

**THE RULE OF LAW AND ACCESS TO COURT:
SOME THOUGHTS ON JUDICIAL REVIEW IN HONG KONG**

JOHANNES CHAN



**THE UNIVERSITY
OF HONG KONG**

**Law Working Paper Series
Paper No 13**

P
KT4365.2
C45

HKBL

UNIVERSITY OF HONG KONG
LIBRARY



Editorial Committee

Peter Wesley-Smith
Janice Brabyn
William MacNeil
Jill Cottrell
Gary Heilbronn

About the author

JOHANNES M M CHAN is a Senior Lecturer in Law at the University of Hong Kong. He studied law at both the University of Hong Kong and the University of London, and is a practising barrister in Hong Kong since 1984. He has published widely in the field of human rights and public law. His major work includes *Media Law and Practice* (1995), *Human Rights and Public Law: A Hong Kong Sourcebook* (1993), *The Hong Kong Bill of Rights: A Comparative Approach* (1993), *Human Rights in Hong Kong* (1990) and *Human Rights and the Rule of Law* (1987). He is one of the founding editors of the *Hong Kong Public Law Reports* and the *Bill of Rights Bulletin*, and has been an assistant editor of the *European Human Rights Reports*. He has served on many government's committees and worked with both local and international organizations on various human rights issues. He has appeared on behalf of non-governmental organizations before United Nations human rights bodies and has acted as a trial observer for international non-governmental organizations in trials in the Asian Region. He has also been heavily involved in the promotion of human rights and the rule of law in Hong Kong, and the development of a bilingual legal system in Hong Kong. In 1995 he was selected as one of the "Ten Outstanding Young Persons in Hong Kong".

**The Rule of Law and Access to Court:
Some Thoughts on Judicial Review in Hong Kong**

*Johannes Chan*¹

IF A PERSON is aggrieved by a decision of the Government or a public authority, the Rule of Law assures him of a right to seek redress in court. To what extent is this right guaranteed under the existing system, and after 1997? This will be the focus of this paper.

The Rule of Law

Let me start by saying a few words about the Rule of Law itself. The Rule of Law is an elusive term - people refer to this expression for widely different meanings. On the one hand, there is the famous Diceyan notion that the Rule of Law means the absence of arbitrary power. Across the border, the Rule of Law is summarized in the mottos: "laws must exist; laws must be obeyed; and laws must be enforced". (有法可依, 有法必依, 違法必究) While these expressions may be succinct capsules of the existence of a legal system, they say nothing about the quality of the law itself. The Rule of Law, as we understand it, implies that the law has to be fair, reasonable and impartially administered. Executive discretion has to be contained and be exercised in a fair and equitable manner. Decision making process affecting individual rights and freedoms has to comply with certain procedural requirements of fairness. And in the last few years, our society slowly but gradually comes to accept the rather belated enlightenment that the Rule of Law shall enhance and protect fundamental human rights and freedoms.

The Onset of a Constitution: the Basic Law

A major challenge to our legal system as a result of the transfer of sovereignty is that we will be moving into an era of constitutionalism: the Basic Law will come into effect on 1 July 1997. Unlike Britain, we do have a written constitution now, namely, the Letters Patent and the Royal Instructions. However, these instruments contain nothing more than a bare outline of the

¹ Senior Lecturer in Law, The University of Hong Kong. This paper is based on a lecture delivered at the Attorney General's Chambers on 3 March 1993. The lecture was organized by the Local Crown Counsel Association.

structure of the Government. While the Letters Patent have been litigated now and then, they have not, on the whole, had any major impact on the daily life of the average population. On the other hand, the provisions of the Basic Law touch on almost every aspect of the Government and human relationship. They extend from foreign relationship to domestic protection of basic civil rights. They regulate education, professional recognition, culture, science, sports, religion, labour and social service. They prescribe matters on public finance, monetary affairs, trade, industry and commerce, land leases, shipping and aviation. They protect fundamental human rights, independence of the judiciary as well as property. In short, the ambit of the Basic Law goes far beyond that of the Letters Patent.

A few years ago, when the Bill of Rights was introduced, one of the major criticisms made by the PRC Government was the open nature of the provisions of the Bill of Rights. It argued that such open-natured provisions would introduce a high degree of uncertainty into our law. Any statutory provision which was inconsistent with the Bill of Rights was to be repealed. However, the provisions of the Bill of Rights themselves were so imprecise that no one could predict with any degree of certainty which law would survive after the Bill of Rights had been enacted. The result, so was it argued, would be chaotic. The Chinese Government also criticized that the Bill of Rights would undermine the authority of law enforcement agencies, including the ICAC, the police, and the Customs and Excise Department in combating crimes and maintaining law and order.

If we look at the Basic Law, its provisions go much further than the Bill of Rights. Indeed, those Bill of Rights provisions which have been heavily litigated in the last few years, such as the guarantee of the presumption of innocence and the right to speedy trial, find their existence in the Basic law in almost identical language.² If the Bill of Rights would have the effect of crippling the law enforcement agencies and toppling our society, the more far-reaching provisions in the Basic Law would have caused even more damages. All those criticisms directed at the Bill of Rights could have applied with equal force, if not more cogently, to the Basic Law.

What would happen then when the Basic law comes into effect? To a lawyer, it would perhaps be unthinkable that the Basic Law, our future constitution, cannot be enforced in our court. However, the position may be much more complicated than it first appears.

Justiciability of the Basic Law

On the one hand, some provisions of the Basic Law are clearly justiciable. Most of the provisions in Chapters 3 and 4 fall into this category. For example, Article 87 provides that "anyone who is lawfully arrested shall have the right to a fair trial by the judicial organs without delay and shall be presumed innocent until convicted by the judicial organs." In the last four years, we have seen the impact of similar provisions under the Bill of Rights, under which the

² Compare Articles 10 and 11(2)(c) of the Bill of Rights with Article 87 of the Basic Law.

court has declared many reverse onus provisions repealed. The court has granted permanent stay of a number of criminal prosecutions on the ground of undue delay. There is no reason to think that our courts would not do the same after 1997 by virtue of the provisions of the Basic Law.

On the other hand, there are provisions which are clearly unjusticiable, or at least questionable whether they are justiciable. Article 109 provides: "The Government of the Hong Kong Special Administrative Region shall provide an appropriate economic and legal environment for the maintenance of the status of Hong Kong as an international financial centre." Whether Hong Kong can retain its status of an international financial centre is not entirely within the power of the Hong Kong Government. What could the court do if the Government fails to provide such an "appropriate economic and legal environment"? How can one enforce this clause in court? Similarly, Article 118 provides that "The Government of the Hong Kong Special Administrative Region shall provide an economic and legal environment for encouraging investments, technological progress and the development of new industries." Could the introduction of Leveraged Foreign Exchange Trading Ordinance controlling leveraged forex trading be contrary to Article 118 because the Government is not providing a "legal environment for encouraging investment", but rather to control investment? This may sound frivolous, but it does illustrate the difficulties of this kind of provisions which are more like policy statements than legal provisions. Thus, it appears that some provisions of the Basic Law are justiciable and some unjusticiable; there may also be provisions whose justiciability may depend on circumstances. The Basic Law will open up a Pandora's box of constitutional issues; it will be a completely new era for our courts as well as for our lawyers. The only thing for sure is that there will be plenty of work for constitutional lawyers after 1997.

Right to Fair Hearing under Article 158 of the Basic Law

More importantly, are members of our civil services, our legal profession as well as the judiciary ready and prepared for the new system? I wish to say a few words on the interpretation of the Basic Law. As you know, the Hong Kong court is given the power to interpret the Basic Law subject to certain provisos under Article 158. In a nutshell, when our court is going to deliver a final judgment which is not appealable, and if it is necessary to interpret a provision of the Basic Law concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the SAR, then it shall, before making the final judgment, seek an interpretation of the relevant provisions from the Standing Committee of the National People's Congress. Suppose you are the counsel appearing for a client before the Court of Final Appeal, and suppose you have to argue a provision of the Basic Law which concerns the relationship between the Central Authorities and the SAR. Once the Court of Final Appeal is satisfied that it has to pronounce on the relevant provision in adjudicating the appeal, it has to refer the question of interpretation of the relevant provision to the NPC Standing Committee. The interpretation of that particular provision may well be decisive to the appeal. Do you have a right to appear before the NPC Standing Committee to make submissions? The NPC Standing Committee is under a duty to

consult the Basic Law Committee before giving an interpretation of the provision.³ Do you have a right of appearance before the Basic Law Committee? If not, would that be a violation of the right to a fair hearing, when the parties concerned are denied the opportunity to state their case at what may well turn out to be the most crucial stage of the appeal? Unfortunately, these questions have not been addressed in the Court of Final Appeal Bill, or indeed anywhere. Rules have to be enacted, either in the form of legislation or Practice Direction, to set out the procedure governing referral to the NPC Standing Committee.

Right of Access to Court

Another difficult provision is Article 35, which provides: "[Every] Hong Kong residents shall have the right to confidential legal advice, access to courts...". Curiously, the phrase "access to court" does not exist in our Bill of Rights. Article 10 of the Bill of Rights protects the right to a fair hearing in the determination of criminal charge or civil rights and obligations. Nowhere does it guarantee a right of access to court, although the European Court of Human Rights has held, in the context of the equivalent article in the European Convention on Human Rights, that the right to a fair hearing guarantees an implied right of access to court.⁴ There is no use of guaranteeing a fair hearing when there is no hearing in the first place. However, the right of access to court goes further than a right to go to a court to seek redress. It imposes an obligation to set up a court if none exists. It is not necessary to be the classic court, provided that the court so set up satisfies the minimum requirements of being independent and impartial.

Let us think about the implications of this requirement in the administrative review system. The classic situation is that an administrative decision is subject to review within the administrative system. Any person aggrieved by the decision can only ask the relevant authority to review its decision, and if that fails, the only avenue of appeal is to petition the Governor or the Governor in Council. There is no independent or impartial tribunal to hear the complaint against the relevant decision. While judicial review is available, it cannot go to the merits of the appeal. In the last few months, the Bill of Rights has begun to have some impact in this area. In *R v Lift Contractors' Disciplinary Board, ex parte Otis Elevator Company (HK) Ltd*,⁵ the applicant was a very well-known lift contractor in Hong Kong. On 14 March 1992, it was carrying out some maintenance work on one of the lifts. Apparently someone has forgotten to deactivate the system. A member of the public pressed the button for the lift. The door was opened. He walked into the lift shaft, and to his horror, he walked into an empty shaft, fell from a considerable height and died. As a result, disciplinary charges were brought by the Director of

³ Art 158.

⁴ *Golder v United Kingdom* (1975) 1 EHRR 524.

⁵ (1994) 4 HKPLR 168

Electrical and Mechanical Services against the applicant. Under the relevant legislation,⁶ the tribunal was to be chaired by the Director of Electrical and Mechanical Services or his representative - a classic case of acting both as a judge and a prosecutor. This cannot be challenged at the common law because the situation was provided for by statute. The statute could now be challenged by the Bill of Rights. The applicant succeeded at first instance; Penlington JA held that there was a violation of the right to a fair hearing under Article 10 of the Bill of Rights. The decision was reversed on appeal on the ground that the decision of the Disciplinary Board was subject to an appeal to the High Court, which will conduct the hearing de nova.⁷

There are many similar examples in our statute book. Under the Mental Health Ordinance, the Director of Social Welfare or any person approved by the Director may apply for a guardianship order, under which the Director or the person so approved may make important decisions affecting the life of a mentally retarded person.⁸ The approving authority is the Director of Social Welfare. Such system seems incompatible with the guarantee of the right of access to court under Article 10 of the Bill of Rights, which requires that, at some stage of the decision making process, a court should be provided which is independent and impartial and which may decide on both merits and law.⁹ To this extent, the Administrative Appeal Board is a first step in the proper direction, although its jurisdictions are fairly limited.¹⁰ The recent reform on the composition of the Building Authority again reflects the impact of Article 10.¹¹

Article 10 applies only when there is a determination of "criminal charge" or "rights and obligations in a suit at law". There is no similar requirement in Article 35 of the Basic Law, which provides a blanket guarantee of a right of access to court. Does Article 35 require that every administrative decision be made subject to a review, on both facts and law, by an independent and impartial tribunal? What is the ambit of Article 35?

Judicial Review of Administrative Decisions

⁶ Lift and Escalators (Safety) Ordinance (Cap 327), s 11E(2)(d).

⁷ (1995) CA, Civ App No 184 of 1994, 11 April 1995.

⁸ s 33, Cap 136.

⁹ *Commissioner for Inland Revenue v Lee Lai-ping* (1993) 3 HKPLR 141, at 155; *Weeks v United Kingdom* (1987) 10 EHRR 293, at 318-319.

¹⁰ Administrative Appeal Board Ordinance (Cap 442).

¹¹ Buildings (Amendment) Ordinance 1994, Ord No 77 of 1994, coming into operation on 16 November 1994. See ss 44, 48 and 50.

This brings me to a slightly different question: how to bring a constitutional challenge under the Basic Law? Article 35 provides that "Hong Kong residents shall have the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel." What are the procedures for bringing such an action? Judicial review of administrative acts is of course a familiar feature under the present system, and is likely to be the procedure for bringing constitutional challenges after 1997. Is the present system adequate? How far does it guarantee accessibility to court, and how well prepared is our existing system for challenges of a constitutional nature?

Attitude of Public Authority

In the last forty years, the development of administrative law has very much centred around the question of how to encourage and promote a fair, efficient and accountable government. In Dicey's terms, the Rule of Law is to prevent abuse of power by the government, which may in turn guarantee a fair, efficient and accountable government. "Abuse of power" may sound emotive and carries a bad connotation of mala fide. In a modern metropolitan society like Hong Kong, we do not have many incidents of abuse of power out of mala fide. Instead, "abuses" are committed, more often than not, out of good intention, of paternalism, or of an over-defensive attitude.

Ultimately, the achievement of a fair and accountable government depends very much on the attitude of the civil servants. The court can only play a supervisory role, although the limits of supervision may change with time and prevailing political mode. Unfortunately, there is little exchange between the court and the administration; very rarely does the court spell out what it expects of the administration. An inherent contradiction in administrative law is that civil servants are expected to know all the intricacies of administrative law and to live up to the high standard of the Rule of Law despite the fact that a large majority of them have received little or no legal training. In return, civil servants complain that judges are not sufficiently aware of the problems which the administration face. Thus, ignorance breeds hostility, and hostility generates a defensive attitude.

The lack of mutual understanding between the judiciary and the civil service should not be lightly dismissed. On the one hand, it has been rightly queried whether the court is the best place to review an administrative decision. The court can only decide on the basis of the evidence before it, and judges are not well placed to consider policy matters with far-reaching implications. Thus, sometimes judges may impose unrealistic requirements on the administration. Sometimes, they may pay too much deference to executive decisions. There is a case for widening judicial training so that judges may become more familiar with the increasingly sophisticated administrative system. On the other hand, it has been proposed elsewhere, particularly in England and Australia, that it might be necessary to produce a non-statutory "code of conduct for public administrations" or "principles of good administrations". Such codes may set out in some details what are required of our administrators. It appears to me that the Ombudsman may play a useful and important role in developing such a code of

conduct for public administration. The Ombudsman has the advantage of being able to maintain a dialogue with the administration, and at the same time to remain independent from the administration. In preparing such a code of conduct, it can take a broad overview of what constitutes good administration and is not confined to the case-by-case approach of the court.

The Attorney General's Chambers also has an important role to play in promoting fair administration. I have the benefit of sitting on a number of public authorities. In that capacity, I have seen some of the advice given by the Attorney General's Chambers. Such advice is invariably technical in nature. Very seldom will Government lawyers touch on the wider issue of whether a proposed action, particular when it involves introducing new restrictions by subsidiary legislation, is fair or whether the action complies with our understanding of the Rule of Law. Such advice - fairness from the legal perspective - will no doubt be very helpful to civil servants and public authorities. The Attorney General's Chambers should not merely play the role of a legal technocrat - it can play an active role, through their legal service, in promoting the Rule of Law among civil servants.

Inadequacies of the Existing System of Judicial Review

An important characteristic of our common law system is that once there is a right, there is a remedy. The remedy is provided by the court, and the appropriate action against the Government is, in most cases, by way of judicial review. What I propose to do in the rest of this paper is to share with you some of my thoughts about the adequacy, or more appropriately, the inadequacy of the present judicial review system.¹²

(1) Why should leave be required at all?

Judicial review is a two-stage process. The first stage is the application for leave. No action will lie unless leave has been granted. It involves an ex parte application made in chambers. Why should leave be required at all?

The orthodox justification for the leave stage is that it serves as a filtering process so that frivolous and groundless applications could be screened out at an early stage. However, frivolous and vexatious applications are not unknown in other types of proceedings. Order 18, Rule 19 of the Rules of the Supreme Court provides the procedure to strike out frivolous and vexatious applications. If this procedure works well for civil cases, why can't the same procedure apply to frivolous and vexatious judicial review applications? Why does this particular kind of actions require a filtering process?

¹² Many of the ideas in the following sections are drawn upon the stimulating Hamlyn Lecture given by Lord Woolf: *Protection of the Public - A New Challenge* (London: Stevens & Sons, 1990).

To some extent, the problem is alleviated by some recent decisions of the Court of Appeal, particularly the leading case of *R v Director of Immigration, ex parte Ho Ming Sai*,¹³ in which the Court of Appeal held that it was unnecessary to show a prima facie case at the leave stage. That would be too high a standard. All that is required is potential arguability: whether materials before the trial court disclose matters which might, on further consideration, demonstrate an arguable case for the grant of the relief claimed. Judicial review involves a private individual against the government. To lower the standard of proof at this initial stage is a welcomed move. But this still leaves open the question why leave should be required in the first place.

Another argument which has been put forward is that judicial review is quite different from other types of proceedings. From time to time, decisions in judicial review proceedings may have wide policy implications. However, there are many civil cases which could also have far-reaching policy impact. At the same time, many judicial review proceedings are fact-specific and does not have any implication beyond the four corners of the case. The need for a leave stage has been reviewed in England, and the review concluded:

"The citizen does not require leave to sue a further citizen and we do not think they should have to obtain leave in order to proceed against state and administrative bodies... What we regard as wrong in the current situation is that one category of litigant namely those seeking judicial review should be subjected to an impediment which is not put in the way of litigants generally."¹⁴

(2) Should applications for leave for judicial review and applications to set aside leave granted be heard in open court?

Leave application is dealt with in chambers. The judge may grant leave without a hearing. The judge may also require the applicant to appear before him. The Government may be put on notice about an ex parte application, and may, with the court's permission, appear before the judge to resist the application. It may also apply to set aside leave after it has been granted, which application is also dealt with in chambers. In many cases, important issues may be argued; important points of law may be decided; matters of great public interest may be raised; but all these take place behind closed door. How could this be reconciled with the time-honoured notion of open justice, which we pride ourselves under the common law? If a citizen alleged that he has been mistreated by the Government, why is the public not entitled to know what his complaint is; and if he fails, why he fails? If leave has been granted and the Government takes step to set it aside, the public is entitled to know why the Government should

¹³ (1993) 3 HKPLR 157.

¹⁴ The Justice All Souls Review, at p 153, referred to in Lord Woolf, *Protection of the Public - A New Challenge* (Hamlyn Lecture)(London: Stevens & Sons, 1990), at p 20.

resist an alleged complaint against it.¹⁵ It is respectfully submitted that all leave applications should be made in open court, subject to the discretion of the court to hear the application in chambers if it is in the public interest to do so.

(3) *Should there be Pleadings in Judicial Review?*

While the Notice of Application for Leave for Judicial Review should set out the Relief Sought and the Grounds for Relief Sought, and while the application has to be supported by affidavits setting out the factual background, they are not pleadings. Strictly speaking, the proceedings are taken out in the name of the Crown, and there is no *lis* between the parties (the applicant and the respondent whose decision was sought to be reviewed). As a result, *res judicata* does not apply in judicial review proceedings.¹⁶ The advantage of a lack of pleadings is that it encourages efficient and expeditious hearing on the merits, and the court would not be tied down by procedural matter. The disadvantage is that the parties may not be able to identify issues until a very late stage of the proceedings, and may hence lead to a waste of court time and resources. This may happen when counsel for the respondent adopts an aggressive line of defence and refuses to disclose his case or identify issues, which he is not obliged to do.¹⁷ If the present procedure is to be retained, it may be desirable to prescribe, possibly by way of Practice Direction, exchange of skeleton arguments by both parties before the hearing.

¹⁵ The recent application by a group of former members of the Special Branch for judicial review against various decisions rejecting their claims for premature retirement with compensation, a benefit conferred on their colleagues, served as a nice example. Leave was refused after a few days' hearing, and the applicants felt aggrieved and took the matter to the press. Much of the hostility and misunderstanding might be dissipated if the whole proceedings were conducted in open court and subject to the scrutiny of the press: *R v Secretary for Security, ex parte Chan Mo-lin & Others* (1994) HCT, MP No 3637 of 1991.

¹⁶ Supreme Court Practice, 53/1-14/7; *R v Secretary of State for the Environment, ex parte Hackney London Borough Council* [1983] 1 WLR 524.

¹⁷ In *R v Town Planning Board, ex parte Kwan Kong Company Ltd* (1995) HCT, MP No 1675 of 1994, counsel for the Town Planning Board, despite repeated requests by the applicant and the bench, refused to identify the issues until he opened his case. As a result, the applicant had to proceed at the opening on the basis that everything was in issue, and had to revisit some of the arguments at the stage of reply when the issues became clear.

(4) Should the Public Law and Private Law Dichotomy be preserved?

The next problem arises from the leading case of the House of Lords in *O'Reilly and Mackman*,¹⁸ which introduces the distinction between public law and private law. The court held that any action in public law must proceed by way of judicial review. Unlike the civil law system, common law does not draw a clear distinction between private law and public law. In the last decade since *O'Reilly v Mackman* has been decided, the distinction between private and public law remains blurred. Sir William Wade, an eminent constitutional lawyer, commented on *O'Reilly v Mackman* in these terms:

"The House of Lords created the most seismic disturbance that the subject had suffered in many years. By declaiming a rigid dichotomy between public and private law, but without explaining how the line was to be drawn the House of Lords created a host of new problems for litigants which have by no means yet been resolved."¹⁹

"A solitary judgment on a single case is not an ideal instrument for proclaiming radical and sweeping changes. In his later years Lord Diplock was inclined to yield to the temptation to restate a whole branch of the law in his own terms. His mastery of administrative law and his contribution to it entitle these *ex cathedra* statements to great respect; but it may not, I hope be impertinent to point out their drawbacks as a technique either of codification or of law reform. A feat of Lord Diplock's, however, which as a mere academic I can only envy is his ability to put forward a novel theory in a lecture and then to enshrine it canonically in a speech in the House of Lords."²⁰

These are very harsh words from such an eminent lawyer.

The distinction between public and private law becomes blurred when government's activities have been privatized, or when functions of the government have been delegated to private bodies. In *R v MTR, ex parte Hong Kong Standard Newspaper Ltd*,²¹ MTR decided to publish an advertising magazine, "the Recruit", which was to be distributed freely to passengers in MTR stations. The Hong Kong Standard Newspaper Ltd, which was the main competitor, complained that this was ultra vires and constituted an abuse of power. Apart from having enjoyed an unfair competition over Hong Kong Standard because MTR had a captive audience in the MTR, Hong Kong Standard argued that MTR, being a statutory body charged with the responsibility of operating a mass transit system only, had no power to engage in advertising business. The court

¹⁸ [1983] 2 AC 237. See also *Gillick v West Norfolk & Wisbech Area Health Authority* [1986] AC 112.

¹⁹ Wade, *Administrative Law* (6th ed, 1988), at p vii.

²⁰ *Ibid*, at p viii.

²¹ (1993) 3 HKPLR 419.

dismissed the application on the ground that it involved private law and not public law. On what constituted public law, the court said:

"for a decision to be susceptible to judicial review the decision-maker must be empowered by public law to make decisions that, if validly made, will lead to administrative action or abstention from action by an authority endowed by law with executive powers."

With respect, this definition is circular and begs the question of what constitutes administrative action or inaction.

Another difficulty arises as a result of dual capacity of the government: it sometimes acts in a public capacity, and sometimes in a private capacity. In *Canadian Overseas Development Co Ltd v Attorney General*,²² the applicant intended to develop one of its sites in Fairview Park, New Territories. Under a special condition in the relevant Crown lease, only buildings in accordance with a Master Layout Plan approved by the Crown were permitted. The applicant submitted a Master Layout Plan embodying its proposal. The plan was rejected by the Hong Kong Government. The applicants argued that the Crown, in deciding whether or not to approve a Master Layout Plan, was performing an executive duty or function governed by public law rather than performing a contractual obligation and exercising a contractual right governed by private law. The court held that the Crown acted in private capacity and therefore no judicial review would lie. It is unfortunate that such an important issue should be decided on a technical distinction on the form of action rather than on the merits. An important feature of town planning in Hong Kong is that it is achieved or implemented through special conditions in the Crown leases. It is extremely difficult to separate the public function of the Government from its private function in imposing special conditions in a Crown lease. To describe Crown leases as private contracts is to ignore altogether the planning function of Crown leases. This judgment amply highlights the artificiality of the distinction between public and private law. It also means that decisions affecting the livelihood of many people are now outside the scrutiny of the court.

In *R v Secretary for Security, ex parte Chan Mo-lin*,²³ disgruntled members of the Special Branch of the Police Force complained that they were not granted the benefits of a pre-mature retirement scheme (with a right of abode in England). Is this public law or private law? On the one hand, it involves a dispute in employment contract, and most English authorities suggest that public personnel matter is in the realm of private law.²⁴ On the other hand, the premature

²² (1991) CA, Civ App No 4 of 1991, 7 June 1991. See also *Hang Wah Chong Investment Co Ltd v Attorney General* [1981] HKLR 336.

²³ (1994) HCt, MP No 3637 of 1991.

²⁴ See *R v Secretary of State for the Home Department, ex parte Benwell* [1985] QB 554; *R v Lord Chancellor's Department, ex parte Nangle* [1991] ICR 743. In *R v Civil Service Board, ex parte Bruce* [1989] 2 All ER 907, the Court of Appeal left open the

retirement scheme was introduced to allay the fear of persecution of former members of the Special Branch. No issue was taken on this point. The court seems to accept that judicial review was the proper procedure,²⁵ and leave was refused on other grounds.

This problem is further complicated by the introduction of the Bill of Rights, as well as the Basic Law after 1997. Arguably any Bill of Rights issue must, by definition, be in the area of public law. The Bill of Rights Ordinance binds the Government. There is no distinction between the Government acting in public capacity and in private capacity. What would be the position if the Bill of Rights is raised against the Government acting in the private capacity, eg, the Government acted in a discriminatory manner in employment related matters?²⁶ Similarly, the Basic Law governs both private law matter and public law matter. If the Basic Law is invoked in a private law matter, should the party commence the proceedings by way of judicial review? An important consequence of this procedural problem is the 3-month rule, under which judicial review proceedings must be commenced within 3 months from the date of the decision sought to be reviewed.

Another related problem arises when an action challenges the constitutionality of primary legislation without challenging any particular decision of a public authority. This happened in *Lee Miu-ling v Attorney General (No 1)*.²⁷ The applicant, who challenged the constitutionality of the functional constituency election system, decided to pursue her application by way of originating summons rather than by way of judicial review. The court, upon the Government's indication that it did not object to the procedure, accepted that this was the proper procedure. Keith J remarked that judicial review might not be entirely apt to deal with challenges to legislation alone. These difficulties echo the observations of Sir William Wade:

"The rigid dichotomy which has been imposed must be accounted a serious setback for administrative law. It has caused many cases which on their merits might have succeeded, to fail merely because of the wrong form of action. It is a step back to the

issue whether a decision upholding the dismissal of a civil servant was susceptible of judicial review.

²⁵ Unlike the position in England, Hong Kong court seems to accept that public personnel matter is a matter of public law: see, for example, *Fong Hin Wah* [1985] HKLR 332; *R v Secretary for Civil Service, ex parte Association of Expatriate Civil Servants* (1995) HCt, MP No 3037 of 1994.

²⁶ But see *R v Secretary for Civil Service, ex parte Association of Expatriate Civil Servants* (1995) HCt, MP No 3037 of 1994, 18 January 1995.

²⁷ (1995) HCt, MP No 1696 of 1994, Ruling on whether originating summons was the appropriate procedure, 28 March 1995.

times of the old forms of action which were so deservedly buried in 1852."²⁸

(4) *Duty to Give Reasons*

Over the years, the question of whether there should be a duty to give reasons has been litigated over and over again. Up to this moment, there is still judicial reluctance to lay down a general principle that administrators, in making their decisions, are under a duty to give reasons. There are compelling grounds why reasons should be given. Existence of reasoned decisions increases the transparency of the Government. It fosters confidence in the decision making process. Unless reasons are given, it may be difficult to know whether the decision is fair, or whether all relevant matters have been properly considered. If the reasons given reveal errors or failure to consider relevant matters, the decision can be corrected without resort to court proceedings, and which in turn will lead to fairer administration. The existence of a duty to give reason is also advantageous to the administrators. It is common experience that one's mind tends to be more sharpened when he has to reduce his thoughts into writing; one tends to be more careful, and more attentive to the various implications of a decision when he has to put down his arguments on paper. Unfortunately, the court has persistently refused to lay down a general requirement to give reasons. As a result, some judges attempted to introduce a duty to give reasons by drawing adverse inference from the failure to give reasons. Thus, in 1968, Lord Upjohn said in the leading case of *Padfield v Minister of Agriculture, Fisheries and Food*:²⁹

"A decision of the minister stands on quite a different basis; he is a public officer charged by Parliament with the discharge of a public discretion affecting Her Majesty's subjects; if he does not give any reason for his decision it may be, if circumstances warrant it, that a court may be at liberty to come to the conclusion that he had no good reason for reaching that conclusion and order a prerogative writ to issue accordingly."

This approach has not been consistently followed. Recently, in *R v Trade and Industry Secretary, ex parte Lonhro*,³⁰ Lord Keith said:

"The absence of reasons for a decision where there is no duty to give them cannot of itself provide any support for suggested irrationality of the decision. The only significance of the absence of reasons is that if all other known facts and circumstances

²⁸ Wade, *supra*, at p 677. Lord Woolf disagreed with this statement: see H Woolf, at pp 24-29.

²⁹ [1968] AC 997, at 1061; see also Lord Reid, at 1032; Lord Hodson, at 1049. See also *R v Lancashire County Council, ex parte Huddleston* [1986] 2 All ER 941, at 945-946, per Sir John Donaldson (duty to disclose; helpless to have just a bald assertion that all relevant matters were taken into consideration without condescending to particulars).

³⁰ [1989] 1 WLR 539

appear to point overwhelmingly in favour of a different decision, the decision-maker, who has given no reasons, cannot complain if the court draws the inference that he has had no rational reason for his decision."

It is perhaps unfortunate that the judiciary has to go down this route. Administrative law may be much simpler if there is a general duty to give reasons, subject to certain narrowly defined exceptions such as compelling public interest not to disclose reasons. We accept that, in some exceptional circumstances, reasons should not be given. But this should be the exception rather than the rule. In this regard, I find myself in good company with Lord Woolf, who said in an extra-judicial lecture:

"... if I were to be asked to identify the most beneficial improvement which could be made to English administrative law I would unhesitatingly reply that it would be the introduction of a general requirement that reasons should normally be available, at least on request, for all administrative actions, unless there is a compelling case for saying that the giving of reasons would be harmful in the public interest."³¹

These words of wisdom have not produced much impact in Hong Kong. At least in the area of immigration, our Court of Appeal has persistently refused to lay down a general duty to give reasons.³²

Wednesbury Unreasonableness and Proportionality

It may be fair to say that English administrative law has been subject to increasing influences by the jurisprudence in Strasbourg developed under the European Convention on Human Rights. While the decisions of the European Court are binding on the State only and do not form part of English law, English judges, on the whole, have been quite receptive to these European decisions. Lord Goff has even gone so far as to say that, in the context of freedom of expression, there is no inconsistency between the common law and Article 10 of the European Convention.³³ The European Convention, like our Bill of Rights, sets out fundamental civil and political rights. These rights are not absolute, but are subject to permissible restrictions. However, to be permissible, the restrictions must be prescribed by law and necessary for the protection of legitimate interests. In considering what is "necessary", the European Court has introduced the concept of "proportionality", namely that the means adopted must be

³¹ Woolf, *supra*, at p 92.

³² See, for example, *R v Director of Immigration, ex parte Chan Heung-mui* (1993) CA, Civ App Nos 168 & 169 of 1993, 24 March 1993; *R v Director of Immigration, ex p Le Pu Phuong* (1994) 4 HKPLR 337.

³³ *Attorney General v Guardian Newspapers Ltd (No 2)* [1991] 1 AC 109, at 283.

proportionate to the objectives to be achieved.³⁴ This line of jurisprudence has been imported into our domestic law through the Bill of Rights. In *R v Sin Yau-ming*,³⁵ Kempster JA held that the expression "prescribed by law" referred not to any particular law but a universal concept of justice. Through this universal concept of justice he introduced the tests of rationality and proportionality.³⁶

In the celebrated case of *CCSU v Minister for the Civil Service*,³⁷ Lord Diplock authoritatively stated that the grounds for judicial review were illegality, procedural impropriety and irrationality. In the last few decades, judicial review has been quite effective in checking against illegality or procedural impropriety. However, judges have been more hesitant when they come to the ground of irrationality, which necessarily blurs the dividing line between executive autonomy and judicial scrutiny. Under the powerful influence of the doctrine of separation of power, our judges demand a fairly high standard of proof to show *Wednesbury* unreasonableness.³⁸ The decision has to be shown to be so irrational that no reasonable officer would have come to. Mere disagreement with, or criticisms at the wisdom of the administration, is not by itself sufficient to show *Wednesbury* unreasonableness. While the doctrine of separation of power is impeccable in theory, its practical operation has sometimes resulted in judges paying unwarranted deference to executive wisdom.

Difficulties arise when these two different standards of scrutiny - a proactive notion of proportionality under human rights law which requires the court to look at the merits of a dispute, and a relatively more restrictive notion of *Wednesbury* unreasonableness - meet one another in judicial review proceedings. The clash becomes more obvious once a constitutional document such as the Basic Law or the Bill of Rights has been enacted. Resolution of many constitutional disputes requires a balance of different interests, and the notion of proportionality is particularly suitable for such balancing exercise. So far English law has resisted to accept proportionality as a separate ground for judicial review,³⁹ although some judges are prepared

³⁴ See, for example, *Sunday Times v United Kingdom* (1979) 2 EHRR 245, at 275.

³⁵ (1991) 1 HKPLR 88.

³⁶ See also *R v Crawley* (1994) 4 HKPLR 62.

³⁷ [1985] 1 AC 374.

³⁸ Lord Greene himself said in *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223, at 230: "It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. That, I think is quite right; but to prove a case of that kind would require something overwhelming."

³⁹ *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696. For an earlier argument, see J Jowell & A Lester, "Beyond *Wednesbury*: Substantive

to bring it in through some vague concept of lawfulness or fairness. Lord Woolf said:

"I find it convenient at times to refer to legitimate expectations and proportionality and I recognize that there are other principles which can be identified. However, I do not at this stage feel a great need to categorise reasonableness and fairness. If a response by an administrator to a situation is sufficiently out of proportion to justify the court intervening then it is unreasonable. **Fairness does not stop with the procedure adopted but spills over into the actual decision.**"⁴⁰

After all, fairness lies at the core of the notion of the Rule of Law:

"To say one thing one day so as to give a legitimate expectation that a particular course will be followed and to do something quite different the next day without giving any warning can be unfair and justify the court intervening. It does, however, depend on the circumstances. What the courts should in my view be doing and what I believe they are normally doing is to look at all the circumstances and, as part of the process of judicial review, apply those broad principles of lawfulness, reasonableness and fairness to the multiplicity of different situations brought before them."⁴¹

Given the broad and open-ended provisions in the Basic Law, the concept of proportionality is likely to gain importance in the years to come. In reviewing whether a decision is *Wednesbury* unreasonable, the court may legitimately take into account whether the decision involves a violation of the Bill of Rights or the Basic Law. My guess is that in the years to come, this notion of proportionality will find a way into our administrative law.

Conclusion

Let me conclude with the remarks of Lord Denning made in the first Hamlyn Lecture in 1949. He said:

"No one can suppose that the executive will never be guilty of the sins that are common to all of us. You may be sure that they will sometimes do things which they ought not to do: and will not do things that they ought to do. But if and when wrongs are thereby suffered by any of us what is the remedy? Our procedure for securing our personal freedom is efficient, our procedure for preventing the abuse of power is not. Just as the pick and shovel is no longer suitable for the winning of coal, so also the procedure of *mandamus*, *certiorari*, and actions on the case are not suitable for the winning of freedom

Principles of Judicial Review" [1987] *Public Law* 368.

⁴⁰ Woolf, *supra*, at pp 123-124.

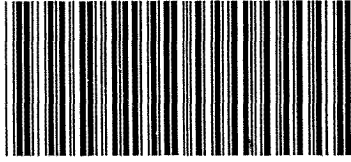
⁴¹ *Ibid.*

in the new age. They must be replaced by new and up to date machinery, by declarations, injunctions and actions for negligence... This is not the task for Parliament... the courts must do this. Of all the great tasks that lie ahead this is the greatest. Properly exercised the new powers of the executive lead to the welfare state; but abused they lead to a totalitarian state."⁴²

Lord Denning warned us that our system was not conducive to the protection of freedom. The need today for reviewing the procedure of judicial review, and more fundamentally, for translating the right of access to court into practical reality, is of no less urgency and cogency than it was 45 years ago.

⁴² Lord Denning, *Freedom under the Law* (London: Stevens & Sons, 1949), at p 126.

X04838622



**Published by the Faculty of Law
The University of Hong Kong**

1996

HK\$15.00