Administrative Law

Johannes Chan SC*

THE IDEAL of the rule of law is probably best exemplified by judicial review. It is a process whereby the exercise of public power is brought under scrutiny by an independent and impartial judiciary. Traditionally, in judicial review, the court is essentially concerned with the legality, procedural propriety and rationality of the decision-making process, with limited scope of review of the merits of a decision.[1] This traditional scope of judicial review was significantly expanded by the introduction of the Bill of Rights Ordinance in 1991, and more so by the coming into operation of the Basic Law on 1 July 1997, by bringing under judicial scrutiny not only the *vires* of administrative decisions but also the *vires* of the sources of power. The court is now empowered to strike down legislative provisions which are inconsistent with the constitutional instruments.[2] As Chief Justice Li remarked, 'it is not an exaggeration to say that the phenomenon of judicial review has redefined the legal landscape. Further, the availability and use of judicial review has had a significant impact on the conduct of the business of the government and has exercised considerable influence on public debate on many issues.'[3] The parallel development of constitutional law jurisprudence, particularly in relation to human rights, also means that the boundary between administrative law and constitutional law is increasingly blurred. In fact, development in one area reinforces and enriches the other. However, for the sake of analysis, this chapter will concentrate on the traditional areas of administrative law.

• Dean and Professor, Faculty of Law, The University of Hong Kong.

1 See, for example, the classic statement of Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410.

2 The power of constitutional review existed even before the introduction of the Bill of Rights in 1991, as the court could always strike down a legislative provision that was repugnant to the Letters Patent: see, for example, *Rediffusion (HK) Ltd v Attorney General* [1970] AC 1136.

3 Speech of the Chief Justice at the Ceremonial Opening of the Legal Year 2007: http://www.info.gov.hk/gia/general/200701/08/P200701080120.htm.

I. Statistics and Threshold

While there has been a steady increase in the number of judicial review applications in the last decade, the number has remained more or less at about 140 to 150 applications each year since 2004. In 2001 and 2002, the number of applications for judicial review filed in the Court of First Instance was respectively 116 and 102. Since 2004, the figure remains relatively stable and stands close to around 150.. Thus, the popular public perception that there have been far too many judicial review applications and that the number of which has been escalating over the years is untrue. Table 1 provides the number of applications between 2001 and 2010.

Year	**Number of Applications**	**Year**	**Number of Applications**
2001	116	2006	132
2002	102	2007	143
2003	125	2008	147
2004	146	2009	144
2005	149	2010	134

Table 1: Number of Applications for Judicial Review 2001-2010. I am grateful to the Judicial Administrator for kindly supplying me with the statistical information in this chapter.

Compared to the eighties of the last century, there are many more judicial review applications these days.[4] The increase can be accounted for by many different reasons, such as increasing complexity of the Government, better education of the public and

[4] Even as late as 1988, there were only 29 applications for judicial review: *Re Sum Tat-man* [1991] 2 HKLR 601 at 613. For an interesting account of the rise of judicial review in Hong Kong, see David Clark and Gerald McCoy, *Hong Kong Administrative Law* (Butterworths, 2nd ed, 1993), ch 1 and Swati Jhaveri, Michael Ramsden and Anne Scully-Hill, *Hong Kong Administrative Law,* ch 2, (LexisNexis, 2010), and Johannes Chan, 'Administrative law, politics and governance: the Hong Kong experience', in Tom Ginsberg and Albert Chen (eds), *Administrative Law and Governance in Asia* (Routledge, 2009), pp 143-174.

increasing awareness of their rights, higher expectation of good and fair governance, availability of avenues to challenge government decisions through the Bill of Rights and the Basic Law, willingness and innovation on the part of the legal profession to mount such challenges, sometimes on a *pro bono* basis, and frustration at the lack of progress on political reforms and the dominance of the pro-establishment forces in the Legislative Council, which has not been able to serve as a platform for discussions, negotiations and resolution of conflicting views in the community.[5]

A closer analysis of these figures reveals that in 2008, of the 147 applications, 17 applications were either not proceeded with or not yet dealt with. Of the remaining 130, leave was granted in only 66 applications. That is, about 49% of the leave applications were unsuccessful. The situation in 2009 and 2010 was similar. Of the leave applications that had been dealt with, slightly over half of them (about 53%) were successful in obtaining leave

Year	**Number of Applications dealt with**	**Leave Granted**	**Leave Refused**
2008	130	66 (51%)	64 (49%)
2009	119	63 (53%)	56 (47%)
2010	12734	68 (54%)	56 (46%)

Table 2: Success rate in obtaining leave 2008-09.[6]

[5] For a more detailed discussion, see Johannes Chan, 'Administrative Law, politics and governance: the Hong Kong experience', in Tom Ginsburg and Albert Chen (eds), *Administrative Law and Governance in Asia: Comparative Perspectives* (London and New York: Routledge, 2009), pp 143-174.

[6] *Source: Speech of the Chief Justice at the Opening of Legal Year 2010, 11 Jan 2010: http://www.info.gov.hk/gia/general/201001/11/P201001110174.htm, for the figures in 2008 & 2009; the figures in 2010 were kindly provided by the Judiciary. For 2008 and 2009, the figures provided by the Judiciary are slightly higher:*

	2008	*2009*	*2010*
Leave granted	*67*	*67*	*68*
Leave refused	*66*	*73*	*56*

At the same time, in 2008, among the 41 cases where judgment has been given, relief was granted in 15 cases. If one takes as the basis the total number of applications dealt with, the success rate is only about 12%. Yet if one takes the total number of judgments, the success rate is as high as 37%. Of the remaining 25 cases where leave has been granted, it appears that a large majority of them did not proceed beyond the leave stage. A possible explanation is that the Government was prepared to settle the claim after leave was granted. If so, the success rate is even higher.

Year	**Number of Applications Dealt with**	**Leave granted**	**Number of cases proceeding to judgment**	**Relief granted**
2008	130	66	41	19

Table 3: Successful applications in 2008. Of the 41 judgments, 4 were consolidated in one single hearing. The corresponding number of cases where relief was granted in 2009 and 2010 is respectively 14 and 9, but there is no information on the number of cases proceeding to judgment in these two years.

Hence, an interesting picture emerges. On the one hand, about half of the applications were unable to get through the leave stage. Yet for those cases that have successfully obtained leave, the success rate could be as high as 37%, that is, nearly one-third. This could mean that the filtering process has been effective as most unmeritorious cases have been screened out. Yet, given the high success rate, it could also mean that the filtering process might be too stringent, filtering cases which would otherwise have been successful.

This brings us to the threshold for granting leave. The threshold was raised at the end of 2007 in *Chan Po Fun v Winnie Cheung*.[7] Previously, the test was known as the potential arguability test, namely whether the materials before the court disclose matters

[7] [2008] 1 HKLRD 319.

which on further consideration might demonstrate an arguable case for the relief sought.[8] In laying down this test the Court of Appeal expressly rejected the approach of requiring an applicant to show an arguable case. Instead, the court had merely to do a quick perusal of the materials available, otherwise the purpose of subsequent judicial review would be pre-empted. [9] This is a sensible rule as an applicant may not be in possession of all relevant materials at the time of making an application, which must be made as soon as practicable and in any event within 3 months from the date when the grounds for application arose, usually the date of the decision impugned.[10] With a high threshold, it may invite arguments, delaying the application and even turning the leave argument into a preliminary hearing of the substantive application—in this way giving the Government two bites at the cherry.

The concern at the other end is that as a low threshold would invite busybodies, the Government and public bodies should be protected against unarguable challenges[11] – apparently a major factor in the Court of Final Appeal's decision to raise the threshold in *Chan Po Fun*. After considering the development in England, the Court of Final Appeal raised the threshold from potential arguability to reasonable arguability, requiring the applicant to show a reasonably arguable case.The court would need more than a 'quick perusal of materials' to decide the application. The Court also rejected a flexible test of a higher standard when the issue involved only statutory construction with no factual dispute on the ground that such a test would be unworkable in practice.[12]

Since this decision, the success rate for applications for leave to apply for judicial review has remained at just above 50%. Statistical information on the rate of success before this case is not available. Such information is necessary before any firm conclusion can be drawn on the impact of the higher threshold for leave application. It is

---

8 *Ho Ming Sai v Director of Immigration* [1994] 1 HKLR 3.

9 Ibid. See also *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 643-644, per Lord Diplock.

10 Order 54 r 4, Rules of the High Court, Cap 4, sub leg.

11 The former Chief Justice Li has warned against the proliferation of judicial review applications as a means to achieve political ends: see the Speech of the Chief Justice at the Ceremonial Opening of the Legal Year 2006 (9 Jan 2006) (available at www.judiciary.gov.hk/en/other_info/speeches.htm).

12 [2008] 1 HKLRD 319 at 327.

also necessary to examine how far the new test has lengthened the leave application or whether it has resulted in more applications to oppose or set aside leave and more extensive arguments on leave application. While the higher threshold may deter frivolous or unmeritorious challenges affecting both the relevant public authorities and the public,, a high success rate in judicial review may be a cause for concern about the practices of public authorities.

On the other hand, the court is prepared to grant leave if the case involves matters of public interest, even when the issue in the case has become academic. Thus, in *Secretary for Security v Prabakar* where the decision of the Director of Immigration refusing the applicant's claim for asylum was challenged, the Court was prepared to consider the merits of the case, although the applicant had already left Hong Kong to resettle in Canada and no longer had any interest in the matter when the appeal was considered.[13] This is a welcome move, as 'very often in public or administrative law cases, the duties of public bodies fall to be exercised on a continuing basis not only in relation to the parties before the court but also perhaps to others in the future.'[14]

The Court of Final Appeal has engaged in a wide-ranging number of issues in administrative law, and has delivered some major judgments which have far reaching implications or which have steered the development of the common law. The following sections will focus on how the court has facilitated access to justice and enhanced procedural due process in disciplinary proceedings, followed by an examination of the vexed question of the delineation of judicial supervision and executive autonomy.

II. Access to Justice

Costs

[13] [2005] 1 HKLRD 289 at 301-302. For further discussion on the grant of declaratory relief in matters which might have become academic, see J Chan, 'Some Reflections on Remedies in Administrative Law' (2009) 39 HKLJ 321-337.

[14] *Chit Fai Motors Co Ltd v Commissioner for Transport* [2004] 1 HKC 465.

The right to fair hearing has little significance if there is no access to a court in the first place. Access to justice can be impeded by a number of factors, an obvious one being the sheer cost of litigation. Indeed, the general principle of cost following the event is the singular deterrence to public interest litigation, as most publicly spirited litigants have limited resources and are very concerned about costs if the case is lost. In this respect, the case of *Town Planning Board v Society for Protection of the Harbour Ltd (No 2)* is a welcome development.[15] The case involved an attempt on the part of the Society to stop the Government from carrying out excessive reclamation of the Victoria Harbour. The Court of First Instance and the Court of Final Appeal found in favour of the plaintiff, and both awarded cost to the Society on an indemnity basis pursuant to O. 62 r 28(3) of the Rules of the High Court. Without limiting its general discretion to determine the appropriate cost order, the Court of Final Appeal took into account the attributes of the parties and the character of the proceedings. The case was brought, not to assert a private right, but to protect a public asset which was a central element in Hong Kong's heritage. There was manifest public interest in the matter. If legal proceedings had not been taken, the public interest in securing compliance with the law would not have prevailed and the fundamental legal issues involved would not have been resolved. The plaintiff had limited finances and was dependent on public donations. These factors were relevant to the indemnity cost order, which, as opposed to a cost order on a party to party basis, provides a more generous basis for taxation and would allow the Society to recover most of its costs. While the readiness of the court to make an indemnity cost order is a great encouragement to promoting public interest litigation, such an order is to be made only at the end of the litigation, which means that a public interest litigant would not be able to ascertain the financial position until after substantial cost has been incurred.

In contrast, a pre-emptive cost order made at the beginning of litigation would have considerably allayed the anxiety of a public interest litigant. Hong Kong courts have not been enthusiastic in making pre-emptive cost orders—understandably as such an

[15] (2004) 7 HKCFAR 114. See also *Chu Hoi Dick v Secretary for Home Affairs* [2007] HKEC 1640 and *Leung Kwok Hung v President of the Legislative Council of the HKSAR* [2007] HKEC 788.

order may put unjustifiable pressure on the other litigants.[16] At the end of the day, it should be a matter of balance; if the concern is an extravagant manner of conducting litigation given a pre-emptive cost order, conditions can be attached to avoid abuse.

Jurisdiction

Another important decision of the Court of Final Appeal concerned a delineation of its own jurisdiction. It is a common design in disciplinary proceeding of many professional bodies that an appeal against the decision of a disciplinary tribunal lies to the Court of Appeal, whose decision is final. Such a finality provision in the Legal Practitioners Ordinance was challenged in *Solicitor v Law Society of Hong Kong* on the ground that it unjustifiably precluded the applicant from a further appeal to the CFA.[17] The Court held the finality provision repugnant to the Judicial Committee Act 1833 and two applicable Orders in Council, and hence not 'law previously in force in Hong Kong' within the meaning of Articles 8 and 18 of the Basic Law. While it was possible for the Court to dispose of the appeal on this ground alone, it proceeded to decide the case on an alternative ground under the Basic Law. The court seems prepared to accept that there is a right to have a dispute resolved by final adjudication by the Court because Article 82 has vested the C F A with the power of final adjudication, albeit that this right to appeal could be subject to restrictions. The restrictions, however, have to comply with the proportionality test, namely a legitimate purpose and reasonable proportionality between the limitation and the purpose., involving a consideration of the subject matter of the dispute, the nature of the dispute (whether it involved law or fact, substantive rights or procedural matters), the need for speedy resolution, and the cost of dispute resolution, including any appeal. As it is necessary to obtain leave to appeal to the CFA, and leave will in general only be granted when the appeal involves a question of great, general or public importance, the leave is a sufficient safeguard to ensure that the final court would only allow appeals the outcome of which would be of importance to the legal system. A blanket restriction of appeal to the Court of Final Appeal was therefore unconstitutional.

---

16 *R v Lord Chancellor, ex parte Child Poverty Action Group* [1991] 1 WLR 347; *Solicitor v Law Society of Hong Kong and Secretary for Justice (No 2)(Intervener)* [2004] 2 HKLRD 754.

17 *Solicitor v Law Society of Hong Kong* (2003) 6 HKCFAR 570.

While this decision reverses the conventional belief that the decision of the Court of Appeal on disciplinary matter is final, the decision itself is not surprising because courts have traditionally jealously guarded their own jurisdiction, not lightly accepting any legislative attempt at restriction.[18] By contrast, in *Stock Exchange of Hong Kong Ltd v New World Development Co Ltd,* the CFA rejected the argument that restriction on the role of lawyers to a purely advisory role at disciplinary hearings as violating the access to court under Article 35 of the Basic Law on the narrow ground that Article 35 applied only to formal courts and not disciplinary tribunals..[19] It pointed to two dimensions to Article 35; the first being the protection of constitutional rights which had nothing to do with court proceedings (including he right to confidential legal advice) and the second being the entrenchment of an individual's rights in relation to 'the courts'. The reference to 'choice of lawyers … for representation in the courts', 'judicial remedies' and 'the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel' suggested that the word 'courts' referred to a formal court of law, as also in other Basic Law provisions referring to 'courts', where the expression meant formal courts.

The reference to other provisions in the Basic Law is at best unhelpful, as all those provisions are found in Chapter 4 which prescribes the judicial system. It would not be surprising that the reference to 'courts' in that context is confined to a formal court of law. Yet this does not mean that a provision in the Chapter on Fundamental Rights should receive the same narrow construction. Moreover, if it is true that the other provisions in Article 35 point to the direction that the reference to 'court' means a formal court of law, these provisions are equally capable of being given a more liberal meaning as the Court of Appeal did in several judgments. It was also open to the Court to construe Article 35 in light of Article 14 of the ICCPR and/or Article 10 of the Bill of Rights, which clearly have a wider scope. Nor did the Court give sufficient consideration to the fact that many decisions made by administrative tribunals could have far reaching

[18] This is best exemplified by the line of cases on ouster clause cumulating in the leading judgment in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

[19] (2006) 9 HKCFAR 234.

implications on the lives of ordinary people, which on policy grounds should be included within the scope of Article 35. The Court was obviously influenced by the fact that this was a pre-emptive strike as the action was taken before the disciplinary hearing was held so that the court was put into a position to speculate what the effect of restricting the role of lawyers would have on the fairness of the proceeding.[20] Yet by adopting a narrow interpretation of the word 'court' in Article 35, the Court has deprived itself of a powerful avenue to consider the constitutionality of any statutory restriction on fair hearing before disciplinary tribunals .

Fortunately, the gap was covered by Article 10 of the Bill of Rights, and this was confirmed in the subsequent case of *Lam Siu Po v Commissioner of Police*.[21] In this case, the Applicant was denied legal representation by Reg 9(11) and (12) of Police (Discipline) Regulations, which served as an absolute ban on legal representation in police disciplinary proceedings. He abandoned his argument on Article 35 of the Basic Law before the CA as the CFA had by then handed down its judgment in *Stock Exchange of Hong Kong v New World Development Ltd*.[22] The unsuccessful appeal before the CA focused solely on Article 14 of the ICCPR, which also formed the main argument before the CFA. After extensive reference to the jurisprudence of the Human Rights Committee and the European Court of Human Rights, the CFA concluded that Article 10 was engaged in relation to disciplinary proceeding which had a direct and highly adverse impact on one's livelihood and pension. The nature of the police force was insufficient to justify any departure from the protection of fair hearing in Article 10, and the effective functioning of the police would not be impaired by allowing its disciplinary tribunal a discretion to permit an officer to be legally represented where fairness so dictated. It is interesting to observe that, in tracing the development of the right to a court in Article 14.1 of the ICCPR and Article 6 of the European Convention of Human Rights (the equivalent of Article 10 of the Bill of Rights), the Court noted that these provisions were not originally intended to apply to decisions of administrative tribunals or to the legal

[20] See, in particular, the judgment of Bokhary PJ at 243.
[21] (2009) 12 HKCFAR 237.
[22] This case also highlights the importance and continued relevance of the Bill of Rights in constitutional review cases.

relations between, for instance, civil servants and the State which employs them, but these restrictions were 'of no more than historical interest'.[23] This is in stark contrast to the approach adopted by the Court in *Stock Exchange of Hong Kong v New World Development Co Ltd* where the Court largely confined itself to a literal analysis of the relevant provision!

The significance of *Lam Siu Po* is that it extends the Court's constitutional jurisdiction to all kinds of disciplinary proceedings, a gap that has been left open by its decision in *New World Development Co Ltd.* The decision has since then been applied to disciplinary proceedings of other law enforcement agencies, civil servants, and the medical profession, and the list is far from being exhaustive. On the other hand, Article 10 does not apply to every administrative or disciplinary decision. It is necessary to show that the decisions determine some civil rights and obligations, and the Court has not laid down any guidance to determine what constitutes 'civil rights and obligations', save that it is prepared to adopt a broad and common sense construction of this term. In these cases, the Court took into account the terminal nature of the decision, the impact of the decision on the pension rights or reputation or the continuing practice as a member of a professional body, and accepted that the right to employment constituted a civil right for this purpose.

III. Retrospectivity and Extension of Time to Appeal

As a result of the CFA judgment in *Lam Siu Po*, many police officers sought to overturn their disciplinary convictions on the ground that they had been denied legal representation. In most of these cases, the application for leave to apply for judicial review, [24] or if leave had previously been granted, an application to include a new ground

---

[23] Ibid, at 267, para 74, per Riberio PJ, citing Lord Walker in *Runa Begum v Tower Hamlets London Borough Council* [2003] 2 AC 430 at 464, para 109.

[24] See *Tsui Kin Kwok Johnnie v Commissioner of Police*, HCAL 50/2009; *Yiu Sung Chi & Lam Yau Tak Joseph v Commissioner of Police*, HCAL 101 & 102/2009); *Tsui Chun Fai Danny v Commissioner of Police*, HCAL 131/2009); *Li Kin Wah & Yung Kam Cheung,* HCAL 126/2009 & 6/2010); *Wong Chi Keung & Others v Commissioner of Police*, HCAL 1/2010, HCAL 20/2010 & HCAL 21/2010).

to take advantage of the decision in *Lam Siu Po*,[25] or an application for an extension of time to appeal to the CA or CFA on the basis of *Lam Siu Po*,[26] were lodged long out of time. The courts had not been entirely consistent in handling these applications.[27] The matter was eventually resolved by the CFA in *Clarence Chan v Commissioner of Police* in favour of finality of litigation.[28] It was held that the mere fact that the law has been changed in favour of a litigant who had previously lost on that view of the law was not a sufficient reason to justify an extension of time for appeal. Such extension could only be justified on very rare occasions of exceptional circumstances.

While the issue was resolved by a refusal to exercise discretion to grant an extension of time for appeal, the aftermath of *Lam Siu Po* highlights the problem of retrospective operation of the common law. It is an inherent feature of the common law that the court in deciding a case is necessarily applying the principle to some events in the past, and hence the common law, by necessity, operates retrospectively. This poses a major challenge to our system of justice when a settled principle of law is reversed, as there may be numerous past decisions or actions that were based on the previous erroneous view of the law and may potentially be open to challenge, sometimes long after the decisions had been made. In the normal course of events, the time limit for filing a case or lodging an appeal will take care of the situation, but the situation becomes more complex when the *vires* of the source of power is successfully challenged. In the *Lam Siu Po* aftermath, the question was whether the disciplinary conviction of a police officer should be upheld when the restriction of legal representation was subsequently found to be unconstitutional.

---

25 *Chiu Kin Ho v Commissioner of Police*, HCAL 135/2004.

26 *Ho Ho Chuen v Commissioner of Police*, HCMP 2276/2009; *Chan Kang Kau Clarence v Commissioner of Police*, HCMP 2824/2004).

27 Leave to make an application or appeal out of time was granted in *Chau Cheuk Yiu v Poon Kit Sang*, HCMP 121/2010; *Chan Ka Man v Commissioner of Correctional Services*, HCAL 111/2009. The Chief Justice explained these decisions as turning on the peculiar facts of these cases and did not decide any principles of law: see Chief Justice Li, 'Reflections on the Retrospective and Prospective Effect of Constitutional Judgments', in Rebecca Lee (ed), *Common Law Lectures 2010* (Faculty of Law, The University of Hong Kong, 2011), p 21, at p 44.

28 FAMV No 15 of 2010; affirmed in *Lam Chi Pan v Commissioner of Police*, FAMV 35 of 2010.

This give rises to the controversial issue of how far the courts can limit the temporal effect of its judgments so as to avoid disturbing decisions that have been made in the past or to avoid a legal vacuum in the future before necessary remedial measures can be taken.[29] The CFA appeared to have accepted, without deciding, that it has an inherent power to engage in prospective overruling.[30] It has also recognised that this question might depend on the understanding and extent of separation of powers and the particular relations between the Legislature, the Executive and the Judiciary in different jurisdictions, and as a result, this was not a question that might yield to a common answer in different parts of the common law world. With such rider, Li CJ provided a helpful summary of the exercise of such power if it existed. He held that (1) if such a power exists, it is an extraordinary power that the court would approach its exercise with the greatest circumspection; (2) whether this power exists depends on the particular constitutional framework of the jurisdiction concerned, and there may not be a common approach across the common law world; (3) the existence and scope of such power may vary in different situations, as the same considerations do not apply to all situations in the different context of private law, criminal law or public law; (4) the existence of the power may also be dependent on the range of remedies that may be available; and (5) common law is developed by an evolutionary process and such development cannot be regarded as an application of the power to prospectively overrule.[31]

IV. Disciplinary Proceedings and Due Process

For a long time in Hong Kong it was believed that the standard of proof in disciplinary proceedings is a standard that is commensurate with the gravity of the

---

[29] For a more detailed discussion, see Johannes Chan, 'Some Reflections on Remedies in Administrative Law' (2009) 39 HKLJ 321-337; Chief Justice Li, 'Reflections on the Retrospective and Prospective Effect of Constitutional Judgments', in Rebecca Lee (ed), *Common Law Lectures 2010* (Faculty of Law, The University of Hong Kong, 2011), pp 21- 55; Kevin Zervos, 'Constitutional Remedies under the Basic Law' (2010) 40 HKLJ 687-718..

[30] *HKSAR v Hung Chan Wa* (2006) 9 HKCFAR 614; *Koo Sze Yiu v Chief Executive* (2006) 9 HKCFAR 441..

[31] *HKSAR v Hung Chan Wa* (2006) 9 HKCFAR 614 at 634.

disciplinary charge.[32] This flexible standard is an acknowledgement that disciplinary charges involve allegations ranging from nothing more than a technical breach to something closely akin to criminal charges. As Keith JA observed,

> [this approach] has the inestimable advantage of flexibility, and does not tie the hands of the disciplinary tribunal to a particular standard of proof, whatever the nature of the allegations and whatever the consequences for the person facing the disciplinary action. The more serious the complaint, and the more dire its consequences, the greater the degree of proof required to prove it, even though the degree of proof required falls short of proof beyond reasonable doubt.[33]

Thus, when the disciplinary charge was in essence one of indecent assault, it was held that the standard of proof has to be something similar or close to the criminal standard of proof beyond reasonable doubt,[34] whereas if the charge was purely technical such as a failure to comply with certain procedural requirements or standards, it was held that the appropriate standard should be the civil standard of a balance of probabilities.[35] Unfortunately, flexibility also means uncertainty; the strength of this flexible approach is also its weakness. In *Pirie v Bar Council*,[36] Le Pichon JA observed *obiter* that 'a party who has to defend himself against serious allegations which are tantamount to the commission of a criminal offence and which have serious repercussions on his professional career should not be placed in a situation where the ground rules for defending himself are elastic and the boundaries imprecise.' The issue was eventually re-visited by the CFA in *Solicitor (24/07) v Law Society of Hong Kong*.[37]

---

32 The leading authorities are *Tso Lo Hong v Attorney General* [1995] 3 HKC 428 at 442A-B, per Litton VP; *Wu Hin Ting v The Medical Council of Hong Kong* [2004] 2 HKC 367 at 378D-G, per Ma CJHC; and *Lai King Shing v Medical Council of Hong Kong* [1996] 1 HKC 24.

33 *Lai King Shing v Medical Council of Hong Kong* [1996] 1 HKC 24 at 27B-28B.

34 *Tso Lo Hong v Attorney General* [1995] 3 HKC 428; *Dr Mu Lie Lian v Medical Council of Hong Kong* [1995] 1 HKLR 29; *Wu Hin Ting v Medical Council of Hong Kong* [2004] 2 HKC 367; *Lai King Shing v Medical Council of Hong Kong* [1996] 1 HKC 24.

35 *Solicitor v Law Society of Hong Kong* [1997] HKLRD 63.

36 [2001] 4 HKC 190 at 204.

37 (2008) 11 HKCFAR 117.

Having set out that there are only two standards of proof known to our law, being proof beyond reasonable doubt and proof on a preponderance of probabilities, Bokhary PJ first examined the standard of proof in civil cases where there was an allegation of criminal conduct. Having satisfied that the appropriate standard of proof was the civil standard, and that the more serious the allegation the more cogent the evidence required to overcome the unlikelihood of what was alleged, his Lordship turned to disciplinary proceedings. It was acknowledged that the standard of proof in disciplinary proceedings 'must be clear and, at the same time, capable of accommodating the variety of circumstances in which it has to be applied from case to case. It must lend itself to the just and proper disposal of all those cases.'[38] The court then turned the standard of proof into a question of cogency of evidence, and held that:[39]

> 'the standard of proof for disciplinary proceedings in Hong Kong is a preponderance of probability under the *Re H* approach. The more serious the act or omission alleged, the more inherently improbable must it be regarded. And the more inherently improbable it is regarded, the more compelling will be the evidence needed to prove it on a preponderance of probability. '

Lord Morris provided a further explanation of this approach in *Re H*:[40]

> 'When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. A stepfather is usually less likely to have repeatedly raped and had nonconsensual oral sex with his under age stepdaughter than on some occasion to have lost his

---

38 Ibid, at 166, para 112.
39 Ibid, at 167, para 116.
40 *Re H & Others (Minors)(Sexual Abuse: Standard of Proof)* [1996] AC 563 at 586D-G.

temper and slapped her. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.'

This explanation is almost self-serving, if not circular, as it begs the question why fraud is more unlikely than negligence, or why a stepfather is more unlikely to commit rape against his step-daughter. It is almost suggesting that a "normal" person is less likely to commit a crime. Besides, once the conduct alleged is criminal in nature, the heightened civil standard is hard to distinguish from the criminal standard in practice,[41] or as Lord Bingham remarked, the distinction 'is in truth, largely illusory'.[42] While it is understandable that the court would like one single standard of proof in disciplinary proceedings, shifting attention from the standard of proof to cogency of evidence is largely semantic when the evidence required to discharge this single standard of proof is to be varied according to the probabilities of the allegations.

In a series of cases, the CFA clarified a number of procedural matters pertaining to due process before disciplinary tribunals that are of far-reaching consequences. In *Medical Council of Hong Kong v Helen Chan*, the issue was the role of the legal adviser in disciplinary proceedings.[43] There are many disciplinary bodies, statutory appeal boards and tribunals for which a legal adviser may be appointed.[44] In the case of the Medical Council, the office of legal adviser is created by the Medical Registration Ordinance (Cap. 161), and by section 6(1) of the Medical Registration (Miscellaneous Provisions) Regulation (Cap. 161, sub. leg. D), the legal adviser shall be present at every inquiry held by the Medical Council. The legal adviser will give his or her advice on the legal issues in the presence of all parties after the Medical Council has heard all evidence and submissions but before it retires to consider its judgment. The legal adviser will, however, retire together with the Medical Council and be present at its deliberation so as to ensure that the Medical Council does not inadvertently take into account irrelevant matters and to prevent any misunderstanding of the legal issues. If necessary, he or she

41 As observed by Lord Phillips in *Gough v Chief Constable of Derbyshire Constabulary* [2002] QB 1213 at 1243A.

42 *B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 WLR 340 at 354A.

43 (2010) 13 HKCFAR 248.

44 For a list of such bodies, see ibid, at 259-260, paras 13-14.

may tender additional legal advice, and will inform all parties of such advice. The adviser will then prepare the first draft of the decision of the Medical Council in its presence. The draft judgment will be scrutinized thoroughly and modified, if necessary, by the Council to ensure that it is not the product of the legal adviser but the collective product of the Council. Given the increasing complexity of the issues confronting the Medical Council and the increasing expectation on procedural fairness, both the Court of Appeal and the CFA were supportive of this practice and were satisfied that its practice was well-intentioned and properly motivated. The issues, however, remained whether the presence of the legal adviser at the deliberations of the Medical Council and the role in drafting the judgment were authorized by law and whether they would give rise to an apparent bias and injustice. The Court of Appeal answered both questions against the Medical Council.

The CFA found no express or implied statutory provision that prohibited the presence of the legal adviser at the Medical Council's deliberations or permitted or prohibited his or her drafting the Council's decision, leaving the matter to be resolved according to the common law. Despite a long line of authorities that cast doubt on the presence of a non-member at the deliberative stage of a disciplinary or statutory appeal tribunal, the CFA drew a distinction between a non-member who acted as prosecuting counsel and a non-member who acted as legal adviser to the tribunal. The CFA held that the presence of the legal adviser at the deliberative stage did not compromise the competence, independence and impartiality of the tribunal, the safeguard being the quality of the members of the tribunal. As for drafting the decision, the Court found the practice acceptable so long as the legal adviser's role is confined to recording and reducing into writing the decision, finding and reasoning of the tribunal.[45]

[45] The CFA emphasized that 'the tribunal must deliberate without any participation by the legal adviser apart from giving it legal advice. No drafting by the legal adviser may commence until after the tribunal – having so deliberated – has arrived at its decision and has made its decisions, findings and reasoning known to the legal adviser. What the legal adviser drafts must embody the tribunal's finding and reasoning. The tribunal must scrutinize the draft. If necessary, the tribunal must modify the draft to ensure that it is the tribunal's product, not the legal adviser's, and that it says what the tribunal means.'Ibid, at 274, para 62.

The Court further proffered two pieces of advice.[46] First, the legal adviser should immediately before retiring and in the presence of all parties make a full and accurate statement of the practice that is to be followed, explaining clearly what he or she would or would not do, so as to allay the concern of all parties-- as well as to remind himself or herself and members of the tribunal-- of his role. Secondly, the legal adviser shall take great care to make his or her impartiality manifest at all times.

While this decision displays great pragmatism and will no doubt be welcomed by many lay tribunals, it may underplay the perception of bias. The line between giving legal advice on the law, or on the consequence of a particular application of the law, on the one hand, and the merit of the decision on the other, is sometimes very difficult to draw. Moreover legal advice on what is permissible can occasionally influence the outcome. The danger is even more obvious when the advice is on what is a relevant or irrelevant consideration. Thus, a reasonable person who does not know what goes on in the deliberation of the tribunal could have a legitimate grievance. It is not about whether the tribunal or the legal adviser would adhere to their roles, which was the court's concern when it posed the question of a reasonable fair-minded observer.[47]

In *Yeung Chung Ming v Commissioner of Police*,[48] the Court had to deal with the vexed problem of the legality of interim action such as withholding part of the salary during the period of interdiction of a police officer pending criminal proceedings. The appellant, a police sergeant, was interdicted upon the laying of criminal charges against him, whereupon the Commissioner directed that 10%, which was subsequently reduced to 7%, of his pay should be withheld during the interdiction. After his conviction and dismissal from the police force, the appellant argued that the withholding of his pay prior to his conviction was a violation of the presumption of innocence. The Court, by a

---

46 Ibid, at 275, paras 65-66.

47 Bokhary PJ observed that 'fair-minded persons would, in the absence of evidence to the contrary, credit responsible bodies with adherence to the safeguards of their practices. Being taken to be fair-minded, the hypothetical observer must be taken to be someone who would credit the Medical Council with adherence to the safeguards of its stated practice unless there is evidence to the contrary.: at 275, para 65.

48 (2008) 11 HKCFAR 513.

majority, rejected the suggestion that any action taken against him on the basis that he *might be* guilty constituted a violation of the presumption of innocence.[49] This must be correct, as the very act of charging a person with criminal offences must involve a view by the prosecuting authority that he might be guilty. The proper test, as pronounced by the Court, is whether the Commissioner's decision to withhold any proportion of the pay of an interdicted officer who has been charged with criminal offences implies a view that the person charged *is* guilty. The test is an objective one. The majority of the Court found no violation of his right, as he had been interdicted in the public interest, and during the period of interdiction, he was relieved from his duties and doing no work. The statute permits the Commissioner to withhold up to half of the officer's pay, and the officer is entitled to the full amount of the pay withheld if he is acquitted after trial. This decision is important as there may be many situations where an interim action might have to be taken against those charged with a disciplinary or a criminal offence. It is important to note that there was no challenge against the interdiction itself. Li CJ, writing for the majority, upheld the interdiction, as a police officer who was to remain on duty pending a criminal trial would seriously erode public confidence in the police force.[50] The test used by the court would mean that most interim measures would probably pass muster.. Test proposed by Bokhary PJ in his dissenting judgment strikes a better balance between the interest of the State and the right of the officer concerned, namely, that 'if a person is treated, by the conduct of the State, as if he is guilty or as if it does not matter whether he is guilty or not, this infringes the presumption of innocence'.[51] As Bokhary PJ observed, 'indifference to a fundamental right or freedom is more insidious – and in that sense can be even more dangerous – than any open derogation from that right or freedom'.[52]

Another important issue is the duty to give reasons for decisions. As Lord Mustill stated in *R v Secretary of State for the Home Department, ex p Doody*, the law at present does not recognize a general duty to give reasons.[53] Nonetheless, there is a clear trend towards an insistence on greater openness of decision-making and the duty to give

---

49 Ibid, at 527, paras 25-28.
50 Ibid, at 532, paras 46-47. The majority of the Court did not address this issue.
51 Ibid, at 531, para 44.
52 Ibid, at 531, para 44.
53 [1994] AC 531 at 564E.

reason has increasingly been imposed in various contexts. In *Oriental Daily Publisher v Commissioner for Television and Entertainment Licensing Authority*, the CFA affirmed this trend.[54] Without deciding on this issue, the Court indicated that it would, as a matter of statutory interpretation or common law principle of fairness, be prepared to assume a duty to give reasons unless there is contrary intention in the statute or it is otherwise inappropriate. Such a duty would promote intellectual discipline, bring sharper focus on and attention to relevant issues, provide guidance to the community, enable the parties to decide any further course of action, promote transparency, enhance consistency in decision-making and law enforcement, and foster public confidence in the work of the tribunal.[55] The Court held that not only is the Obscene Articles Tribunal obliged to give reasons, but the reasons must be adequate. The adequacy would depend on the context in which the decision maker is operating and the circumstances of the case in question. In the case of obscenity and indecency, sometimes the content of the articles in question may be self-explanatory, but when this is not the case, the Tribunal would have to explain its decision.[56] This welcome development enhances transparency and accountability of the administrative decision-making process.[57]

V. From Wednesbury to Proportionality

Another major contribution of the CFA is the introduction of the principle of proportionality to judicial review.[58] A perennial problem in administrative law is the extent of judicial scrutiny. For decades the principle of *Wednesbury* unreasonableness represented the orthodox position of judicial review. This principle is heavily influenced

---

54 [1998] 4 HKC 505 at 513H-515B.

55 Ibid, at 515C-H

56 In that particular case, the pictures involved some photographs of semi-naked females, and the Court found that if these photographs were considered indecent, the Tribunal would be coming close to holding that photographs of semi-naked females were per se indecent according to community standards. This is not self-explanatory and the Tribunal has to explain its decision: at 517-518.

57 See also *Re SJM Holdings Ltd* [2009] 1 HKLRD 321; *Wong Hin Hang v Hong Kong Housing Authority* [2009] HKEC 1151; *Ming Pao Newspaper Ltd v Obscene Articles Tribunal* [2008] HKEC 1750; *Three Weekly Ltd v Obscene Articles Tribunal* [2007] 3 HKLRD 673.

58 For a more detailed discussion, see Johannes Chan, 'A Sliding Scale of Reasonableness in Judicial Review' [2006] *Acta Juridica* 233-256.

by the doctrine of the separation of powers, under which the proper role of the judiciary is to ensure the legality of administrative decisions, not to substitute them by its own. . As modern administration becomes increasingly complex, and when administrative discretion encroaches on almost every aspect of daily life, it comes as no surprise that the courts are increasingly dissatisfied with the narrow scope of the *Wednesbury* test. The strongest attack probably came from Lord Cooke in *R(Daly) v Secretary of State for the Home Department* who prophesized that 'the day will come when it will be more widely recognized that the *Wednesbury* test was an unfortunately retrogressive decision in English administrative law, in so far as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation.'[59]

As a partial response to the narrow scope of *Wednesbury* unreasonableness, the court introduced a 'heightened scrutiny' test when fundamental rights or liberty are at stake, dealing not with the process of decision making alone, but also on the merits of the decision. Thus, in *R v Lord Saville of Newdigate, ex p A*, Lord Woolf MR said:[60]

> 'What is important to note is that when a fundamental right such as the right to life is engaged, the options available to the reasonable decision-maker are curtailed. They are curtailed because it is unreasonable to reach a decision which contravenes or could contravene human rights unless there are sufficiently significant countervailing considerations. In other words it is not open to the decision-maker to risk interfering with fundamental rights in the absence of compelling justification. Even the broadest discretion is constrained by the need for there to be countervailing circumstances justifying interference with human rights. *The courts will anxiously scrutinize the strength of the countervailing circumstances and the degree of the interference with the human right involved* and then apply the test accepted by Sir Thomas Bingham MR in *R v Ministry of Defence, ex p Smith* [1996] QB 517, which is not in issue.' (emphasis supplied).

[59] [2001] 2 AC 532 at 549.
[60] [2000] 1 WLR 1855 at 1867 para 37.

In a similar tone, the CFA held that when personal liberty is at stake, the Court would demand the highest standard of fairness and subject the decision to the most rigorous scrutiny.[61]

The principle of proportionality, developed notably in international human rights jurisprudence, has quickly found its way into domestic law in human rights matters.[62] The proportionality test acknowledges the central role of the courts in ensuring that administrative discretion cannot be exercised in a way that undermines fundamental human rights. As Lord Steyn pointed out, 'the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions.'[63] It goes beyond the traditional grounds of review 'inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations.'[64]

With the introduction of the Human Rights Act 1998 in Britain, the proportionality test is now firmly rooted in English human rights law. Yet despite the increasing influence of the jurisprudence from the European Court of Human Rights in the United Kingdom, an attempt to introduce proportionality as the fourth ground for judicial review has been unsuccessful.[65] This gives rise to a strange situation that in human rights cases, the court will adopt the proportionality test or a heightened scrutiny test; otherwise the *Wednesbury* unreasonableness test remains the guiding principle. In the UK, upon the introduction of the Human Rights Act, it has been forcefully argued that it is only a matter of time that proportionality will be accepted in English

---

61 *Secretary for Security v Sakthevel Prabaker* [2005] 1 HKLRD 289 at 302B-G.

62 See, for example, *Handyside v United Kingdom* (1980) 1 EHRR 347 at para 49; *Sunday Times v United Kingdom* (1980) 2 EHRR 245 at para 62; *Norris v Ireland* (1991) 13 EHRR 186 at para 41; *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 at para 27; *R v Shayler* [2003] 1 AC 247 at paras 60-61; *R v Oakes* (1986) 26 DLR (4th) 200; *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69; *S v Makwanyane* (1995) 3 SA 391*; Leung Kwok Hung v HKSAR* [2005] 3 HKLRD 164 at 183.

63 *R(Daly) v. Secretary of State for the Home Department* [2001]2 AC 532 at 547.

64 Ibid.

65 An argument that proportionality constituted a fourth ground for judicial review alongside illegality, procedural irregularities and impropriety was rejected by the House of Lords in *R v. Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696.

administrative law.[66] In Hong Kong, after the Bill of Rights and the Basic Law, the court has readily accepted the proportionality test in assessing the constitutionality of any restriction on fundamental rights.[67]

An attempt to bring together this parallel concept of proportionality and *Wednesbury* unreasonableness is the introduction of the so-called 'sliding scale of intensity of scrutiny test'. This concept of a sliding scale of intensity of scrutiny first appeared in the judgment of Laws LJ in *R (Mahmood) v Secretary of State for the Home Department* :

> '… in a case involving human rights the second approach which I outlined at paragraph 16 as to the intensity of review is generally to be followed, leaving aside incorporation of the Convention; but that approach and the basic *Wednesbury* rule are by no means hermetically sealed one from the other. *There is, rather, what may be called a sliding scale of review; the graver the impact of the decision in question upon the individual affected by it, the more substantial the justification that will be required*. It is in the nature of the human condition that cases where, objectively, the individual is most gravely affected will be those where we have come to call his fundamental rights are or are said to be put in jeopardy.' [68] (italics supplied)

Though confined to human rights cases[69,] there is no rational principle why the test of sliding scale should not be applied to other types of judicial review.[70] The proportionality test itself embodies an inherent flexibility as the degree of cogency of

---

66 Wade & Forsyth *Administrative Law* 368-369; Jeffrey Jowell 'Beyond the Rule of Law: Towards Constitutional Judicial Review' [2000] PL 671; David Feldman 'Proportionality and the Human Rights Act 1998' in Evelyn Ellis (ed) *The Principle of Proportionality in the Laws of Europe* (1999) 117, 127 et seq.

67 *Leung Kwok Hung v. HKSAR* [2005] 3 HKLRD a64 at 183, per Li CJ. See also *R v. Lord Saville of Newdigate, ex parte A* [2000] 1 WLR 1855 at 1867. For a more detailed argument, see J Chan, 'A Sliding Scale of Reasonableness in Judicial Review' [2006] *Acta Juridica* 233.

69 See also Sir Bingham MR in *R v Ministry of Defence, ex p Smith*: [1996] QB 517 at 554.

69 See also Sir Bingham MR in *R v Ministry of Defence, ex p Smith*: [1996] QB 517 at 554.

70 See also *R v Secretary of State for the Home Department, ex p Launder* [1997] 1 WLR 839 at 867 per Lord Hope; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1985) 162 CLR 24 at 41-42 per Mason J.

justification would vary with the importance of the interest to be protected. Parliament could always be presumed to confer a power the exercise of which is confined to what is necessary for the statutory objectives, whether involving rights or other interests. In this sense there is little difference between a proportionality test and a sliding scale of intensity of review. These cases merely illustrate a general principle that the intensity of review should be proportionate to the gravity of the subject matter at stake,[71] and a violation of human rights simply provides a context that enables the court to exercise a more rigorous standard of scrutiny. The proper issue would be what the intention of the Legislature is when it confers the powers on the public officer or the public body. If the Legislature has decided to attach specific weight to a particular factor, it is only right that the Court should ensure that such a specific weight has been accorded in the decision-making process.[72]

This argument received some blessing by the CFA in *Town Planning Board v The Society for the Protection of Harbour.*[73] The issue was the appropriate test to displace the presumption against reclamation of the Harbour which was described as a natural heritage of the people of Hong Kong under section 3 of the Protection of the Harbour Ordinance. The Town Planning Board argued that section 3 created a mandatory factor that must be taken into consideration in any reclamation, but the weight to be attached to this factor was a matter for the Board, subject only to the *Wednesbury* test. The Society, on the other hand, argued that, given the importance of the statutory objective to protect the Harbour, the Board has to demonstrate a compelling need before the presumption against reclamation could be displaced—which the CFA accepted. The need has to arise within a definite and reasonable time frame, taking into account the time scale of planning exercises, to be proved by cogent and convincing evidence. As the need has to be overriding, the extent of reclamation cannot go beyond the minimum that is required by the overriding need, and each area of reclamation must be justified. In the course of argument, the possibility of introducing a sliding scale of intensity of review was raised

---

[71] See *Minister for Aboriginal Affairs v. Peko-Wallsend Ltd* (1985) 162 CLR 24 at 41-42, per Mason J; *R v. Secretary of State for the Home Department, ex parte Launder* [1997] 1 WLR 839 at 867, per Lord Hope.

[72] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd.* (1985) 162 CLR 24 at 41.

[73] (2004) 7 HKCFAR 1.

by Sir Anthony Mason. The Court of Final Appeal noted that this issue deserved serious consideration and could well point to how common law should develop, but eventually found it unnecessary to resolve this issue.[74]

This is the first time that the Court suggested that the proportionality test, or a sliding scale of intensity of review, was appropriate in judicial review of administrative decisions concerning subject matters other than human rights. The test is flexible enough to encompass, as appropriate, a more rigorous review or the conventional *Wednesbury* unreasonableness. The sliding scale principle was eventually adopted in *Society for Protection of the Harbour Ltd v. Chief Executive in Council (No 2)*, in light of the unique legal status of the Harbour.[75] Quietly, the notion of proportionality has crept into the general principle of administrative law.

A related issue is the question of deference. Notwithstanding stricter scrutiny, the court is prepared to pay due deference to the views of the executive government in some circumstances, especially when allocation of resources or formulation of major policies is concerned. A conventional justification for due deference is that the judiciary, being unelected, lacks the legitimacy to frustrate the will of the general public manifested through the elected legislature. This justification is more relevant to constitutional review than in the classic situation of judicial review of administrative decision. It can also be argued that the judiciary is entrusted with the duty to ensure that the executive government, and likewise the legislature, does not transgress the limits of the law, including the Basic Law. This argument is stronger in Hong Kong when the Basic Law confers on the judiciary the role of constitutional review (or at least this role is assumed by the judiciary without much queries from the community), whereas in the United Kingdom or New Zealand, even upon the introduction of the Human Rights Act or the

---

74 At 21-22 paras 67 & 68.

75 *Society for Protection of the Harbour Ltd v. Chief Executive in Council (No 2)* [2004] 2 HKLRD 902 at 929-930. Despite the rhetoric, the manner the court applied this sliding scale test was not much different from the *Wednesbury* unreasonable test, highlighting the uneasiness of the court to interfere with the executive assessment of competing factors. For a detailed discussion, see J Chan, 'A Sliding Scale of Reasonableness in Judicial Review' [2006] *Acta Juridica* 233.

Bill of Rights, it was explicitly decided that the judiciary should not enjoy the power to strike down legislation.

The second justification for deference is institutional incompetence. The judiciary does not have the expertise or knowledge to encroach on some executive decisions, as for example on the allocation of state resources--. to some extent the basis of the *Wednesbury* principle. Yet there are also many judicial review decisions which have had major adverse impact on the operation of the government. The Harbour Reclamation case resulted in setting aside many years of planning for reclamation of the Harbour and sending the reclamation plan (at least part of it) back to the drawing board again,[76] whereas the decision in the public housing case would potentially affect over 2.4 million residents in public housing.[77] There are numerous examples of judicial review cases which have major public implications, and the court has not felt constrained in deciding these cases. The strength of the court is to analyse objectively the evidence and to weigh competing interests and arguments. This is a role that the court is well suited to discharge, regardless of consequences. Thirdly, this is not to say that the court should not give weight to the views of the executive government. Rather, such view should form part of the weighing process. Unfortunately, the doctrine of due deference has sometimes gone far beyond that and has resulted in an abdication of judicial duty.[78] The issue of deference has determined the outcome of a number of cases involving social and economic rights,[79] and these cases will soon reach the CFA.

---

[76] *Town Planning Board v Society for Protection of the Harbour Ltd (200*4) 7 HKCFAR 1.

[77] *Ho Choi Wan v Hong Kong Housing Authority* (2005) 8 HKCFAR 628.

[78] For an insightful discussion on deference, see J Jowell, 'Judicial Deference: Servility, Civility or Institutional Capacity?' [2003] *Public Law* 592-601; TRS Allan, 'Human Rights and Judicial Review: A Critique of "Due Deference"' (2006) 63 *Cambridge Law Journal* 671-695; M Hunt, 'Sovereignty's Blight: Why Public Law Needs "Due Deference"', in N Bamforth and P Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart, 2003), at p 337.

[79] *Kong Yun Ming v Director of Social Welfare* [2009] 4 HKLRD 382; *Fok Chun Wa v The Hospital Authority* [2010] HKCA 136; *Lau Cheong v HKSAR* [2002] 3 HKC 146; *George Yau v Director of Social Welfare* [2010] HKEC 968, ; but also see *Kwong Kwok Hay v Medical Council of Hong Kong* [2008] 3 HKLRD 524 and Cora Chan, 'Judicial Deference at Work: Some Reflections on Chan Kin Sum and Kong Yun Ming' (2010) 40 HKLJ 1.

Substantive Legitimate Expectation

In the landmark decision of *Ng Siu Tung v. Director of Immigration*,[80] the CFA extended the doctrine of legitimate expectation to cover substantive protection.[81] Indeed, the first landmark case on legitimate expectation also came from Hong Kong. In *Attorney General v. Ng Yuen Shiu*,[82] the Privy Council held that where a public authority charged with a duty of making a decision promised to follow certain procedures before reaching that decision, good administration required that it should act by implementing the promise if the implementation did not conflict with the authority's statutory duty. In that case, it was held that, having promised to consider each case on its merits upon the discontinuance of the 'touch base' policy, the Director of Immigration could not retract from that promise by removing an illegal immigrant without affording him an opportunity to be heard. This is sometimes referred to as procedural legitimate expectation. The court has for some years been hesitant to hold that the promise made in such circumstances is enforceable, as it may unnecessarily hamper the Government's ability to change a policy. Thus, only a decade ago, the doctrine of substantive legitimate expectation was still labeled by the English Court of Appeal as 'wrong in principle' and 'heretical'[83]

On the other hand, important as it may be, procedural legitimate expectation leaves an aggrieved person with little consolation and would not be conducive to good administration when he or she has relied on a promise made by the Government, and yet the promise could be withdrawn without any consequence.[84] The challenge is to delineate the scope of proper judicial intervention without unduly tying the hands of the

---

80 [2002] 1 HKLRD 561.

81 For a detailed discussion of this doctrine, see Forsyth & Williams, 'Closing Chapter in the Immigration Children Saga: Substantive Legitimate Expectations and Administrative Justice in Hong Kong' (2002) 10 *Asia Pacific Law Review* 29-47; Li & Leung, 'The Doctrine of Substantive Legitimate Expectation: The Significance of Ng Siu Tung and Others v Director of Immigration' (2002) 32 *Hong Kong Law Journal* 471-496; Tai & Yam, 'The Advent of Substantive Legitimate Expectations in Hong Kong: Two Competing Visions' [2002] *Public Law* 688-702.

82 [1983] 2 AC 629

83 *R v. Secretary of State for the Home Department, ex parte Hargreaves* [1997] 1 WLR 906 at 924-925.

84 See C Forsyth, 'The Provenance and Protection of Legitimate Expectations' [1988] CLJ 238 at 240.

Government when a change of policy is called for. Over the years, the court has on various occasions held the Government to its promise. In *Wong Pei Chun v. Hong Kong Housing Authority*,[85] the Commissioner for Resettlement assured in writing that the residents at Rennie's Mill could reside in the area indefinitely; many of them were nationalist soldiers of Kuomintang Government who came to settle in Hong Kong after 1949. Confining the principle of legitimate expectation to procedural protection, the court held that it was an abuse of power for the Government to breach the promise some 35 years later when the Government decided to remove the residents in order to carry out urban redevelopment.

The principle of substantive legitimate expectation received renewed interest in England in recent years[86] and was finally and authoritatively established in Hong Kong in *Ng Siu Tung*. Shortly after 1 July 1997, about 5,000 Mainland-born children of Hong Kong permanent residents claimed to have a right of abode in Hong Kong pursuant to Article 24 of the Basic Law, a status that they did not enjoy before the changeover. To make the litigation manageable, it was agreed that a few representative cases should be chosen. Some of the claimants were advised not to join the litigation, but were assured that they would be treated in the same way as the applicants in *Ng Ka Ling*, which was intended to be a test case. In *Ng Ka Ling v. Director of Immigration*,[87] the CFA upheld the claims. Subsequently, *Ng Ka Ling* was reversed by the Standing Committee of the National People's Congress ('NPCSC') pursuant to Article 158 of the Basic Law, which provided that 'judgments previously rendered shall not be affected.' The applicants in *Ng Siu Tung* claimed that they were given the expectation that they would be treated in the same way as the applicants in *Ng Ka Ling* and demanded that they be granted a right of abode in Hong Kong. In this sense they were claiming a substantive benefit. The CFA upheld the claims of some of them and held that, where the conduct of a public officer, whether by way of promise, representation, practice or policy, gave rise to a legitimate expectation of a substantive outcome or benefit, it would be an abuse of power to refuse

---

85 [1996] 2 HKLRD 293.

86 See also *R v. North and East Devon Health Authority, ex parte Coughlan* [2000] 2 WLR 262.

87 (1999) 2 HKCFAR 4.

to honor such legitimate expectation in the absence of any overriding reason of law or policy. [88]

While the principle is formulated in rather general language, the Court narrowed it down with a number of qualifications. First, whether an expectation is legitimate depends partly upon the conduct of the relevant public authority and what it has committed itself to. Secondly, while the expectation may arise from representation or conduct, the representation or conduct has to be clear and unambiguous. The court accepted that many policy statements are necessarily couched in vague terms. Hence, the more general a statement is, the less likely that the court will infer from it a definite promise or representation. The requirement of a clear and unambiguous promise or representation may prove to be the most difficult hurdle for any claim for legitimate expectation. Thus, the court held that a general statement that the Government would respect the rule of law and abide by the court judgment was insufficient.[89] Likewise, the court has held that there was no legitimate expectation of a periodic rental review when the Housing Authority refused to conduct a rental review in a deflationary economy (leading presumably to a reduction in rent as a result of a statutory cap), despite a consistent previous practice of rental review of public housing every two years for over twenty years on the ground that the previous rental review was non-statutory based and was conducted in an inflationary economy (which consistently resulted in a rental increase).[90] The court further held that if a representation was reasonably susceptible to a competing construction, it would be wrong to adopt the construction most favourable to the person asserting the legitimate expectation. Instead, the correct approach would be to accept the interpretation applied by the public authority, subject to the application of the *Wednesbury* unreasonableness test.[91] This was particularly apt in relation to Government's policy statements because, in general, no unfairness could arise when the Government acted on a rational view of its policy statements.[92]

---

88 (2002) 5 HKCFAR 1 at 41, para 92.
89 At 38, para 82.
90 *Ho Choi Wan v Hong Kong Housing Authority* (2005) 8 HKCFAR 628 at 648-650, paras 50-55.
91 (2002) 5 HKCFAR 1 at 44, para 104.
92 (2002) 5 HKCFAR 1 at 44-45, para 104.

Thirdly, for an expectation to be legitimate, the benefits to be accorded must be what the claimant is legally entitled to expect. It is not legitimate to expect a benefit that it is unlawful to be conferred. Nor it is legitimate to expect the public authority to make a decision or exercise a discretion in a manner which is contrary to law, or which is outside the power of the public authority, or which would undermine the statutory purpose.[93] In this case, the Government argued that once the NPCSC had given the interpretation which had the effect of reversing *Ng Ka Ling*, the Director of Immigration had no power to exempt the applicants from the requirement of having a one-way exit permit from the Mainland authorities as such an exemption would be unlawful. The Court accepted this argument, but held that the Director would nonetheless have a general discretion under the Immigration Ordinance to permit the eligible applicants to stay in Hong Kong. The Director argued that this would still be an unlawful fettering of the discretion of the Director, and if the Director exercised his discretion in favour of the entire class of claimants, it would undermine the statutory scheme.[94] The Court responded that

> if the circumstances are such as to raise a legitimate expectation, the common law itself imposes a duty on the decision maker, grounded in the principle of good administration and the duty to act fairly, to take that legitimate expectation into account, so long as, and to the extent that, taking it into account is not inconsistent with the statutory provisions and does not undermine the statutory purpose.[95]

However, the Court did reckon that to allow the entire class of claimants to stay in Hong Kong would be contrary to the statutory scheme which has been validated by the NPCSC's interpretation.[96] Those who relied on a specific representation of the Director of Legal Aid or the Director of Immigration were treated separately from those claimants who relied on general statements from the Government. A crucial factor was that the former class was a determined class of people of a finite size. It was held that exercising discretion in favour of a small and finite class of claimants to stay in Hong Kong to

---

93 At 47, para 112.
94 At 50-55, particularly paras 129 and 134-138 and 143.
95 At 52, para 129.
96 At 54, para 136.

mitigate the failure of the original legitimate expectation would be lawful—a pragmatic solution in conflict between legitimate expectations and statutory obligations[13397] It is difficult, however, to see why, as a matter of principle, that legitimate expectation should be defeated by the sheer number of beneficiaries, as Bokhary PJ stated in his powerful dissent:

> I do not regard the fact that an abuse of executive power on a large scale as a reason for letting such abuse pass unremedied. Nor do I regard it as any part of the statutory purpose of the provisions in question that those provisions cannot be resorted to even when resorting to them would avoid an abuse of executive power.[98]

Once an applicant succeeds in establishing a legitimate expectation, the expectation has to be properly taken into account in the decision-making process and is normally expected to be honoured. This is so even if the decision involves policy consideration. If effect is not given to the expectation, the decision-maker should express its reasons so that they may be tested in court. In general, the failure to take account of the legitimate expectation would constitute an abuse of power.[99]

Formulated in this manner, there is close resemblance between the doctrine of legitimate expectation and estoppel. A major difference is that as legitimate expectation is grounded on fairness and good administration, it would not be essential to establish detrimental reliance.[100] The rationale is that it is unfair and contrary to good administration to allow the public authority to renege on a representation or a promise of benefits without good reasons, and not, as in the estoppel, that an applicant has altered his or her position to their detriment by relying on a promise or a representation of the public authority. At the same time, it could be difficult to prove reliance in a legitimate

---

97 At 26-27. While *Ng Ka Ling* and *Chan Kam Nga* were regarded as 'representative cases', neither case was constituted by a court order to make the applicants representative parties.

98 At 119, para 399.

99 At 42-43, paras 94-98.

100 The majority of the Court left open the issue whether detrimental reliance was necessary (at 46, para 110), whereas the issue was addressed at length by Bokhary PJ in his dissenting judgment (at 106-108, paras 354-359).

expectation case when the representation is made by reference to a large and innominate class of applicants and as Bokhary PJ pointed out, there was no good reason to deny a person of the benefit of a legitimate expectation of his or her class merely because he or she learned of the relevant representation after a decision disappointing it.[101] In practice, there may be little difference whichever route is adopted, as there would be few cases of legitimate expectation where there is no detrimental reliance. In any event, if the claimant has suffered no detriment, this could always be a factor that the court could take into account in determining the appropriate relief.

The recognition of the doctrine of substantive legitimate expectation is a major development in the common law. While the public authorities might become more cautious in making public statements, the various safeguards that the Court has established suggest that the court would avoid unduly trespassing upon the policy preserve of the executive. The doctrine greatly enhances the role of judicial scrutiny of administrative actions and the accountability of public authorities. *Ng Siu Tung* soon became a landmark decision in the common law and has been followed both locally and overseas.[102]

Conclusion

Unlike constitutional law where the court is charting into a completely new area and has to deal with the novel and difficult issue of delineation of powers between the central and the SAR Governments, in administrative law the court is building on well-

[101] At 106, para 355.

[102] See *R v. Secretary of State for the Home Department, ex parte Zeqiri* [2002] UKHL 3. It has generated a large number of cases in Hong Kong, see, for example, *Cathay Pacific Airways Flight Attendants Union v. Director General of Civil Aviation* [2007] 2 HKC 393; *Ho Choi Wan v. Hong Kong Housing Authority* (2005) 8 HKCFAR 628. For further discussion of this doctrine, see Forsyth & Williams, 'Closing Chapter in the Immigration Children Saga: Substantive Legitimate Expectations and Administrative Justice in Hong Kong' (2002) 10 *Asia Pacific Law Review* 29-47; Li & Leung, 'The Doctrine of Substantive Legitimate Expectation: The Significance of Ng Siu Tung and Others v Director of Immigration' (2002) 32 *Hong Kong Law Journal* 471-496; Tai & Yam, 'The Advent of Substantive Legitimate Expectations in Hong Kong: Two Competing Visions' [2002] *Public Law* 688-702. See P.Y. Lo, Chapter **, in this book.

established principles and making incremental changes and sometimes novel advancement. That said, it is inevitable that the court, in exercising judicial scrutiny over administrative action, will be affected and guided by its perception of separation of powers between the judiciary and the executive. The development of administrative law is further complicated by the increasingly blurred distinction between administrative law and constitutional law. Under the Basic Law, it is possible to challenge not just the *vires* of administrative decisions, which are the conventional purview of administrative law, but also the *vires* of the source of power of administrative decisions. In so doing, the CFA has shown great sensitivity towards the delicate delineation of powers between the executive and the judiciary. It has established itself as a reasonably liberal court, striking a good balance between achieving good administration and governance on the one hand and respecting the rights of individuals and the rule of law on the other. It has also shown to be innovative and is ready to explore the uncharted areas, such as prospective overruling or substantive legitimate expectation. Space constraint does not allow us to survey all the important decisions of the Court in the area of administrative law. What has been shown in this chapter is how the Court has contributed to enhancing good administration and accountability of public authority through liberal procedures facilitating access to justice, refinement of procedural due process, and review of substantive merits of administrative decisions through the doctrines of proportionality, a sliding scale of intensity of review, and substantive legitimate expectation. The Court has also been confronted with issues that have grave political consequences. It has not shied away from such challenges, and has tried to do its best to develop a legal solution without losing sight of the importance of pragmatism and flexibility, though one may query whether the Court has on some occasions been too ready to achieve a pragmatic solution at the expense of a principled outcome.