond the Court of Final Appeal. However, as far as interpretation of the Basic Law is concerned, the courts must seek an interpretation of the relevant provisions from the NPCSC where the provisions concern affairs which are the responsibility of the Central People's Government or which concern the relationship between the Central Authorities and the SAR. There is no requirement to seek an interpretation from the NPCSC where the provisions concern affairs which are within the limits of the autonomy of the SAR.<sup>12</sup> Interpretations can also be sought outside litigation,

<sup>12</sup> Basic Law, Art.158.

and only one of the five interpretations issued to date was sought on request of the Court of Final Appeal.<sup>13</sup> Though it is provided that “judgments previously rendered shall not be affected”,<sup>14</sup> it is possible for the Government to request an interpretation, or the NPCSC to issue an interpretation on its own initiative, when litigation is contemplated or in motion, which judgment has not yet been rendered.<sup>15</sup> This occurred during the taking controversy in November 2016 in relation to Sixtus Leung Chung and Yau Wai Ching when the NPCSC issued an interpretation of Article 104 of the Basic Law between the dates of two judgments in litigation. The possibility for an interpretation to be issued when litigation is contemplated in motion represents a significant opportunity for politically-motivated intervention by the executive authorities which can fundamentally change the course of the litigation. It is particularly disconcerting that the Government can request an interpretation even when it is already, or is to be, a party to proceedings to which the interpretation relates.

### Common Law and the Rule of Law

There are, in any event, risks associated with seeking to constitutionalise ground judicial review exclusively in the text of the Basic Law. A dependent argument, without more, is a weak argument: if judicial review is constitutionally premised on such provisions as Articles 8 or 35 of the Basic Law, all that is needed is an amendment by the NPC under Article 159(3) to remove the interpretation under Article 158 which effectively “explains away” the grounds of judicial review, and the argument is perhaps fatally wounded. The possibility is compounded by the fact there is no explicit reference to judicial review

<sup>13</sup> *Democratic Republic of the Congo v FG Hemisphere Associates LLC (No 1)* (2011) 13 HKCFAR 95 (2011 interpretation of Arts.13 and 19). Two interpretations were issued on the request of the HKSAR Government (1999 interpretation of Arts.22 and 24; and 2005 interpretation of Art.53(2)), and two interpretations were made by the NPCSC on its own initiative (2005 interpretation of Art.7 of Annex I and Art.3 of Annex II; and 2016 interpretation of Art.104 of the Basic Law, Art.158(3)).

<sup>14</sup> NPCSC interpretations can have retrospective effect; see Po Jen Yap and Eric Chan, “Oaths and Judicial Intervention in Hong Kong” (2017) 47 *Hong Kong Law Journal* 1.

<sup>15</sup> Interpretation of Article 104 of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China by the Standing Committee of the National People’s Congress (adopted by the Standing Committee of the Twelfth National People’s Congress at its Twenty-Fourth Session on 7 November 2016). The interpretation was issued between 10 and 11 November 2016 on an application for interim injunction to restrain the President of the Legislative Council from permitting Mr Leung and Ms Yau from retaking their oaths (*Chief Executive v President of Legislative Council* (2016) HKEC 2315, judgment dated 18 October 2016). See also *HKSAR v President of Legislative Council* (2016) HKEC 2487, judgment dated 15 November 2016.

<sup>17</sup> It is provided by Article 159(3) that no amendment to the Basic Law shall contravene the established basic policies of the PRC regarding Hong Kong, though it is questionable whether this would prevent the NPC from amending (or repealing) the Basic Law by legislative

Articles 8 or 35. This is not to suggest that textual protection for judicial review is worthless or of no practical significance; the contrary is true. It is to recognise that a purely textual approach to the constitutional foundation of judicial review is insufficient.

A more normatively compelling argument would recognise that textual protection is valuable but that the common law and rule of law tradition are a significant (non-textual) part of the constitutional foundation for judicial review in Hong Kong. Ivor Jennings attributed to A.V. Dicey the assumption that:

English law ... better protects the individual because it does not give him worthless paper guarantees which can be torn up like any other scrap of paper, but provides him with substantive remedies enforced by the Courts. Moreover, these Courts are free, independent and unbiased.<sup>18</sup>

If one substitutes “the common law” for “English law” in this excerpt and adopts this as a recognition on the limits of textual guarantees, one begins to reject the fragility and contingency of textualism, allowing one to draw instead on the strength of the enduring normative values embedded in the common law method and tradition.

The common law is capable of functioning as a relatively independent constitutional foundation for judicial review. The Basic Law is merely the tip of the constitutional iceberg. It is itself subject to a common law approach when interpreted by the courts, including the values and norms that such an approach entails.<sup>19</sup> The courts are themselves part of the structural constitution, and are the most authoritative interpreters of the law (including the Basic Law).<sup>20</sup> The authoritative meaning of legislation is determined not solely by reference to the legislation, but by reference to the judicial interpretation of the legislation. The same holds true of judicial interpretation of Basic Law provisions, even when the courts are interpreting an NPCSC interpretation of those provisions.<sup>21</sup> This reveals courts to be generators, not only of legal norms, but of constitutional norms. Courts are capable of providing a distinct source of constitutional authority. That includes the capacity to provide a distinct source of constitutional authority for judicial review. It allows judicial review to be constitutionally grounded in the common law and the rule of law tradition applied by the courts.

The predominance of the rule of law is evident in the day-to-day interpretation and application of law by the courts. It is a central aspect of the common

<sup>18</sup> W. I. Jennings, ‘In Praise of Dicey (1885–1935)’ (1935) 13 *Pub. Admin.* 123, p.132.

<sup>19</sup> See, for example, *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4.

<sup>20</sup> Subject, where appropriate, to interpretations of the NPCSC. See also Albert H. Y. Chen, “A Tale of Two Islands: Comparative Reflections on Constitutionalism in Hong Kong and Taiwan” (2007) 37 *Hong Kong Law Journal* 647, pp.670–671.

<sup>21</sup> See Eric C. Ip, “Interpreting Interpretations: A Methodology for the Judicial Enforcement of Legislative Interpretations of the Hong Kong Basic Law” [2017] *Public Law* 552.

law tradition,<sup>22</sup> of which judicial review is an important part. The rule of law has been said to lie at the heart of the Basic Law and to have “constitutional status”.<sup>23</sup> The rule of law “reigns” in Hong Kong.<sup>24</sup> Li CJ stated that “the rule of law with an independent Judiciary is and will remain a cardinal value of our society which is immutable”.<sup>25</sup> It is a “cornerstone of our society”<sup>26</sup> and “end in itself”.<sup>27</sup> Sir Anthony Mason NPJ said that the rule of law is the foundation of judicial review.<sup>28</sup>

The rule of law is an essential concept, rather than a technical one: it is an ethos of the rule of law that is key. It is a way of thinking about law, justice and justice, and should be a central principle guiding not only the judiciary but also the legislature and the executive. A prominent aspect is equality before the law; that the law and the courts treat like persons alike. The idea is that the powerful and the weak, the wealthy and the impoverished, the governing and the governed, are subject as far as possible to equal treatment by the law in a legal system.<sup>29</sup>

The rule of law has two principal conceptions: a formalistic and a substantive version.<sup>30</sup> A formalistic version requires little more than that all persons are subject to the law, and even equally subject to the law. It does not guarantee that the law is good or bad, just or unjust. The law may be grossly and crushingly unfair to the poor or the vulnerable; it may be discriminatory towards minorities; it may sanction violent means of law enforcement such as the death penalty for minor offences; it may curtail freedom of speech, assembly, religion and privacy. For the most formalistic version of the rule of law, none of this particularly matters: provided that this is what is sanctioned by law, that the law is declared prospectively and both made and consistently applied using lawful processes, the rule of law is in force.

A more substantive version of the rule of law looks, as the name suggests, not just to the form but to the substance of the law in establishing its validity. The features of law just described would likely violate more substantive

<sup>22</sup> Pragmatism and robustness were described as characteristic of the common law – *On the Daily Publisher Ltd v Commissioner for Television and Entertainment Licensing Authority* (1997–1998) 1 HKCFAR 279, p.290.

<sup>23</sup> *Leung Kwok Hung v Chief Executive of HKSAR* (2006) HKEC 239, para.167, per Hartmann CJHC.

<sup>24</sup> *Chief Executive of HKSAR v President of the Legislative Council* (2017) 1 HKLRD 460, para. 24, per Cheung CJHC.

<sup>25</sup> Li CJ, *Chief Justice's Speech at the Ceremonial Opening of the Legal Year 2007*. Ma CJ said: “[w]e assemble here at the annual Opening of the Legal Year, this year and every year to acknowledge the importance of the rule of law” – *Chief Justice's Speech at the Ceremonial Opening of the Legal Year 2015*.

<sup>26</sup> Li CJ, *Chief Justice's Speech at the Ceremonial Opening of the Legal Year 2005*.

<sup>27</sup> Ma CJ, *Chief Justice's Speech at the Ceremonial Opening of the Legal Year 2015*.

<sup>28</sup> *C v Director of Immigration* (2013) 16 HKCFAR 280, para.77.

<sup>29</sup> There are of course limitations on this, such as access to justice difficulties, making legal aid particularly important.

<sup>30</sup> Formalistic and substantive versions of the rule of law are linked by a gradient, along which varying degrees of emphasis on more formalistic or substantive criteria.

versions of the rule of law, which would tend to emphasise fundamental and inviolable rights, respect for human dignity, protection of minorities or the vulnerable, fairness, transparency, due process, reasonableness and accountability. The content of more substantive versions of the rule of law will vary, but a number of these values are discernible in the common law method and tradition.<sup>31</sup> Several are also discernible in the common law grounds of judicial review, for example in procedural fairness, legitimate expectations and *Wednesday* unreasonableness. These are living examples of rule of law values enforced through judicial review, grounded in the common law method and tradition.

The common law tradition is a more entrenched constitutional foundation for judicial review in Hong Kong than a mere set of textual prescriptions; it is a guardian of the rule of law, and medium through which it is enforced. This does not belittle the Basic Law; it elevates its potential. As Wood J stated of the Canadian Charter of Rights and Freedoms:

It is the rule of law which distinguishes civilized society from anarchy. Everything which we have today, and which we cherish in this free and democratic state, we have because of the rule of law . . . Without the rule of law the *Canadian Charter of Rights and Freedoms* . . . would be nothing but another piece of parchment adrift in the timeless evolution of man's history.<sup>32</sup>

The strength of judicial review derives not only and not principally from the Basic Law but more profoundly from the common law tradition and the rule of law ideal it promotes. Not only is that a more normatively compelling constitutional foundation in which to anchor judicial review, it is one which both stands up to logical scrutiny and which rejects the fragility and circumstance of textualism. One can annul a text at the stroke of a pen, but the common law and rule of law tradition, as a way of thinking about law, legality and justice – a way of living the law – cannot be so summarily erased.

### Legislative Supremacy

There is no question of legislative supremacy in Hong Kong in the post-Handover period.<sup>33</sup> This is a significant constitutional difference from the

<sup>31</sup> Ma CJ stated that “Hong Kong's legal system is based on the common law and on that system's characteristics of fairness, transparency and access to justice” – *Chief Justice's Speech at the Ceremonial Opening of the Legal Year 2016*.

<sup>32</sup> *R v Bridges (No 2)* (1989) 48 CCC (3d) 545 (Supreme Court of British Columbia), pp. 547–548, per Wood J; endorsed in *Secretary for Justice v Cheng Kam Mun* (2017) HKEC 671, para.43, per Chan J.

<sup>33</sup> Subject to the reach of the NPC (and its Standing Committee) over Hong Kong; being a legislative body.

costs and the giving of security as it thinks fit.<sup>7</sup> Leave can also act as a stay of proceedings to which the application relates if the relief sought is an order of certiorari or prohibition, or interim relief can be granted at any time in the proceedings where any other relief is sought.<sup>8</sup> After leave has been granted, the application for judicial review must be made by originating summons Form No. 86A to a judge in open court or, if the judge granting leave has so ordered, to a judge sitting in chambers.<sup>9</sup> The originating summons must be issued within fourteen days of leave being granted.<sup>10</sup>

Though leave is a statutory requirement, the court has wide discretion whether to grant or refuse leave. There is a statutory basis for refusing leave on the basis of delay, though this remains subject to significant judicial discretion.<sup>11</sup> There is also a statutory requirement for the court to refuse leave where it considers that the applicant does not have a sufficient interest in the matter to which the application relates, but the content and meaning of sufficient interest is again subject to judicial discretion.<sup>12</sup> Whilst the court is bound to have sufficient regard to delay and sufficient interest in deciding whether to grant leave, there is no fixed list of criteria which the court must take into account. It is provided, however, that the court shall not grant leave for a person to file evidence or make representations at the hearing of the application for judicial review unless it appears to the court that the applicant is a proper person to be heard at the hearing of the application. In addition to delay and insufficient interest, courts are more likely to refuse leave where the case has an insufficient public (law) element, where the subject matter of the dispute is non-justiciable or non-reviewable, or where the application does not disclose an arguable case.

The court may direct there to be a rolled-up hearing. This involves a "direction for having the two stages to be heard on the same date with the leave application being heard immediately before the substantive application".<sup>14</sup> It does not involve – and cannot involve – circumventing the statutory requirement for leave, there is no discretion to dispense with the requirement for leave, or to dispense with a "two-stage process".<sup>15</sup> Instead, it is about managing the case in such a way that factors such as those found in Order 1A of the Rules of the High Court – including cost-effectiveness, expeditiousness, reasonable proportion and procedural economy, and the fair distribution of court resources – are promoted.

<sup>7</sup> O.53, r.3(9).

<sup>8</sup> *Id.*, r.3(10).

<sup>9</sup> *Id.*, r.5(1).

<sup>10</sup> *Id.*, r.5(5).

<sup>11</sup> High Court Ordinance (cap.4), s.21K(6); O.53, r.4. It was suggested that the binding effect of precedent may not be as strong in relation to leave as in other areas of law – *Ho Ming Sang v Director of Immigration* [1994] 1 HKLR 21, p.27, per Litton JA.

<sup>12</sup> High Court Ordinance (cap.4), s.21K(3); O.53, r.3(7).

<sup>13</sup> O.53, r.5B. It is also provided that such an application must be made promptly – *id.*, r.5B.

<sup>14</sup> *BI v Director of Immigration* [2016] 2 HKLRD 520 (CA), para.135.

<sup>15</sup> *Id.* O.1A, Rules of the High Court (cap.4A). In *Lo Siu Lan v Hong Kong Housing Authority* [2006] HKEC 279 (CA), for example, a rolled-up hearing was adopted at first instance due to the urgency of the matters raised by the application.

However, if leave is refused by the Court of First Instance in a rolled-up hearing, an appeal to the Court of Appeal remains an appeal against the refusal to grant leave – the Court of Appeal is not obliged to hear full arguments on the merits in the appeal. It has been added, however, that if full arguments have been deployed in the Court of First Instance in a rolled-up hearing:

other things being equal, as a matter of case management in light of the underlying objectives in Order 1A, it is usually appropriate for [the Court of Appeal] to allow parties to canvass full arguments on the merits in the appeal.<sup>17</sup>

This nevertheless does not enable the Court of Appeal to grant substantive relief in such an appeal if it agrees with the appellant on the substantive merits.<sup>18</sup> Due to procedural complexities that may arise, caution has been urged of judges in the Court of First Instance when deciding whether to deal with an application for judicial review by way of a rolled-up hearing.<sup>19</sup> Though a rolled-up hearing would typically be seen by "combining" the leave stage and substantive hearing, there is also precedent for a rolled-up hearing comprising an application to set aside leave and the substantive application for judicial review.<sup>20</sup>

It is worth considering whether the leave stage should be retained in its current form, even if the principles it seeks to uphold, and the rationale of filtering out inappropriate cases at an early stage, are thought commendable. There are several challenges to the suitability of the leave stage as it currently stands.

First, the leave stage is envisaged to be a relatively brief, preliminary aspect of judicial review procedure. It is not concerned so much with the merits of the application as with its amenability to review. Questions of substance are for the substantive hearing. As Lord Diplock explained:

The discretion that the court is exercising at this stage is not the same as that which it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application.<sup>21</sup>

<sup>17</sup> *Hung Shui Fung v Director of Food and Environmental Hygiene*, CACV 219/2004 and CACV 220/2014 (CA) (6 June 2016), para.6(f) and (g).

<sup>18</sup> *Id.*, para.7. It was added (paras.14–17) that, in order to secure that as far as possible all matters in dispute between the parties are completely and finally determined and multiplicity of proceedings is avoided (see High Court Ordinance (cap.4), s.16(2)), and with regard to the objectives and duty of active case management in O.1A, the Court of Appeal could – provided only that all relevant issues could be determined in the appeal – remit the matter to the Court of First Instance and direct that judgment be entered in accordance with the Court of Appeal's judgment on all the substantive issues.

<sup>19</sup> *Hung Shui Fung v Director of Food and Environmental Hygiene*, CACV 219/2004 and CACV 220/2014 (CA) (6 June 2016), para.17.

<sup>20</sup> *AA v Securities and Futures Commission* [2016] HKEC 1718.

<sup>21</sup> *R v Inland Revenue Commissioners, ex parte National Federation of Self Employed and Small Businesses Ltd* [1982] AC 617, p.644.

Council said in *Sharma v Brown-Antoine* ... it is to be considered a highly exceptional remedy.<sup>88</sup>

Though *RV v Director of Immigration* was not expressly referred to in its judgment, the Court of Appeal stated in a closely following case that it would be in "extremely rare cases" and "only where the evidence points unquestionably to the desirability of there being a prosecution" that the court should interfere with the prosecuting authority's decision not to prosecute. Article 63 of the Basic Law made it all the more important that the court should exercise "extreme caution" when considering whether to review such a decision.<sup>89</sup> To completely insulate prosecutorial discretion from the possibility of judicial review could undermine the rule of law by rendering persons vulnerable to abuses and misuses of those powers. The adoption of a lower intensity of review in relation to prosecutorial discretion would therefore seem to be a sensible middle ground between immunising such discretion from judicial review and jeopardising the principle of prosecutorial independence. It has been suggested that the common law rules on review of prosecutorial discretion might also apply to decisions of a similar nature taken by regulatory bodies such as the Securities and Futures Commission.<sup>90</sup>

<sup>88</sup> *RV v Director of Immigration* [2008] 4 HKLRD 529, paras.69–76. The application for judicial review failed on the merits of the challenge. See also *Ng Chi Keung v Secretary for Justice* [2016] 2 HKLRD 1330, paras.104–110; and *Re Lau Hei Wing* [2016] 3 HKLRD 652, paras.18–21.

<sup>89</sup> *Ma Pui Tung v Department of Justice* [2008] HKEC 1590 (CA), para.10, per Rogers J.P.

<sup>90</sup> *Shek Lai San v Securities and Futures Commission* [2010] 4 HKC 168, para.79. For more general concerns about permitting judicial review in relation to criminal prosecutions, see *Dairy Farm Co Ltd v Director of Food and Environmental Hygiene* [2005] HKEC 754, paras.28 and 32; *Mr Yuk Ping v Secretary for Justice* [2005] HKEC 1363, paras.51–52; *Yeung Chun Pong v Secretary for Justice (No 4)* [2008] 2 HKC 46, pp.74–77; and *Gammon Construction Ltd v HKSAR* [2014] HKEC 1712, paras.63–64. One of the concerns is whether judicial review should be permitted when the applicant could instead appeal the case through the criminal courts. *Viva Magnetics Ltd v Secretary for Justice* [2002] 3 HKLRD 571, paras.18–19; *Chow Shun Chiu v HKSAR* [2001] HKEC 882, para.34. This is not to say, as the discussion in these cases demonstrates, that the courts are categorically unwilling to allow judicial review in the context of a criminal prosecution.

## Arguability and Qualitative Filtering

The court will make a qualitative assessment of the applicant's case in deciding whether or not to grant leave. This is more controversial than may at first appear, as the leave stage is in principle not suited to a consideration of substantive issues. An assessment of the quality of the application for leave will, however, be difficult to conduct without at least partly examining the substance of the application and the merits of the grounds advanced therein. In addition, the courts have moved to a more rigorous examination of the quality of the application at the leave stage, which can have a tendency to encourage more detailed papers to be lodged, and arguments made, at the leave stage than was previously the case. This qualitative filter is increasingly in tension with the concept of the leave stage as a brief, procedural sift.

There are essentially two types of application that this test aims to target. One is the application that is non-serious, vexatious or for some other reason inappropriate, such as where the arguments are political rather than legal, or where the application is merely calculated to cause annoyance or inconvenience. Such applications can with relatively little controversy be dispensed with at the leave stage on the basis that they do not meet the necessary qualitative requirements. Less straightforward is the second kind of application, which is a *bona fide* application which seeks to argue a genuine point but is for some reason misconceived or deemed hopeless. Perhaps the arguments are poorly or irrelevantly framed, or the argument advanced has already failed in a previous case, or the complaint is hypothetical or speculative, or the court simply does not think that the application has a realistic chance of success.<sup>1</sup> This can be a more delicate assessment for the court to make, as it is already judging the merits of the application but without the benefit of the full argumentation and

<sup>1</sup> Litton JA described the intention behind the qualitative filter as "that public authorities and the like should not be vexed with hopeless applications" – *Ho Ming Sai v Director of Immigration* [1994] 1 HKLR 21, p.27. Where the potential impact on third parties that the relief sought would have would be such as to conclude that there is no realistic prospect of the grant of such relief at the substantive hearing, the case could be held not to be reasonably arguable – *Shek Lai San v Securities and Futures Commission* [2010] 4 HKC 168, paras.42–45. It was specifically stated (para.44) that the reasonably arguable case related not only to the substantive complaint, but also to the relief sought.

evidence which would be led at the substantive hearing.<sup>2</sup> Arguability also raises other issues, such as sufficient interest.<sup>3</sup>

In principle, however, the idea of a qualitative filter is a fair one, and there are certainly arguments favouring the prevention of applications of this nature from proceeding to a substantive hearing. It helps ensure that public body respondents do not needlessly incur the full time and resource costs associated with legal representation and court process at the substantive hearing. The court's time and resources are also conserved if such applications are not allowed to proceed, in terms of the substantive hearing and associated procedure, such as in relation to discovery, interrogatories, cross-examination and so on.<sup>4</sup> There are also implications for the smooth conduct of public administration, as public bodies and third parties affected by their decisions may face uncertainty as to the legality of decisions impugned by essentially unarguable claims.<sup>5</sup>

### Threshold

The courts now adopt an "arguability" threshold to test the quality of the application at the leave stage. This represents a shift from the previous threshold of "potential arguability", though there was also authority for a higher threshold.<sup>6</sup> Kempster JA, sitting in the Court of Appeal in *Ho Ming Sai v Director of Immigration*, expressly rejected as too high the test that "it was arguable that grounds for judicial review existed".<sup>7</sup> Litton JA explained in the same case why it was inappropriate to erect too high a threshold for the applicant, pointing out that the applicant may have little material in hand at the leave stage and may have a complaint that the public body had "dealt with him in an oppressively secretive manner".<sup>8</sup> As more information may come to light after discovery, interrogatories, cross-examination and so on, to set the bar too high at the leave stage may mean that "many legitimate grievances could be screened out".<sup>9</sup>

<sup>2</sup> Consider *Ng Wing Hung v Hong Kong Examinations and Assessment Authority* [2010] HKEC 1471, para.13.

<sup>3</sup> See, for example, *Chu Woan Chyi v Director of Immigration* [2004] 3 HKLRD 11, paras.8-9.

<sup>4</sup> Regarding cross-examination, see *The Queen v Director of Immigration, ex parte Do Giaw* [1992] 1 HKLR 287, pp.302 and 343-344.

<sup>5</sup> *Po Fun Chan v Winnie Cheung* (2007) 10 HKCFAR 676, para.14, per Li CJ.

<sup>6</sup> *R v Legal Aid Board, ex parte Hughes* (1992) 24 HLR 698; and see *Lee Sap Pat v Commissioner of Inland Revenue* [1991] 2 HKC 251, p.257.

<sup>7</sup> *Ho Ming Sai v Director of Immigration* [1994] 1 HKLR 21, p.23. This case applied, on point of the leave threshold, *R v Inland Revenue Commissioners, ex parte National Federation of Self Employed and Small Businesses Ltd* [1982] AC 617 (HL); and *R v Civil Service Appeal Board, ex parte Cunningham* [1992] ICR 816. In the latter case, reference was made by Lord Donaldson

MR (p.823) to making out a *prima facie* case for the granting of leave.

<sup>8</sup> *Ho Ming Sai v Director of Immigration* [1994] 1 HKLR 21, p.27.

<sup>9</sup> *Id.*, per Litton JA. Uncertainty as to the appropriate threshold was expressed in *Yu Pik Ying v Director of Immigration* [2002] 1 HKC 18 (CA), pp.28-29.

Further evidence of the lower threshold was seen in later cases. Hartmann J stated that the "standard test for leave is whether the material ... discloses matters which, on further consideration, might disclose an arguable case. It is not a high test. It is intended only to eliminate vexatious or hopeless cases",<sup>10</sup> echoing Litton JA's expression from a decade earlier.<sup>11</sup> Hartmann J went on to say that there was in the instant case a "*prima facie* arguable case ... not a hopeless case".<sup>12</sup> Rogers V-P said in *Yu Pik Ying v Director of Immigration* that:

In my view, the application for leave to bring judicial review proceedings should be a short procedure. As the cases indicate it should not involve lengthy applications. Indeed, the more the details of the case are considered, at the application stage, the more undesirable the lengthening of the proceedings becomes. The merits of the application should be considered at the hearing for judicial review, if leave be granted. It is indeed, undesirable that the merits are considered in depth until the case is fully prepared since even the expression of preliminary views can have undesirable effects. It is for this reason that in my view the application stage should be more of a weeding out process, stopping those applications doomed to failure.<sup>13</sup>

In another case, it was said that the applicant was not a "meddlesome busybody",<sup>14</sup> which is again not to set the bar particularly high.<sup>15</sup> On an application of the potential arguability test, it was "sufficient for [the applicant] merely to satisfy the court that on further consideration at a subsequent hearing an arguable case might be demonstrated".<sup>16</sup>

<sup>10</sup> *Mo Yuk Ping v Secretary for Justice* [2005] HKEC 1363, para.47.

<sup>11</sup> *Ho Ming Sai v Director of Immigration* [1994] 1 HKLR 21, p.27.

<sup>12</sup> *Mo Yuk Ping v Secretary for Justice* [2005] HKEC 1363, para.47.

<sup>13</sup> *Yu Pik Ying v Director of Immigration* [2002] 1 HKC 18 (CA), p.29. Lord Diplock described the qualitative aspect of the leave stage as to "prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error" - *R v Inland Revenue Commissioners, ex parte National Federation of Self Employed and Small Businesses Ltd* [1982] AC 617 (HL), pp.642-643.

<sup>14</sup> *Chu Woan Chyi v Director of Immigration* [2004] 3 HKLRD 11, para.9, per Rogers V-P; drawing on Lord Diplock's use of the term "busybody" in *R v Inland Revenue Commissioners, ex parte National Federation of Self Employed and Small Businesses Ltd* [1982] AC 617 (HL). This raises issues of sufficient interest in addition to those of arguability.

<sup>15</sup> It has been said, however, that the fact the applicant is not a busybody or troublemaker "may well not be sufficient to tip the scales in her favour" and persuade the court to grant leave - *Shek Lai San v Securities and Futures Commission* [2010] 4 HKC 168, para.57.

<sup>16</sup> *Po Fun Chan v Winnie Cheung* (2007) 10 HKCFAR 676, para.12, per Li CJ. Emphasis in the original. Lord Diplock had stated that: "The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion that the court is exercising at this stage is not the same as that which it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application" - *R v Inland Revenue*

For some, the bar was not high enough. Keith JA said the test set out in *Ho Ming Sai* would be appropriate "if the rationale for obtaining leave is only to weed out those cases which are obviously hopeless", but a more rigorous test would be appropriate "if it was intended that only those cases which are genuinely arguable should go to a full hearing, in which case the arguability of the case would have to be considered in a meaningful way".<sup>17</sup> Though stating that this was not the case in which to establish which was the correct test, he posited a flexible test in which a higher, arguability threshold should apply in cases such as those of statutory construction, but a lower, potential arguability threshold in cases of, for example, procedural fairness.<sup>18</sup> This more flexible approach was endorsed in a subsequent case, though not with the most persuasive argument: "[l]eave should only be granted if the point of law is arguable for it is very difficult, if not impracticable, to draw a meaningful distinction between an arguable point of law and a potentially arguable point of law".<sup>19</sup> Hartmann J stated that, though he had some sympathy for the view that the test of potential arguability was too weak and thus may "as often undermine the ends of justice as enhance them", he was bound to apply it.<sup>20</sup> That test would merely screen out the "plainly hopeless cases".<sup>21</sup>

In *Po Fun Chan v Winnie Cheung*, Li CJ gave "authoritative guidance" on the applicable threshold in leave applications:<sup>22</sup>

The purpose of the leave requirement would be better served by the adoption of the arguability test instead of the potential arguability test. The granting of leave to apply for judicial review is a matter for the court's discretion to be exercised judicially. The test which should be applied is the arguability test. Under this test, arguability must mean reasonable arguability. A claim for relief which is not reasonably arguable could not be regarded as arguable. A reasonably arguable case is one which enjoys realistic prospects of success. Whilst the test adopted represents a higher threshold than the potential arguability test, claims which are reasonably arguable would be given leave

*Commissioners, ex parte National Federation of Self Employed and Small Businesses Ltd* [1982] AC 617 (HL), pp.643-644.

<sup>17</sup> *Wong Chung Ki v Chief Executive* [2003] 1 HKC 404 (CA), pp.413-414. In the same case, Godfrey V-P referred to Atkin's Court Forms (2nd edn) (Vol. 23(2), 1998 issue), p.177, which stated that "[l]eave should only be refused . . . if there is no prima facie arguable case at all".

<sup>18</sup> *Wong Chung Ki v Chief Executive* [2003] 1 HKC 404 (CA), p.414.

<sup>19</sup> *Shem Yin Fun v Director of Legal Aid* [2003] 1 HKC 404 (CA), p.574, per Chu J. The case involved "construction of the statute and does not involve any investigation of fact, [therefore] the Court ought to adopt a more flexible approach". Nevertheless, it made, in that case, "no practical difference to the outcome whether the threshold test is one of arguability or potential arguability".

<sup>20</sup> *Leung TC William Roy v Secretary for Justice* [2005] HKEC 998, para.16; noting *Wong Chung Ki v Chief Executive* [2003] 1 HKC 404 (CA), p.417.

<sup>21</sup> *Po Fun Chan v Winnie Cheung* (2007) 10 HKCFAR 676, para.13, per Li CJ.

<sup>22</sup> *Id.*, para.11.

to go forward under it. It is in the public interest that challenges which are not reasonably arguable should not be given leave to proceed.<sup>23</sup>

Whilst this was an expression from the most senior judge and the most senior court in the jurisdiction that the threshold for granting leave should be higher,<sup>24</sup> it remained unclear what an arguable claim might look like as distinct from a potentially arguable claim. The description of arguability as meaning "reasonable arguability" was neither, with respect, elucidatory.<sup>25</sup> It was pointed out that one of the difficulties of the potential arguability threshold was uncertainty at the leave stage about what further materials and arguments may be available at the substantive hearing.<sup>26</sup> However, raising the threshold presumably makes it more likely that legitimate claims will fail at the leave stage merely because of the unavailability of evidence and sufficiently elaborated arguments that would and perhaps could only be presented at the substantive hearing. In any event, uncertainties appear to persist under the arguability threshold. The lack of certainty in what is required by the arguability threshold is exacerbated by the following observations made in *Re RS*:

[I]t is necessary to point out that the mere fact that leave had previously been granted by another judge on a similar point does not necessarily mean that leave should be granted in this case. First, there may be differences in the factual matrix which call for different considerations. Second, the state of the law may have been further clarified since the grant of leave in a previous case. Third, there may be factors applicable in the instance case that are not germane in the earlier case which affect the exercise of discretionary considerations in terms of grant or refusal of leave. Fourth, the issues raised in the Forms 86 in the two cases may be different. As observed during the course of the appeal, this court must assess whether the grounds raised by the Applicant are reasonably arguable by reference to the materials placed before us and it would not be right to second-guess why leave was granted in another case.<sup>27</sup>

<sup>23</sup> *Id.*, para.15. The court followed in this regard *R v Legal Aid Board, ex parte Hughes* (1992) 24 HLR 698. See also *Ng Yat Chi v Max Share Ltd* (2005) 8 HKCFAR 1, para.13, and at para.20 where Li CJ described the purpose of the leave stage in judicial review proceedings as enabling "unarguable claims to be filtered out" and a "mechanism . . . for preventing abuse of process"; and *Sharma v Brown-Antoine* [2007] 1 WLR 780 (PC) (Trinidad and Tobago), p.787. The arguability threshold set out in *Po Fun Chan* was described in the Court of Appeal as a "more realistic filter" – *Yeung Chun Pong v Secretary for Justice* [2008] HKEC 40 (CA), para.17, per Stock JA.

<sup>24</sup> There was an indication twelve months earlier in the Court of Appeal that the lower threshold might be reconsidered; See *Smart Gain Investment Ltd v Town Planning Board* [2006] HKEC 2063, para.3, per Ma CJHC.

<sup>25</sup> Nevertheless, reasonableness tests are arguably part of the common law method and tradition, and emblematic of its pragmatic approach.

<sup>26</sup> *Po Fun Chan v Winnie Cheung* (2007) 10 HKCFAR 676, para.12.

<sup>27</sup> *Re RS* [2013] HKEC 1309 (CA), para.21, per Lam JA.

## Overview of the Grounds of Judicial Review

The grounds of judicial review are the bases on which an application for judicial review can be made. They comprise categories of activity that, if violated, may result in a successful application for review. There is no fixed list of grounds, but there are three main sources for the grounds of review: (i) the Basic Law; (ii) statute; and (iii) the common law. If a relevant provision of the Basic Law is violated, this can form a legitimate ground for judicial review. It will essentially comprise "constitutional review", as the Basic Law formally has the status of a constitutional document. Statutes have created many and varied grounds of judicial review. The courts have created and developed grounds of review over centuries of jurisprudence in England and Wales in particular, and these have largely been incorporated into the law of Hong Kong. The common law grounds are neither fixed nor static, and they continue to be developed by the courts. Just as judges could change the rules on standing to meet the need to preserve the integrity of the rule of law, so could they change the substantive principles of judicial review.<sup>1</sup> Some grounds – for example aspects of procedural impropriety – are of longstanding pedigree, whilst others, such as breach of legitimate expectations (especially substantive expectations) are more recent innovations. The common law grounds of review are the focus of this part of the book, as they are available across the whole range of reviewable decisions, whereas statutory grounds in particular take different, discrete forms which are specific to individual statutory contexts. The Basic Law is of course an important source of rights, and of potential grounds of judicial review, but is rather for analysis in a text on constitutional law.

Judicial review can be used to mount a more procedural or substantive form of challenge. Where a more procedural form of challenge is made, the applicant will usually be seeking judicial review of a process by which a decision is made. Where a more substantive form of challenge is made, the applicant will usually be seeking review of a substantive act or decision. These are not discrete categories of review, and issues of procedure and substance are often

<sup>1</sup> *R (on the application of Cart) v Upper Tribunal* [2011] QB 120, pp.168–169, per Sedley LJ.

intertwined.<sup>2</sup> Nevertheless, some grounds of review are more typically utilised to attack procedure (such as procedural impropriety), whilst others are more typically utilised to attack substance. A number of grounds can be more useful to attack procedure or substance, such as breach of legitimate expectations.<sup>3</sup> If a decision-making process is found to be unlawful, this will usually also vitiate the legality of the decision resulting from that process.

There is no fixed list of common law grounds of review. Variations in terminology will be found among different cases and texts. Some will treat as distinct two grounds of review which may elsewhere be considered to combine as a single ground, or vice versa. For example, some texts are more prepared than others to recognise breach of legitimate expectations as a distinct ground of review. Some refer to (*Wednesbury*) unreasonableness rather than irrationality, or vice versa. Whereas one text may specify procedural impropriety as a ground of review, another may label it breach of procedural fairness, or natural justice. The common law grounds of review are neither discrete nor mutually exclusive: they are often interrelated, overlapping, complementary, interacting and conceptually interdependent. However, some structure must be brought to bear on the grounds; conceptually, doctrinally and practically. The categorisations and typologies found in the case law and literature are attempts to make sense of, and give structure to, an array of different bases on which judicial review can be sought; to bring order to a wide range of angles of attack. Categorisation is an "indispensable tool in the search for rationality and coherence in law".<sup>4</sup>

One of the classic statements on the grounds of review was given by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service*.

Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality", the second "irrationality" and the third "procedural impropriety". That is not to say that further development of a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose

<sup>2</sup> It has been said that the distinction between substantive and procedural invalidity will often be difficult or impossible to draw and that the grey area between them may cover considerable terrain – *Boddington v British Transport Police* [1999] 2 AC 143 (HL), p.170, per Lord Steyn.  
<sup>3</sup> Lord Steyn stated that the taking into account of extraneous considerations is variously treated as substantive or procedural – *id.*  
<sup>4</sup> *Id.*, per Lord Steyn.

of the instant case the three already well-established heads that I have mentioned will suffice.<sup>5</sup>

Whether or not Lord Diplock intended this to be or become a definitive statement of the grounds of review, it has become much-recycled in the case law and literature. Lord Scarman described Lord Diplock's statement as a "valuable, and already 'classical', but certainly not exhaustive analysis" of the grounds of judicial review.<sup>6</sup> It is indeed not exhaustive, not only because other grounds of review may in future develop, or because existing grounds might change so as to insufficiently fit within this framework. It is also unclear where some grounds of review, such as breach of legitimate expectations or fettering of discretion, would fit under this categorisation. Furthermore, the terms used are problematic. This is principally seen in the term "illegality", which is over-broad and chronically unspecific – violation of any of the grounds of review could be described as "illegal". Lord Diplock described illegality as meaning that the "decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it".<sup>7</sup> Instances of "irrationality" or "procedural impropriety" could easily enough be accommodated within this description. Rather than being an elastic category, this borders on the meaningless as far as categorisation is concerned. Furthermore, the term "irrationality" is potentially problematic.<sup>8</sup> It is doubtful how useful is this tripartite categorisation, and questionable whether it ought to be used as a taxonomy of the grounds of review. It is neither particularly accurate nor elucidatory, and does not form the basis on which the grounds of review are organised in this book. As Lord Hoffmann explained:

The principles of judicial review, the ceaseless struggle to delimit the boundaries which the law has set to the power of the State, cannot be captured even by Lord Diplock in three or four bullet points with single word headings elucidated by a single sentence of explanation. It is a far more subtle and complex subject. Judges tend to support their decisions in a particular case by appropriate rhetoric. In a case in which the court has decided that judicial intervention is inappropriate, there is a temptation to emphasize in the most general terms the reluctance of the courts to intervene. And there is always a tendency to reductionism, to trying to squeeze the diversity of life into single formula which can be made to yield an answer in every case.<sup>9</sup>

<sup>5</sup> *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, p.410, per Lord Diplock.

<sup>6</sup> *R v Secretary of State for the Environment, ex parte Nottinghamshire County Council* [1986] AC 240, p.249, per Lord Scarman.

<sup>7</sup> *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, p.410, per Lord Diplock.

<sup>8</sup> See Chapter 18, and pp.242–245 in particular.

<sup>9</sup> Lord Hoffmann, "A Sense of Proportion" in Mads Andenas and Francis Jacobs (eds), *European Community Law in the English Courts* (Clarendon Press, Oxford, 1988), p.153.

Lord Irvine of Lairg added in the context of Lord Diplock's classification of the principles underlying our developing public law. But these are not watertight compartments because the various grounds for judicial review run together. The exercise of a power for an improper purpose may involve taking irrelevant considerations into account, or ignoring relevant considerations; and either may lead to an irrational result. The failure to grant a person affected by a decision a hearing, in breach of principles of procedural fairness, may result in a failure to take into account relevant considerations.<sup>10</sup>

The grounds of review discussed in this book are presented as neither exclusive nor mutually exclusive, but as an attempt to distil the broad range of issues on which decisions and decision-making processes can be challenged and to organise the grounds in a coherent and structured manner.

<sup>10</sup> *Boddington v British Transport Police* [1999] 2 AC 143 (HL), p.152, per Lord Irvine of Lairg, approved in *To Kin Wah v Tuen Mun District Officer* [2006] HKEC 95 (CA), para.37. Lord Greene MR pointed out that different grounds of review "run into one another" and "overlap to a great extent" – *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1942] 1 KB 223, p.229.

## 11

### Excess of Power, the Limits of Discretionary Power and Non-Compliance with Statute

#### Authority and Agency

Decision makers must be careful to remain within the bounds of their legal powers. Exceeding those powers may result in actions and decisions being struck down as *ultra vires*,<sup>1</sup> and there may be additional liability such as in contract or tort depending on the circumstances of the case. Every act or decision of the body must be capable of being traced to a source of legal power; typically, this will be statutory. The capacity of a statutory corporation must be ascertained from a proper interpretation of the statute, and it would be a mistake to begin by assuming that the legislature meant to create a corporation with a capacity resembling that of a natural person, and then to ask whether the language of the statute cuts down that capacity.<sup>2</sup> Legal powers need not always be explicitly conferred: as noted in the following section, bodies can often exercise ancillary and implied powers.

However, there are of course limits to those powers, and every body's power is limited by law. There is, in particular, no such thing as unfettered discretion. The use of broad or subjective language in statute, such as the conferral on a body of discretion to be exercised "as it thinks fit", does not confer unlimited

<sup>1</sup> In addition, if the *ultra vires* act or decision is one that should properly have been done or made by another body, that other body will not ordinarily be bound by the *ultra vires* act or decision.

<sup>2</sup> *Lo Siu Lan v Hong Kong Housing Authority* (2005) 8 HKCFAR 363, para.32, applying *Bonanza Creek Gold Mining Co Ltd v The King* [1916] 1 AC 566 (PC) (Canada), pp.577–578. In construing statutory language, the court's task is to ascertain and give effect to legislative intention. The purpose of legislation has been said to remedy a perceived mischief or defect in the existing legislation, and it should be presumed that legislation was not intended to be wider in its operation than necessary to remedy the relevant mischief or defect. General terms must be narrowly construed so as to give effect to legislative intention but not go beyond it – *Ho Choi Wan v Hong Kong Housing Authority* (2005) 8 HKCFAR 628, para.109. Note, however, section 19 of the Interpretation and General Clauses Ordinance (cap.1), which states that an "Ordinance shall be deemed to be remedial and shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Ordinance according to its true intent, meaning and spirit".

discretion on the body.<sup>3</sup> Statutory discretion must, for example, be exercised reasonably.<sup>4</sup> It must also be exercised so as to promote the policy and objects of the statute,<sup>5</sup> though there may be more than one way in which to promote the policy and objects.<sup>6</sup> As Lord Nicholls of Birkenhead put it:

No statutory power is of unlimited scope. The discretion given by Parliament is never absolute or unfettered. Powers are conferred by Parliament for a purpose, and they may be lawfully exercised only in furtherance of that purpose... The purpose for which a power is conferred, and hence its limits, may be stated expressly in the statute. Or it may be implicit. Then the purpose has to be inferred from the language used, read in its statutory context and having regard to any aid to interpretation which assists in the particular case. In either event, whether the purpose is stated expressly or has to be inferred, the exercise is one of statutory interpretation.<sup>7</sup>

This principle cannot be used to create ambiguity in the meaning of provisions that are being construed,<sup>8</sup> nor can an applicant seek to go through "the back door of *Padfield*" that which he could not achieve through "the front door of statutory interpretation".<sup>9</sup> Furthermore, courts cannot confer powers to bodies which they do not already enjoy; and specifically, courts cannot extend the scope of statutory powers beyond that provided for in the statute (or, where relevant, the Basic Law). There must be legal authority for every act performed, thing done or decision made.

Second, there is the issue of agency. A person acting on behalf of a public body in public law context will represent that body and be capable of binding it in public law. For example, the failure of an official in the Inland Revenue Department to provide reasons for a decision, where the law deems reasons to be required, will in law comprise a failure on the part of the Inland Revenue Department to provide reasons. A representation made by an immigration official will, subject to the relevant legal requirements being established, be capable of generating a legitimate expectation on the part of the immigration Department. This is essentially vicarious liability in public law.

However, it is an important limitation that this form of agency in public law remains subject to the restrictions on legal authority. Under the doctrine of legal validity, legal validity cannot be given to anything the public body

<sup>3</sup> This applies "no matter how widely expressed" the statutory discretion. *C v Director of Immigration* (2013) 16 HKCFAR 280, para.72.

<sup>4</sup> *Roberts v Hopwood* [1925] AC 578 (HL).

<sup>5</sup> *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 (HL).

<sup>6</sup> *Chan Noi Heung v Chief Executive in Council* [2007] HKEC 885.

<sup>7</sup> *R v Secretary of State for the Environment, Transport and the Regions, ex parte Smeeth* [2001] 2 AC 349, p.397.

<sup>8</sup> *Li Yiu Kee v Chinese University of Hong Kong* [2009] HKEC 184, para.41, per Cheung J.

<sup>9</sup> *Id.*, para.112, per Cheung J; affirmed in *Li Yiu Kee v Chinese University of Hong Kong* [2009] HKEC 1159 (CA).

its officials says or does which would have the effect of unlawfully expanding their powers or taking them beyond their jurisdiction. An employee or representative of a public body cannot bind that body in public law when to do so would take the body beyond its legal powers. Were it otherwise, either the employee or representative – or the courts in litigation – would be capable of effectively extending the legal powers of public bodies. This would be particularly objectionable where it involved the extension of statutory powers. It is also not within the discretion of a public body to relax or abrogate compliance with the law.

This can, of course, lead to some undesirable outcomes. If a Hong Kong non-permanent resident is told by an immigration official at Hong Kong International Airport that he will enjoy the right to land on an indefinite basis, and the resident relies on that statement – only for it to transpire that the Immigration Department had no statutory power to make that assurance and that the statement is of no legal effect – the resident may suffer material loss or detriment to his plans or intentions.<sup>10</sup> That is in addition to the feelings of disappointment and unfair treatment that he will likely experience. If a person who intends to establish a restaurant business is told by the Business Registration Office of the Inland Revenue Department that he meets the requirements for a General Restaurant Licence, but his subsequent application for such a licence to the Director of Food and Environmental Health is rejected, the Business Registration Office is not capable of binding the Director of Food and Environmental Health as to his licensing decisions and the licence application may lawfully be rejected.<sup>11</sup> The applicant may likewise suffer material loss or detriment to his plans or intentions, again in addition to the likely feelings of disappointment and frustration. In each of these cases, however, it is (in public law) simply too bad for the person affected: the necessary legal authority is lacking in the relevant decision maker for public law liability to result. It was recently stated *obiter* that "an officer of a government department or a public body may bind the latter only if he acts on actual or ostensible authority".<sup>12</sup> Whether an entity has actual or ostensible authority will be taken from the evidence,<sup>13</sup> including of course the relevant statutory context.

In the context of legitimate expectations, a police informant who was imprisoned was told by police that if he was accepted into the protected witness unit scheme he would remain in it for the whole of his sentence, and he was subsequently accepted into it but later removed and returned to the general prison population. It was held that the police had no actual or ostensible authority to treat the claimant as a protected witness, as decision-making

<sup>10</sup> This is subject to the law on breach of legitimate expectations, but that itself brings limitations to bear on such statements.

<sup>11</sup> See pp.221–223.

<sup>12</sup> *Ng Chi Keung v Secretary for Justice* [2016] 2 HKLRD 1330, para.41, per Li J.

<sup>13</sup> See, for example, *id.*, para.42.