2. Express Limits on Judicial Review

(a) Constitutional limitations

(i) Acts of state

Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China
(Cap 2101)

Article 19

The Hong Kong Special Administrative Region shall be vested with independent judicial power, including that of final adjudication.

The courts of the Hong Kong Special Administrative Region shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained.

The courts of the Hong Kong Special Administrative Region shall have no jurisdiction over acts of state such as defence and foreign affairs. The courts of the Region shall obtain a certificate from the Chief Executive on questions of fact concerning acts of state such as defence and foreign affairs whenever such questions arise in the adjudication of cases. This certificate shall be binding on the courts. Before issuing such a certificate, the Chief Executive shall obtain a certifying document from the Central People's Government.

COMMENTARY

1. *Acts of state*

The term 'acts of state' refers to any assertion of sovereignty in international relations.[5] This includes the recognition of foreign states[6] and governments,[7] the conduct of international relations,[8] the conclusion

5 S De Smith and R Brazier, *Constitutional and Administrative Law* (London, Penguin Books, 8th Edn).

6 *The Jupiter* [1924] P 236 at [238], [242].

7 *Somalia v Woodhouse Drak & Carey (Suisse) SA ('The Mary')* [1993] QB 54.

8 *Abbasi v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA 1598 at [83]-[86], [107]. This case concerned an application to compel the Foreign Secretary to make representations to the United States government to seek the release of a British citizen held for an indefinite period at Guantanamo Bay, Cuba. Lord Phillips said at [107]: 'On no view would it be appropriate to order the Secretary of State to make any specific representations to the United States, even in the face of what appears to be a clear breach of a fundamental human right, as it is obvious that this would have an impact on the conduct of foreign policy, and an impact on such policy at a particularly delicate time.'

of treaties,[9] the decision to use military force[10] and national security.[11] The general rationale for excluding acts of state from review is that they are matters of policy and not law, with the executive in a better position than the courts to determine where the balance lies.

In *Re Chong Bing Keung (No 2)* [2000] 2 HKLRD 571, the United States sought the extradition of 'E' from Hong Kong. However, a United States District Court held that the extradition agreement entered into between the United States and HKSAR was a nullity, as the US Congress had determined that treaties could only be entered into with sovereign states (HKSAR was deemed to be of 'sub-sovereign' status). E brought habeas corpus proceedings contending that as the extradition agreement was now invalid, the magistrate lacked the jurisdiction to order the committal of E. On appeal, the issue was raised as to whether the courts should presume that the extradition agreement was binding. The Court of Appeal held that they had no competence to adjudicate upon treaty obligations on the plane of international law:[12]

> The state of foreign relations at any particular time between the HKSAR and some other state or international entity may be subject to ambiguity, inconsistency and ongoing diplomatic discussions. It is not conducive to legal scrutiny by the courts ... [The appellant's argument] involves the appellant inviting the court to rule that the international treaty constituted by the Agreement has effectively been abrogated by the USA as a result of Congress rendering it incapable of performing its obligations thereunder. This is an invitation which the court must decline as it is clearly established that the municipal courts of Hong Kong are not competent to adjudicate upon treaty obligations on the plane of international law.

Godfrey V-P added at pp 587–588:

> [W]hat this court has been asked to do is, in effect, to declare that the government of the United States of America is not bound by an international treaty obligation into which it has purported to enter. I cannot conceive that it lies within the jurisdiction of a municipal court of the Hong Kong Special Administrative Region to do this ... It must be for the executive arm of our government here to consider whether such a treaty obligation does or does not subsist and, if it decides that it does not, to act (or refuse to act) accordingly.

9 *Yang Chang Chun Robert v Government of the United States of America & Anor* [1997] 3 HKC 338.

10 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 398 per Lord Fraser; *R (On the Application of Gentle) v Prime Minister* [2007] 2 WLR 195 at 210-213. This concerned a challenge to the legality of the US-UK led military intervention into Iraq in 2003. The UK House of Lords held that the lawfulness of the use of force belonged to the area of relations between states.

11 *Liversidge v Anderson & Anor* [1941] 3 All ER 338 (HL); *Chandler v Director of Public Prosecutions* [1962] 3 All ER 142 (HL).

12 Riberio JA at [582], [587].

The principle in *Chong Bing Keung* reflects the English approach that was prevalent in Hong Kong prior to the handover in 1997. That is, the power to conclude treaties with others states is considered an exercise of the royal prerogative that cannot be challenged in municipal law.[13] On this basis, the court will confine their review to examining whether the foreign warrant authorizing the arrest of the fugitive had been duly authenticated and determine whether the evidence produced by the requesting state would justify the committal of the fugitive for trial.[14]

2. *HKSAR autonomous powers*

By necessary implication, the Basic Law prevents the courts from adjudicating on matters outside of the autonomous powers enjoyed by Hong Kong. A recent controversy surrounding the wife of Zimbabwe President Robert Mugabe provides a good example of a non-justiciable decision (at least partly) on the grounds of foreign policy, being outside of the HKSAR's autonomous powers. Grace Mugabe was alleged to have assaulted a photojournalist during her visit to Hong Kong in January 2009. However, as the wife of a serving head of state, Grace Mugabe was entitled to diplomatic immunity for any offence she was alleged to have committed during her stay in Hong Kong.[15] As diplomatic immunity is a matter which is the sole responsibility of the Central People's Government, the courts in Hong Kong would have no jurisdiction to entertain an application for judicial review.[16]

(ii) Prerogative of mercy

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13 *Rustomjee v The Queen* (1876) 2 QBD 69 at 74 per Lord Coleridge CJ; *Blackburn v Attorney-General* [1971] 1 WLR 1037.

14 See *Yang Chang Chun Robert v Government of the United States of America & Anor* [1997] 3 HKC 338. It is possible, however, for legitimate expectations to be generated from the conclusion of a treaty that has yet been ratified (see Chap 13).

15 By virtue of Art 22(1)-(3) of the PRC Regulations Concerning Diplomatic Privileges as applied to Hong Kong by Art 18(2) and Annex III of the Basic Law.

16 See, further, Secretary of Justice's opening remarks at a meeting of Legco Panel on Administration of Justice and Legal Services, 30 March 2009. For a view that diplomatic immunity did not apply (and therefore Grace Mugabe's prosecution would not be a matter of foreign affairs), see 'Grace Mugabe's Questionable Immunity', *Hong Kong Human Rights Monitor*, Hong Kong, 23 March 2009.

Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China
(Cap 2101)

Article 48

The Chief Executive of the Hong Kong Special Administrative Region shall exercise the following powers and functions ...

(12) To pardon persons convicted of criminal offences or commute their penalties

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Ch'ng Poh v Chief Executive of HKSAR
[2003] HKCU 1346

The applicant was convicted of fraud related crimes. The applicant's appeal against conviction was dismissed by the Court of Appeal although the sentence in respect of the first offence was reduced by one year. Following unsuccessful appeals and on release, the applicant petitioned the Chief Executive seeking either a pardon or the agreement of the Chief Executive to exercise his powers in terms of s83P of the Ordinance to refer his case to the Court of Appeal for fresh consideration. One issue raised in the proceedings was whether the Chief Executive's power to grant pardons was amenable to judicial review.

Hartmann J:

26. Prior to the change of sovereignty, the prerogative of mercy was exercised on behalf of the monarch by successive governors, their delegated power being contained in the Letters Patent. Upon the change of sovereignty, the Basic Law gave to the Chief Executive the power to pardon persons or commute their sentences. That power is a prerogative power; namely, a power vested solely in the Chief Executive to be exercised by him as an executive act ...

27. On behalf of the respondent, [counsel] submitted that the power vested in the Chief Executive under Art 48(12) is in all its essentials the same prerogative power exercised in Hong Kong before 1 July 1997. As such, said [counsel], the common law pertaining to the exercise of the royal prerogative as at the change of sovereignty is also, in the absence of any consideration of the matter by the Hong Kong courts since the change, the law pertaining to Art 48(12). [Counsel for the respondent relied on two Privy Council decisions that clearly stated that the prerogative of mercy is not susceptible to judicial review.]

34. [However in] Hong Kong, the power vested in the Chief Executive pursuant to Art 48(12) is to be read within the context of the Basic Law itself, our primary document of constitution. It is the Basic Law which gives the power and fashions its nature. Article11 of the Law speaks to this in the following terms: 'In accordance with Art 31 of the Constitution of the People's Republic of China, the systems and policies practised in the Hong

Kong Special Administrative Region, including the social and economic systems, the system for safeguarding the fundamental rights and freedoms of its residents, the executive, legislative and judicial systems, and the relevant policies, shall be based on the provisions of this Law.'

35. Article11 defines the basis of executive power. That power is to be found not by looking to the history of the royal prerogative but by looking at the Basic Law itself, a law that protects the fundamental freedoms of all residents. In my judgment, it is evident that the Basic Law, while giving the Chief Executive certain prerogative powers, does not seek to place him above the law; his powers are defined by and therefore constrained by the Basic Law. The Chief Executive is a creature of the Basic Law and he enjoys no powers, no rights or privileges which are not afforded to him by that law. That being the case, I do not see that his powers exercised pursuant to Art 48(12) can be classified as purely personal acts of grace, a species of private acts carried out by the official who, in terms of Art 43, is the head of the Hong Kong Special Administrative Region. To the contrary, when the Chief Executive acts pursuant to Art 48(12), in my judgment, he acts within the greater constitutional scheme, a scheme which looks to the protection of the rights of all residents according to law. In 1927, in *Biddle v Perovich* 274 US 480, 486 (1927), the American jurist, Holmes J, expressed it thus: 'A pardon in our days is not a private act of grace from an individual happening to possess power. *It is a part of the Constitutional scheme*. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.' [my emphasis]...

37. In my judgment, it would offend the Basic Law – and do so manifestly – if, for example, those advising the Chief Executive in respect of his discretion under Art 48(12) were able with impunity to subvert the honesty of that advice on the basis of racial, sexual or religious grounds or were able with impunity to refuse to put before the Chief Executive evidential material which did not for whatever reason suit their private ends. If such was the case, the Chief Executive would not, in making a determination on the basis advice, be discharging his obligations in terms of the Basic Law. That is because the Basic Law, as a document of constitution that safeguards the rights and freedoms of all residents in accordance with law (see Art4), does not permit such pollution of lawful process, executive or otherwise.

38. In the circumstances, I am satisfied that in terms of the Basic Law, while the merits of any decision made by the Chief Executive pursuant to Art 48(12) are not subject to the review of the courts, the lawfulness of the process by which such a decision is made is open to review. Accordingly, the applicant's challenge in respect of Art 48(12) is not vitiated by a lack of jurisdiction.

[Hartmann J then went on to address the applicant's claims, which were all relating to the fairness of the process in terms of which the Chief Executive came to his determination. Having considered the arguments, Hartmann J held there was no procedural impropriety.]

COMMENTARY

1. *Role*

Exercise of the prerogative of mercy can have the effect of relieving a prisoner from the punishment, either freely or conditionally, that may follow criminal conviction.[17] As the applicant sought in *Ch'ng Poh*, the prerogative of mercy can also be exercised to request a fresh hearing, or to pardon those convicted who have already served their sentences. The prerogative of mercy is used as a means of correcting miscarriages of justice when the appellate courts could not, such as where exculpatory evidence was inadmissible, or for summary convictions, which at that time had no avenue for appeal.[18] The prerogative of mercy exists as a safety valve where the criminal trial and appeal system produces a result which the public interest cannot sustain.[19] They have also been used for administrative convenience, to assist those providing assistance to the prosecuting authorities, or to recognize good behavior in prison.[20]

2. *Justiciability*

Traditionally, the prerogative of mercy was not susceptible to judicial review, as is clear from Lord Roskill's dictum in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 418. The orthodox understanding of the prerogative was expressed by Lord Diplock, who said that the grant was essentially a privilege granted by the Secretary of State: '[m]ercy is not the subject of legal rights. It begins where legal rights end'.[21] The court in *Ch'ng Poh v Chief Executive* rejected counsel's submission on the line of cases supporting on this proposition on the ground that they do not accurately reflect the constitutional foundation for the Chief Executive's power to grant mercy, which is now the Basic Law. Any decision made by the Chief Executive is therefore amenable to judicial review on the conventional grounds.[22]

17 BV Harris, 'Judicial Review of the Prerogative of Mercy?' [1991] *Public Law* 386.
18 Hannah Quirk, Prisoners, *Pardons and Politics: R (On the Application of Shields) v Secretary of State for Justice* (2009) 9 Crim LR 648-651.
19 Op cit , n 18.
20 Ibid.
21 *De Freitas v Benny* [1976] AC 239 at 247.
22 For further analysis on the reviewability of the prerogative of mercy, see BV Harris, 'Judicial Review, Justiciability and the Prerogative of Mercy' (2003) 62(3) *Cambridge Law Journal* 631.

3. Uses of Proportionality

As mentioned above, proportionality has not been recognised as a general ground of judicial review alongside illegality, irrationality and procedural impropriety. Instead, proportionality has only been used in discrete categories of cases where the courts have felt the need to engage in a more searching enquiry.

(a) Proportionality and procedural impropriety

The courts have developed a proportionality-type analysis for determining the scope of common law rights to legal representation available before adjudicative bodies. Applicants have sought to rely on Art 35 of the Basic Law to establish a right to legal representation before adjudicative bodies such as tribunals and disciplinary bodies. Art 35 of the Basic Law states:

> Hong Kong residents shall have the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies. Hong Kong residents shall have the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel.

Applicants have been largely unsuccessful in their reliance on Art 35. The courts have adopted a narrow view of the definition of the meaning of 'courts' under Art 35. However, the courts have held that applicants do have a right to legal representation, albeit qualified, at common law and the scope of the right is to be determined by reference to a proportionality test. This was apparent in *Stock Exchange of Hong Kong Ltd v New World Development Co Ltd & Ors*.[5]

Stock Exchange of Hong Kong Ltd v New World Development Co Ltd & Ors
[2006] 2 HKC 533, [2006] 2 HKLRD 518 (Court of Final Appeal)

The applicants were challenging the limitations on legal representation at a disciplinary hearing of the Disciplinary Committee of the Stock Exchange. The Court of Final Appeal rejected the applicants' arguments based on Art 35: it took the view that 'courts' under that provision was a reference to the formal courts of the HKSAR to the exclusion of tribunals and disciplinary bodies. In analyzing the applicants' alternative argument that there is a right to legal representation at common law, the Court of Final Appeal took the view that there is such a right but it is not an absolute right. Instead there is a discretion on the part of the adjudicative body on whether or not to permit legal representation. The manner in which this discretion is to be exercised includes elements of a proportionality-style analysis: the extent to which legal representation will be permitted at common law will depend on the needs of fairness in the circumstances of the case and what was proportionate.

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5 [2006] 2 HKC 533, [2006] 2 HKLRD 518 (Court of Final Appeal). This case is also discussed in Chapter 8 in the context of procedural impropriety.

Ribeiro PJ:

The applicability of the common law principles of procedural fairness

90... I have dealt at some length with the art. 35 argument because of the need to address the case-law developed by the Court of Appeal on this important constitutional subject.

91... However, as all the parties correctly accept, the common law principles of procedural fairness provide an appropriate framework for dealing with the issues dividing them. As Reyes. J points out: "An inquiry into whether art. 35 rights have been transgressed by a court's procedure does not end with mere identification of a tribunal as a "court". As Cheung JA stresses, there remain questions of proportionality." (sub-paragraph 113) It follows that even assuming the respondents succeeded in maintaining that the Disciplinary Committee is a court for art. 35 purposes, they would still have to address the question whether it may be proportionate to restrict legal representation in given circumstances – an inquiry which mirrors the inquiry that is undertaken at common law. Legal representation is not invariably an attribute of a court of law. Thus in tribunals dealing with small claims or employment matters, lawyers are often dispensed with for wholly legitimate policy reasons (usually while providing for the possible transfer of proceedings and appeal to more formal courts where justice requires).

92... Moreover, this is not a case where the respondents face a prohibition against legal representation. On the contrary, as the provisions of the Disciplinary Procedures set out...above indicate, persons appearing can avail themselves of legal assistance and advice before and during the hearing. The proceedings being primarily by way of written submissions (DP 2.5), their lawyers can and may be expected to draft the same. Their lawyers can accompany them and can confer with them at any stage of the hearing (DP 5.1). The lawyers may also, at the Disciplinary Committee's request, clarify or elaborate upon any answer given by their client (DP 6.3). And, prior to final submissions, the client can confer with the lawyer who will no doubt prepare submissions to be advanced (DP 6.3). One should bear in mind in this context that in many states which are signatories to relevant human rights conventions, the rule is that parties have no right to examine witnesses.

93... The issue in the present case therefore concerns the precise mode and extent of legal representation which should be permitted at the hearing. The answer must depend on what is fair and proportionate, applying the common law approach. This case is therefore distinguishable from *Dr. Ip Kay Lo v Medical Council of Hong Kong (No. 2)* [2003] 3 HKLRD 851 where upon refusal of an adjournment, Dr Ip was left without any legal representation at the hearing. It is also quite different from the *Solicitor v Law Society of Hong Kong* (unrep., CACV No. 302 of 2002, [2004] HKEC 219), where the court was concerned with the purported impact of indemnity costs on the

right of access to a tribunal and where the solicitor in question actually had counsel appearing on his behalf (sub-paragraph 3).

94... It is also convenient at this stage to deal with art. 10 [of BORO]. In my view, the applicability of the common law principles of fairness makes it unnecessary to embark on a parallel inquiry into the applicability of art. 10. Certain questions arise as to art. 10's scope and applicability to disciplinary proceedings (which, for instance, may or may not be "a suit at law"). But even assuming that it does apply, the parties are agreed that it does not add anything to the common law rules on procedural fairness. I therefore propose to say nothing more about art. 10.

Legal representation and the common law principles of fairness

95... Mr. Griffiths [counsel for the respondents] based his submissions on a dictum of *Lord Denning. MR in Pett v Greyhound Racing Association Ltd* [1969] 1 QB 125. After emphasising the value and importance of legal representation to a layman, his Lordship stated:

> ... when a man's reputation or livelihood is at stake, he not only has a right to speak by his own mouth. He also has a right to speak by counsel or solicitor. (at p. 132)

96... On that basis, Mr. Griffiths suggested that in the circumstances of the present case, the respondents were entitled to legal representation as of right.

97... I am unable to accept that submission. The authorities have not developed along the lines suggested by Lord Denning. MR. Indeed, as was pointed out by Webster. J in *R v Secretary of State for the Home Department & Others, ex.p Tarrant & Others* [1985] QB 251 at pp. 273–274, in *Pett v Greyhound Racing Association Ltd (No. 1)* [1969] 1 QB 125, the Court of Appeal was dealing with an interlocutory appeal against an interim injunction and was dealing "only with the question whether it was arguable that the trainer was entitled, as of right, to legal representation..." Webster. J points out that at the substantive hearing, Lyell. J found (see *Pett v Greyhound Racing Association Ltd (No. 2)* [1970] 1 QB 46 at pp. 63–66) that the defendant association had not acted contrary to the rules of natural justice in refusing the plaintiff legal representation at the inquiry, preferring the decision of the Privy Council in *University of Ceylon v Fernando* [1960] 1 WLR 223, to the dicta in *Pett v Greyhound Racing Association Ltd (No. 1)*.

98... More recent authority clearly establishes that there is no absolute right to have counsel address the tribunal or to question witnesses, any such entitlement depending on whether such procedures are required as a matter of fairness.

99... Thus, in *R v Board of Visitors of HM Prison, the Maze, ex.p Hone & Another* [1988] AC 379, the House of Lords was concerned with a case involving

prisoners charged with offences against prison discipline (which would also constitute criminal offences). The cases were referred to the prison's board of visitors and the prisoners were refused legal representation before them. Their argument that they were entitled as of right to legal representation at the hearing was rejected. Lord Goff of Chieveley (with whom the other Law Lords agreed) stated:

> ... though the rules of natural justice may require legal representation before a board of visitors, I can see no basis for Mr. Hill's submission that they should do so in every case as of right. Everything must depend on the circumstances of the particular case, as is amply demonstrated by the circumstances so carefully listed by Webster. J in *R v Secretary of State for the Home Department & Others, ex.p Tarrant & Others* [1985] QB 251 as matters which boards of visitors should take into account. But it is easy to envisage circumstances in which the rules of natural justice do not call for representation, even though the disciplinary charge relates to a matter which constitutes in law a crime, as may well happen in the case of a simple assault where no question of law arises, and where the prisoner charged is capable of presenting his own case. To hold otherwise would result in wholly unnecessary delays in many cases, to the detriment of all concerned including the prisoner charged, and to wholly unnecessary waste of time and money, contrary to the public interest. (at p.392)

100... As his Lordship stated, the common law position is that such tribunals have a discretion whether to permit legal representation, depending on the needs of fairness: In English law, we are fortunate in having available to us a discretionary power, so often employed when it is necessary to weigh the effect of different factors; and it is established that disciplinary tribunals have, in the exercise of their discretion, and having regard to a broad range of factors including those mentioned by the European Court, to decide whether natural justice requires that a person appearing before the tribunal should be legally represented. (at p.394)

101... The matters listed in *R v Secretary of State for the Home Department & Others, ex.p Tarrant & Others* [1985] QB 251 (at pp.285–286) referred to by Lord Goff include (with modifications to make the point more general): the seriousness of the charge and potential penalty; whether any points of law are likely to arise; the capacity of the individual to present his own case; procedural difficulties; the need for reasonable speed in making the adjudication; and the need for fairness among the individuals concerned. This approach was adopted in Hong Kong by Mayo.J in *R v Hong Kong Polytechnic, ex. p Jenny Chua Yee Yen* (1992) 2 HKPLR 34. Plainly, as these judgments emphasise, no list of such factors can be comprehensive. The common law principles of fairness operate flexibly, requiring the tribunal to respond reasonably to the requirements of fairness arising in each case, balancing any competing interests and considering what, if any, limits may proportionately be imposed on legal representation in consequence.

[The Court of Final Appeal decided in favour of the Disciplinary Committee of the Stock Exchange. This is largely because they felt the application for judicial review had been premature: the Disciplinary Committee had not yet made complete directions on the extent of legal representation that would be permitted during the disciplinary proceedings as the proceedings were still at a relatively early stage at the time the applicants commenced judicial review proceedings].

COMMENTARY

1. Proportionality was accordingly used to determine the scope of the common law right to legal representation in this case. This approach to determining the scope of rights was extended to interpret the scope of the procedural protections available under Art 10 of BORO by the Court of Final Appeal in *Lam Siu Po v Commissioner of Police*.[6] The material part of Art 10 of BORO reads '*[a]ll persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law*'. The case involved a challenge of a blanket ban on legal representation included in police disciplinary regulations governing proceedings before the Police Disciplinary Tribunal. The Court of Final Appeal interpreted Art 10 (and in particular, the phrase 'determination of... his rights and obligations in a suit of law') broadly to include proceedings that are disciplinary in nature. One of the key issues following on from this conclusion was on the scope and extent of protections available for a 'fair and public hearing' under Art 10. On this, Ribeiro PJ (delivering the majority judgment) concluded that:

> ... what are the requirements of a fair hearing under Art 10? In particular, what is required in terms of legal representation at disciplinary proceedings such as those under discussion? It is my view that the well developed common law principles of procedural fairness supply the answer. An arrangement which satisfies the requirements of the common law will almost certainly conform with the fairness requirements of Art 10.[7]

2. The 'common law principles of procedural fairness' referred to by Ribeiro PJ are those principles mentioned above in the *Stock Exchange* case. Accordingly, the Police Disciplinary Tribunal in the case had a discretion on the extent of legal representation that should be permitted during the relevant disciplinary proceedings. This discretion was to be exercised on the basis mentioned in paras 100 and 101 of the *Stock Exchange* case. However, on the facts of the case, the Court of Final Appeal did not need to consider how the Police Disciplinary Tribunal in the case should have exercised their discretion on the question of legal representation as the underlying disciplinary regulations were '*systemically* incompatible' with Art 10 in imposing a *blanket* ban on legal representation.

3. Both the *Stock Exchange* case and *Lam Siu Po* highlight that the primary decision on the extent of legal representation required by the fairness of the situation and what is proportionate, is to be made by the primary decision maker. Accordingly, the courts will not themselves apply the proportionality analysis but will instead review the way in which the decision-maker has done so. This is similar to the approach suggested by the courts in *R v Secretary of State for the Home Department, ex parte Brind*[8] and *R v Ministry of Defence, ex parte Smith*[9] (discussed in Section 7 in Chapter 10). In *Brind* and *ex parte Smith* the courts held that the primary decision-maker must consider questions of proportionality when making a decision that infringes on fundamental rights. The courts will then review that decision using irrationality as the relevant ground of review. In the present context, the courts have, however, stated that in reviewing the decision-maker's decision on legal representation, they will not use irrationality as the relevant ground of review but will instead ask whether the discretion on whether to permit legal representation was exercised 'fairly'. This was the issue in *Rowse v Secretary for Civil Service*[10] where Hartmann J (as he then was) rejected the respondent's argument that '*the appropriate test [for reviewing the decision-maker's decision] was the test of rationality; in short, whether it could be said that the Secretary for the Civil Service had come to a decision which no reasonable decision maker could have reached*'.[11] The court preferred to and felt obliged to reject irrationality as the ground of review on the basis that these were questions going to the procedural ***fairness*** of the underlying decisions. As Hartmann J states:

> The court remains obliged to apply the fairness test rather than the rationality test. The requirement of fairness is fundamental and our courts have long exercised a supervisory jurisdiction to ensure that administrative hearings are conducted fairly. It has been said that the duty to act fairly is so fundamental that it amounts to a 'constitutional duty' – see *Bushell & Anor v Secretary of State for the Environment* [1981] AC 75, p 95B – and I do not see how courts can ensure that duty is met by considering matters on the basis of whether the decisions of a tribunal were or were not within the bounds of rationality.[12]

(b) Proportionality and substantive legitimate expectations

Judicial review on the basis of the doctrine of substantive legitimate expectations is discussed in detail in Chapter 13. Briefly, in this category of cases, the applicant is trying to establish a legitimate expectation that a certain decision will be

6 FACV 9/2008, 26 March 2009 (Court of Final Appeal).
7 Ibid at para 137.
8 [1991] 1 ALI ER 720, [1991] 1 AC 696.
9 [1996] QB 517.
10 [2008] 5 HKLRD 217 (Court of First Instance). This case is discussed further in Chapter 8.
11 Ibid at paras 133–134.
12 Ibid at para 134.