

**Speech by The Honourable Chief Justice Geoffrey Ma
at the Inaugural Caius Mok Law Lecture
Gonville and Caius College, University of Cambridge
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**The Endless Search for the Right Answer:
European Legal Principles as Applied in Hong Kong¹**

1. It is a singular honour to be invited to give the Inaugural Caius Mok Law Lecture here at Gonville and Caius College. I thank the Mok family, the College, Dr Pippa Rogerson, the Master of Caius and Dr Jens Scherpe.

2. Just over a month ago, I delivered a lecture at the Aula of the University of Zurich. It was there on 19 September 1946 that Winston Churchill made his famous speech containing his immortal words “Therefore I say to you:

¹ I am grateful for the assistance I have received from the Judicial Assistants of the Hong Kong Court of Final Appeal: Mr Griffith Cheng, LLB (University of Hong Kong), LLM (LSE); Mr Adrian Lee, BA (Oxon), LLM (UCL); Mr Wing So, LLB (City University, Hong Kong), BCL (Oxon), MPhil (Oxon), DPhil (Oxon); Ms Samantha Lau, BSc (University of Hong Kong), LLB (University of Hong Kong), LLM (Harvard); Ms Hayley Wong, LLB (Birmingham), LLM (UCL).

Let Europe Arise”²; these were words² that stirred a continent from the fatigue of war. Mr Churchill’s vision and support inspired the European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR). It has virtually the same content as the International Convention on Civil and Political Rights (the ICCPR). Both set out to enumerate fundamental rights. While the ECHR³ was a convention for Europe,⁴ the ICCPR had a more international flavour. The ICCPR is a multilateral treaty adopted by the United Nations General Assembly in 1966, being one of the two important conventions on human rights adopted by the United Nations.⁵

² Now engraved on a plaque on the wall of the Aula.

³ Which came into force on 3 September 1953.

⁴ It was the first major achievement of the newly created Council of Europe.

⁵ The other being the International Covenant on Economic, Social and Cultural Rights (the ICESCR).

3. The ICCPR is directly applicable in Hong Kong and is given constitutional backing by the Basic Law.⁶ The provisions of the ICCPR are reproduced almost word for word in Hong Kong's own bill of rights.⁷ Thus, one finds in the Bill of Rights those rights and fundamental freedoms commonly found in other human rights documents: the guarantee of equality (Articles 1 and 22), the guarantee that no one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment (CIDTP) (Article 3), access to justice, and the entitlement to a fair and public hearing in the determination of any criminal charge or of rights and obligations in a suit of law (Article 10), the freedom of thought, conscience and religion (Article 15), the freedom of opinion and expression (Article 16), the right of

⁶ The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China was promulgated by the PRC on 4 April 1990, taking effect on 1 July 1997 (when the PRC resumed the exercise of sovereignty over Hong Kong). It is the constitutional document relevant to Hong Kong.

⁷ Contained in the Hong Kong Bill of Rights Ordinance Cap. 383 (HKBORO). It should be noted that the concept of setting out rights for Hong Kong found its origins in the Joint Declaration of the United Kingdom and Chinese Governments on the Question of Hong Kong dated 19 December 1984. Annex I of the Joint Declaration provides (in elaborating on the PRC's basic policies regarding Hong Kong) that fundamental rights and freedoms would be protected and the provisions of the ICCPR (which the United Kingdom extended to Hong Kong) would remain in force after 1 July 1997.

peaceful assembly (Article 17), the right to marry (Article 19), the right to vote and participate in public life (Article 21) etc.

4. I believe the introduction of a bill of rights in Hong Kong marked a change of seismic proportions in the legal (as well as social and political) landscape of Hong Kong and this change catapulted the work of the courts into an area of constitutional law in which they were relatively inexperienced. The impact of the introduction of the ICCPR into Hong Kong law began with the passing of HKBORO and remains just as strong now – 28 years on – as it ever has. The Hong Kong courts had by necessity to adapt quickly to what has been termed “the new constitutional order”.⁸ In so doing, the Hong Kong courts sought guidance from overseas jurisprudence. It was put in the following way by my predecessor Chief Justice

⁸ This term is usually employed to describe the constitutional model of “One Country Two Systems” contained in the Basic Law, but it can equally apply to Hong Kong having for the first time a constitutional document guaranteeing fundamental rights and freedoms.

Andrew Li,⁹ “After 1 July 1997, in the new constitutional order, it is of the greatest importance that the courts in Hong Kong should continue to derive assistance from overseas jurisprudence. This includes the decisions of final appellate courts in various common law jurisdictions as well as decisions of supra-national courts such as the European Court of Human Rights.”

5. The reference to the European Court of Human Rights (the ECtHR) was deliberately aimed at addressing what I have referred to earlier as a change of seismic proportions consequent upon the introduction of a bill of rights in Hong Kong. Of course, reliance on European jurisprudence in other areas of the law was not unfamiliar to the Hong Kong courts. Hong Kong’s personal data privacy

⁹ In *Solicitor (24/07) v Law Society of Hong Kong* (2008) 11 HKCFAR 117, at para. 16.

laws¹⁰ are attributable to the 1995 EU Directive¹¹ on the protection of individuals with regard to the processing of personal data and on the free movement of such data. Similarly, Hong Kong's trademark legislation, the Trade Marks Ordinance¹² is modelled on the United Kingdom's Trade Marks Act 1994 which was enacted to implement European Trade Mark Directive 89/104/EEC. Reference has had to be made to decisions of the European Court of Justice. Recently, the Hong Kong Court of Final Appeal¹³ (the CFA), in dealing with a case on insider dealing,¹⁴ referred to a decision of the ECJ (*Spector Photo Group NV v Commissie voor het Bank-, Financie-en Assurantiewezen (CBFA)*)¹⁵ to seek guidance as to the concept of "using" insider information.

¹⁰ Principally contained in the Personal Data (Privacy) Ordinance, Cap. 486.

¹¹ Directive 95/46/EC of the European Parliament and of the Council dated 25 October 1995.

¹² Cap. 559.

¹³ Hong Kong's highest appellate court which replaced the Judicial Committee of the Privy Council on 1 July 1997.

¹⁴ *Securities and Futures Commission v Yiu Hoi Hing Charles* (2018) 21 HKCFAR 475.

¹⁵ [2010] Bus LR 1416.

In these areas, to which can be added competition law, the similarity in the legislative regimes in Europe and Hong Kong, give rise to similar policy and legal issues. It is therefore not surprising in the least that guidance can properly be sought from European jurisprudence.

6. In the area of human rights, one can rightly say that since Hong Kong has implemented the ICCPR (which, as stated earlier, is largely the same as the ECHR), so it must follow that, like the other areas of law mentioned earlier, guidance can and should be sought from the decisions of relevant courts such as decisions of the ECtHR. However, this somewhat understates the significance of the influence of European jurisprudence on the work of the Hong Kong courts as far as human rights are concerned. It is not an exaggeration to say that this influence has brought about a complete cultural change in the way public law is regarded and dealt

with in Hong Kong. It is important in this context to understand that in human rights law, unlike almost every other area of the law, the courts are often faced with having to adjudicate between diametrically opposed legal principles or points of view, which on their face are reasonable if not compelling. For instance, the freedom of speech contained in Article 16 of the Bill of Rights¹⁶ states that the exercise of this right carries with it special duties and responsibilities. In Article 16(3), it is stated that the right “may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary –

- (a) for respect of the rights and reputations of others; or
- (b) for the protection of national security or of public order (*ordre public*), or of public health or morals.”

¹⁶ Article 19 of the ICCPR.

7. It may sometimes be extremely difficult to arrive at the right answer in these circumstances and the court will be put in the position of having to balance the conflicting interests. Crucial questions then arise for the courts: Should there be more weight given to the recognition and enforcement of rights and freedoms than to attempts to restrict them? If so, at what point can rights be restricted? How far should the views of the Government or the legislature in restricting rights be recognized by the courts? And what of the views of the community itself? To what extent should the courts even enter the arena in questioning the views of the Government or the legislature or the community? These were not questions with which the Hong Kong courts had to grapple prior to HKBORO.

8. These and many other similar questions arise uniquely in the determination by the courts of human rights

issues. In almost any other area of the law (perhaps even in every other area of the law), these dilemmas do not arise. It is difficult enough discovering what the law is and how it should be developed when dealing with, say, commercial law or equitable principles, but when one adds to the problem the type of questions just enumerated, the task is made considerably more complex. Furthermore, it must be borne in mind that the stakes are high. In the determination of cases involving basic rights and fundamental freedoms, the public interest is very much engaged. The ramifications of public law cases are often wide. Furthermore, decisions must be made on a principled basis and not seen to be in any sense arbitrary. A principled basis of course means deciding cases according to law, legal principle and the spirit of the law. The stakes are high not just because one is here dealing with fundamental rights, but also considerable powers are given to the courts. For example, the courts in Hong Kong are able to

declare as unconstitutional legislation or measures which offend against fundamental rights. Such declarations have been made from time to time.

9. How have the Hong Kong courts in practice discharged their responsibility to search for the right answer in the area of human rights and fundamental freedoms? Before I answer this question, I ought perhaps to digress just a little and put matters in proper context.

10. Prior to 1 July 1997, Hong Kong was, and remains, a common law jurisdiction. The closest that Hong Kong (like any other colony) got to a constitutional document prior to the Basic Law were the Letters Patent of 5 April 1843 and the Royal Instructions dated 6 April 1843 (both as amended). Neither document, however, set out any rights, dealing mainly

with the structure of Government in Hong Kong.¹⁷ Although human rights obviously existed under the common law,¹⁸ they were not used as a basis to challenge legislation. It has been said¹⁹ that “For most of Hong Kong’s constitutional history, the protection of human rights depended exclusively on the common law, which had developed within the constraints of the English doctrine of parliamentary sovereignty.” This had a limited effect on the enforcement of human rights. It was also said²⁰ “The weaknesses of common law protection are equally obvious. Under the doctrine that Parliament is supreme, common law principles may be displaced or reversed by draconian legislation.” This theme of

¹⁷ The Governor was the head of the Government (representing the Crown) assisted by the Executive Council and the Legislative Council. Article VII of the Letters Patent stated that the Government made laws with the advice and consent of the Legislative Council for the “peace, order and good government of [Hong Kong].”

¹⁸ See, for example, a reference to the freedom of expression being a fundamental right at common law in *Her Majesty’s Attorney General In and For the United Kingdom v South China Morning Post Ltd* [1988] 1 HKLR 143.

¹⁹ By Dinusha Panditaratne (Chapter 16 “Basic Law, Hong Kong Bill of Rights and the ICCPR” in Johannes Chan and C L Lim (eds), *Law of the Hong Kong Constitution* (2nd ed Sweet & Maxwell, 2015) at para. 16.009.

²⁰ By Johannes Chan and C L Lim (“Interpreting Constitutional Rights and Permissible Restrictions” in *Law of the Hong Kong Constitution* at para. 17.002.

parliamentary sovereignty was a facet of Hong Kong's constitutional law that had to be addressed head on when the ICCPR came into effect.

11. In 1991, HKBORO was enacted which, as we have seen, contained for the first time in Hong Kong's history a Bill of Rights. Section 6 of this Ordinance deals with the available remedies for contraventions of the Bill of Rights, stating that where there has been a violation, the court may grant such remedy or relief or make such order as it considers appropriate and just in the circumstances. This includes the jurisdiction to declare acts or statutes unconstitutional and therefore void.²¹

12. On 1 July 1997, the Basic Law came into effect. The Preamble states clearly the constitutional model of "One

²¹ And not merely a declaration of incompatibility as in the case under s. 4 of the UK Human Rights Act 1998. Article VII of the Letters Patent was amended in 1991 by the Hong Kong Letters Patent 1991 (No. 2) to prevent the passing of laws inconsistent with the ICCPR.

Country Two Systems”. One of the manifestations of this was the continuation of the common law system in Hong Kong, with an emphasis²² on that cornerstone of the rule of law, judicial independence. The continuation of the common law system is shown by the following provisions:-

- (1) Article 81 refers to the maintenance of the judicial system previously practised in Hong Kong (namely the common law system) except for those changes consequent upon the establishment of the CFA as the final appellate court for Hong Kong.

- (2) Article 82 states that the CFA may as required invite judges from other common law jurisdictions to sit on the Court.²³

²² In three separate provisions, Articles 2, 19 and 85.

²³ On every substantive appeal heard by the Court of Final Appeal since 1 July 1997 (except for about 5 or 6 appeals), the Court has included one overseas common law jurisdiction judge. The panel of judges from common law jurisdictions come from the United Kingdom, Australia, Canada and New Zealand, and

(3) Article 84 is a curious provision in that it states that the courts may refer to precedents of other common law jurisdictions. This is not some sort of constitutional bar to refer to the jurisdiction of non-common law jurisdictions. Rather it seeks to reiterate the fact that Hong Kong is a common law jurisdiction.

(4) This is emphasized also by Article 92 which states that the judges in Hong Kong may be recruited from other common law jurisdictions.

13. For present purposes, however, the important provisions of the Basic Law are to be found in Chapter III headed “Fundamental Rights and Duties of the Residents”:-

include Baroness Hale of Richmond, Lord Neuberger of Abbotsbury, Lord Phillips of Worth Matravers, Lord Hoffmann, Lord Walker of Gestingthorpe, Lord Millet, Lord Collins of Mapesbury and Lord Clarke of Stone-cum-Ebony (from the United Kingdom), the former Chief Justice McLachlin (from Canada), the former Chief Justices of Australia Sir Anthony Mason, Sir Gerard Brennan, Gleeson CJ and French CJ, the former Chief Justice of New South Wales, Spigelman CJ and judges from New Zealand such as Lord Cooke of Thorndon, Sir Ivor Richardson, Sir Thomas Eichelbaum and Sir Thomas Gault.

(1) Some of the rights in the ICCPR are given prominence by being expressly set out, such as the guarantee of equality (Article 25), the right to vote and stand for election (Article 26), the freedom of conscience and religious belief (Article 32), the right to confidential legal advice and access to the courts (Article 35), the right to institute legal proceedings in the courts against the acts of the executive (Article 35) and the freedom of marriage (Article 37). Other rights and freedoms safeguarded by the laws of Hong Kong, which include common law rights, would also continue to be protected (Article 38).

(2) Article 39 is important and states:-

“The provisions of The International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.”

14. The importance of Part III of the Basic Law lies in the following:-

(1) As I have earlier said, for the first time in Hong Kong's history, there was a constitutional document setting out fundamental rights and freedoms. HKBORO was an important statute but it was not until the Basic Law came into effect that constitutional backing was given after 1 July 1997²⁴ to the rights and freedoms contained in the Bill of Rights.

(2) There was also a specific reference in this constitutional document to international conventions, namely the ICCPR as well as the ICESCR. It can be inferred that Hong Kong was expected to adhere to the standards contained in these conventions.

²⁴ It could be argued that constitutional backing was given prior to this date by the amendment to Article VII of the Letters Patent (see para. 11 fn 21 above).

(3) The second paragraph of Article 39 also placed an emphasis on the rights and freedoms enjoyed by Hong Kong residents:²⁵ these rights and freedoms were valuable and were not to be restricted unless prescribed by law.

15. The change to the constitutional legal landscape by the Basic Law obviously required careful thought to be given by the courts as to how rights and freedoms were to be addressed and enforced under this new constitutional order. As noted earlier, the enforcement of rights under the common law had been constrained by the doctrine of parliamentary sovereignty, which, translated to Hong Kong, meant that prior to the Bill of Rights and the Basic Law, there were hardly any challenges to the legality of legislation or administrative acts by reference to fundamental rights or freedoms. With the

²⁵ It should be noted that although reference is made to the position of Hong Kong residents, Article 41 of the Basic Law makes it clear that the same rights and freedoms are also to be enjoyed by persons in Hong Kong other than Hong Kong residents.

emphasis on such rights and freedoms now plain to see, there had to be a change in approach, but how were the questions rhetorically posed earlier²⁶ to be answered? The guidance from the English courts, traditionally the first point of reference for the Hong Kong courts, was limited. With the principle of parliamentary sovereignty firmly established, there was obviously a tilt towards upholding any government or legislative measure. In *Liversidge v Anderson*,²⁷ Lord Wright had observed “Parliament is supreme. It can enact extraordinary powers of interfering with personal liberty.” This was admittedly an extreme view but prior to the coming into effect of the Human Rights Act 1998, the position was neatly summarized in the following passage in Lord Clyde’s²⁸

²⁶ See para. 7 above.

²⁷ [1942] AC 206, at 261.

²⁸ Lord Clyde was a Lord of Appeal in Ordinary who set out the oft quoted three step proportionality test in *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, at 80.

excellent book on judicial review,²⁹ “Although the protection of human rights has long been a feature of the common law and also a focus of judicial review in recent years, the judicial approach to Parliamentary supremacy operated to restrict challenges to primary legislation and often also to discretionary decisions where the grounds of challenge were fundamental human rights.” Of course, subsequent to the coming into effect of the Human Rights Act 1998, the United Kingdom courts have had to change their way of approaching human rights problems, and adapt and develop concepts such as proportionality.

16. Guidance was instead found by the Hong Kong courts primarily in the case law of the ECtHR. It had long been a principle of human rights law in Europe that the starting point of any discussion was the recognition of the full

²⁹ *Judicial Review* (2000, W Green) at para. 6.01.

value of fundamental rights and freedoms. In *Airey v Ireland*,³⁰ it was said in relation to the ECHR, “The Convention was intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.” This recognition came in one of the earliest cases determined by the CFA³¹ where it was emphasized by the Chief Justice,³² “The courts should give a generous interpretation to the provisions in Chapter III [of the Basic Law] that contain these constitutional guarantees in order to give to Hong Kong residents the full measure of fundamental rights and freedoms so constitutionally guaranteed.” Following from this basic position and drawing on decisions of the Judicial Committee of the Privy Council,³³ the CFA has

³⁰ (1979-80) 2 EHRR 305, at para. 24.

³¹ *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4.

³² At 29A-B.

³³ When the Board had to deal with constitutional provisions found elsewhere in the Commonwealth. See: *Attorney General of the Gambia v Jobe* [1984] AC 689 where Lord Diplock famously said, “A constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction”; *Minister of Home Affairs v Fisher* [1980] AC 319.

said it is now an established part of Hong Kong's jurisprudence that fundamental rights and freedoms are to be given a generous interpretation and correspondingly, any restrictions on rights are to be narrowly construed.³⁴ So one starts with the premise – surely not too extreme a view by any standards – that fundamental rights and freedoms are valuable and ought, wherever possible, to be protected.

17. From this springboard, one can then understand the true meaning of various concepts that are reflected in the Basic Law and the ICCPR. Thus, in Article 4 of the Basic Law, it is mandated that the HKSAR “shall safeguard the rights and freedoms of the residents and other persons in Hong Kong in accordance with law”. Article 39, which has been set out earlier,³⁵ states that the rights and freedoms set out in the Basic Law shall not be restricted “unless prescribed

³⁴ *Leung Kwok Hung v HKSAR* (2005) 8 HKCFAR 229, at para. 16.

³⁵ See para. 14 above.

by law”. This phrase “prescribed by law” referring to restrictions on rights is an important concept that derives from European origins. There are similar phrases in the ICCPR such as “provided by law” (Article 16 of the Bill of Rights dealing with the freedom of expression), “in conformity with the law” (Article 17 of the Bill of Rights dealing with the right of peaceful assembly). They mean the same thing, encapsulating the principle of legal certainty. This was stated clearly by the CFA in *Shum Kwok Sher v HKSAR*³⁶ where Sir Anthony Mason said,³⁷ “The decisions of the European Court of Human Rights authoritatively establish the expression ‘prescribed by law’ ... incorporate the requirements that the relevant law be certain and that it be adequately accessible”. Reference was made to the

³⁶ (2002) 5 HKCFAR 381.

³⁷ At para. 62.

well-known passage in the ECtHR decision of *Sunday Times v United Kingdom (No. 1)*³⁸:-

“First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.”

18. I have earlier made the point that one of the notable challenges facing the courts in dealing with human rights

³⁸ (1979-80) 2 EHRR 245, at para. 49.

cases is the existence of reasonable arguments or points of view that pull in different directions. The rhetorical questions I have posed emphasize this challenge. It is this aspect where I think European jurisprudence has provided crucial guidance to the Hong Kong courts. It has often been said that a constant theme of the case law of the ECtHR has been the respect for human rights together with the recognition that there may be broader community interests that should be considered. This was succinctly put in *Soering v United Kingdom*³⁹ “Furthermore, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights.” This balancing approach has been accepted in the United Kingdom and the words of Lord Steyn in *Brown v Stott*⁴⁰ states the European position accurately (and they equally apply in Hong

³⁹ (1989) 11 EHRR 439, at para. 89.

⁴⁰ [2003] 1 AC 681, at 708B-C.

Kong as far as the ICCPR is concerned): “The European Convention requires that where difficult questions arise a balance must be struck. Subject to a limited number of absolute guarantees, the scheme and structure of the Convention reflects this balanced approach.” In other words, save for some rights which are absolute,⁴¹ the court will need to balance various opposing interests in a human rights context. While, as I have already emphasized, individual rights and freedoms are to be protected, sometimes (or even often) there are also legitimate interests which pull in the opposite direction. As Lord Steyn further made clear in his speech in *Brown v Stott*⁴² the framers of the ECHR “realized only too well that a single-minded concentration on the pursuit of fundamental rights of individuals to the exclusion of the interests of the wider public might be subversive of the

⁴¹ Such as the right not to be subject to CIDTP: see here *Ubamaka v Secretary for Security* (2012) 15 HKCFAR 743.

⁴² At 707G-H.

ideal of tolerant European liberal democracies.” In other words, one must have regard not only to individual rights but also to the rights of others. Often the interests of the wider public are represented by government policies or legislation.

19. However, one must start by asking just what is the proper approach in arriving at the fair balance between legitimate competing interests? The approach must be a principled one. The English approach (again prior to the Human Rights Act 1998) has at times bordered on reasonableness alone. In *R v Secretary of State for the Home Department Ex parte Brind*⁴³ in considering the discretion exercised by a minister seeking to restrict the broadcasting of any matter which might be referable to terrorist organizations, Lord Bridge of Harwich, while accepting that any curb on the freedom of expression had to be justified, suggested a test

⁴³ [1991] 1 AC 696.

based on the reasonableness of the decision maker: “The primary judgment as to whether the particular competing public interest justifies the particular restriction imposed falls to be made by the Secretary of State to whom Parliament has entrusted the discretion. But we are entitled to exercise a secondary judgment by asking whether a reasonable Secretary of State, on the material before him, could reasonably make that primary judgment.”⁴⁴

20. However, an approach based on reasonableness is vague and open ended, and can lead to inconsistent results as applied by different judges. It can even lead to a situation where the only way to impugn a measure that appears to restrict human rights is to prove *Wednesbury* unreasonableness. The European approach has been much more focused and, crucially, much more in line with the

⁴⁴ At 749A-B.

importance of enforcing human rights and freedoms. The approach is that of proportionality and this represents a principled approach.⁴⁵ This approach or test at once requires the court to address the conundrum of legitimate competing interests while paying sufficient attention to the importance of human rights and freedoms. It is structured, methodical, precise and systematic and has been described as an “orderly process of decision-making”.⁴⁶ It is quite understandable that this structured approach should be preferred over the relatively amorphous standard of reasonableness.⁴⁷ As Lord Reed said in *Bank Mellat v Her Majesty’s Treasury*

⁴⁵ The modern concept of proportionality can be traced to developments in Prussia in the 18th and 19th centuries, particularly in the area of administrative law: see *Proportionality: Constitutional Rights of their Limitations* Aharon Barak (Cambridge University Press 2012) Chapter 7 at 177-179. The example frequently given is of the case of a store owner who had violated his store’s liquor license several times. The police ordered the closure of the whole shop. This was said to be completely disproportionate, given the clear option of merely revoking the store’s liquor license. A number of colourful expressions are used to capture the essence of the concept: “You should not use a cannon to kill a sparrow” (Fritz Fleiner, the German jurist), “You must not use a steam hammer to crack a nut, if a nutcracker would do” (Lord Diplock in *R v Goldstein* [1983] 1 WLR 151, 155). The first decision of the ECtHR discussing proportionality can be traced to *Handyside v United Kingdom* (1979-80) 1 EHRR 737.

⁴⁶ By Baroness Hale of Richmond in *R (Lord Carlisle of Berriew) v Secretary of State for the Home Department* [2015] AC 945, at para. 89.

⁴⁷ See the judgment of Ribeiro PJ in *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372, at para. 59.

(No. 2),⁴⁸ “Its attraction as a heuristic tool is that, by breaking down an assessment of proportionality into distinct elements, it can clarify different aspects of such an assessment, and make value judgments more explicit.”

21. After some initial doubts as to whether the proportionality test was appropriate for Hong Kong,⁴⁹ it was firmly established by two decisions, one by the Privy Council prior to 1 July 1997⁵⁰ and by the CFA after that date.⁵¹

22. We are by now quite familiar with the contents of the proportionality exercise. The test is of course to test the constitutionality or legality of measures, including legislation, where such are said to restrict human rights or freedoms. The

⁴⁸ [2014] AC 700, at para. 74.

⁴⁹ Expressed by the Privy Council in *Attorney-General of Hong Kong v Lee Kwong Kut* [1993] AC 951, where the proportionality test was described as a “somewhat complex process” (at 972E) and it was also said that issues involving Hong Kong’s Bill of Rights should be approached “with realism and good sense” (at 975B-C).

⁵⁰ *Ming Pao Newspapers Ltd v Attorney-General of Hong Kong* [1996] AC 907.

⁵¹ *HKSAR v Ng Kung Siu* (1999) 2 HKCFAR 442.

well-known proportionality test involves the following exercise. Where a fundamental right has been adversely affected, the public authority (usually the Government) will be required to demonstrate that the impugned measure that has adversely affected an identified human right or has encroached upon it pursues a legitimate aim, that it is rationally connected to that aim and that the effect of the impugned measure is no more than necessary to deal with the asserted legitimate aim. To these three steps in the proportionality exercise is now added a fourth, namely, that after the three steps have been satisfied, it is also necessary to show that a reasonable balance has been struck between the societal benefits of the encroachment on the relevant human right and the extent to which that right has been encroached or adversely effected. This was the effect of the decision of the Court of Final Appeal in *Hysan Development Co Ltd v Town Planning Board*. This fourth step requires the Court to take

an overall, balanced view: see *Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs* (2017) 20 HKCFAR 353, at para. 47. It reflects again the European approach of never losing sight of the importance of recognizing fundamental rights.

23. The principled approach in the proportionality exercise does not mean that difficulties will not arise in its application and the case law that has been generated in most jurisdictions that have adopted this test (including the United Kingdom and Hong Kong as well as the case law of the ECtHR) amply demonstrates this. The chief difficulty of course lies in the fact that inherent in the proportionality analysis is the responsibility on the courts to examine, closely at times, government policies. One then instantly faces a constitutional dilemma: just as an independent judiciary has its particular role to play in exercising judicial power to apply

the law, so the roles of the executive and the legislature are also distinct. The role of the Chief Executive in Hong Kong is to lead the Government and decide on government policies and to issue executive orders.⁵² The role of the legislature is to enact legislation.⁵³ Why should the courts be able to scrutinize the acts of the executive and the legislature? The answer lies in the courts' constitutional duty being to apply the law and this includes ensuring in any given case that the acts of the executive and legislature are in accordance with the law. The more difficult question in practice is to ask: to what extent should the court respect the decisions or policy of a government or legislature? The English courts have traditionally (certainly before the Human Rights Act 1998) been perhaps somewhat coy in reviewing government or administrative measures on the merits and have been slow to question matters of policy. The thinking is this: some

⁵² Article 48 of the Basic Law.

⁵³ Article 73 of the Basic Law.

decisions are required to be made by politicians rather than by judges, and, unlike judges, they are elected. As Lord Bingham of Cornhill put it,⁵⁴ “The democratic process is liable to be subverted if, on a question of moral and political judgment, opponents of [a statute] achieve through the courts what they could not achieve in Parliament.”

24. The concept of the margin of appreciation is one that finds its roots in the jurisprudence of the ECtHR. The Strasbourg Court, being a supra-national court, recognizes that in some areas it is appropriate to regard the national courts of member states as being better placed to assess the validity and applicability of national policy objectives and accordingly, to determine the extent of the acceptability of encroachments on human rights and freedoms. In *James v United Kingdom*,⁵⁵ a

⁵⁴ In *R (Countrywide Alliance) v Attorney General* [2008] AC 719, at para. 45.

⁵⁵ (1986) 8 EHRR 123, at para. 46.

case dealing with leasehold enfranchisement legislation, the ECtHR said:-

“... the decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ widely. The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature’s judgment as to what is ‘in the public interest’ unless that judgment be manifestly without reasonable foundation.”

Thus, a wide margin of appreciation has been given for example in relation to town planning matters.⁵⁶ Where morals are involved, this is another area in which a wide margin of appreciation is extended to member states. In *Handyside v United Kingdom*,⁵⁷ the court said this:-

“In particular, it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterized by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a

⁵⁶ See for example *Sporrong and Lönnroth v Sweden* (1983) 5 EHRR 35; *Phocas v France* (2001) 32 EHRR 1.

⁵⁷ (1976) 1 EHRR 737.

better position than the international judge to give an opinion on the exact content of these requirements as well as on the ‘necessity’ of a ‘restriction’ or ‘penalty’ intended to meet them.”

25. The margin of appreciation concept has been extended by analogy in the domestic context in Hong Kong. It is appropriate to do so because similar considerations apply in terms of the desirability of according due weight to the views or policies of the executive or legislative authorities. Even though it is ultimately the responsibility of the courts to determine as a matter of law where the balance lies in any given case, it must be recognized that sometimes very difficult choices may have to be made by the executive or the legislature. Particularly in the area of socio-economic policy where executive authorities have to draw lines in order to implement a sensible economic policy, the court will be more

inclined to accord the relevant decision-maker a wider margin of appreciation. The position in Hong Kong was put in the following way in *Fok Chun Wa v Hospital Authority*,⁵⁸ a case involving the examination of the healthcare policy of the Hong Kong Government in the context of different fees charged in respect of obstetrics services in public hospitals (the complaint being that different charges applied for the same service to different classes of patient, hence an allegation that the right to equality had been breached):-

“A clear example of state or community policy are the socio-economic policies of a government. Here, it is the responsibility of the executive to devise and implement such policies. Article 48(4) of the Basic Law states that the Chief Executive has the responsibility of deciding on government policies

⁵⁸ (2012) 15 HKCFAR 409, at para. 65.

(assisted of course by the Executive Council – art.54). Article 62 of the Basic Law places the duty on the Government to formulate and implement policies (sub-para(1)) and to formulate budgets and final accounts (sub-para(4)). In discharging its responsibilities, the Executive will of course take into consideration many different factors and interests – no doubt these factors and interests often pulling in different directions – to arrive at the chosen policy. In the context of healthcare and the setting of fees chargeable in public hospitals, the Hospital Authority Ordinance contains relevant provisions that place the obligation on the respondents to recommend and devise appropriate policies. See for example: ss. 4, 5 and 18 of the Ordinance. I have already set out s. 4(d) of that Ordinance ... So far as the Legislature is concerned,

the policy consideration was put in this way by Chief Justice Li (in the context of legislation regarding serious crime, namely murder) in *Lau Cheong* 449C ([105]), ‘the legislature has to make a difficult collective judgment taking into account the rights of individuals as well as the interests of society’.”

Reference was made to the decision of *Sentges v The Netherlands*⁵⁹ where the ECtHR said, “This margin of appreciation is even wider when, as in the present case, the issues involved an assessment of the priorities in the context of the allocation of limited State resources.”

26. In areas such as socio-economic policy where the court will often be inclined to accord a wider margin of

⁵⁹ (2004) 7 CCL Rep 400.

appreciation, in dealing with the third step of the proportionality analysis (the need to show that the impugned measure is no more than necessary to achieve a legitimate objective), where a number of alternative, but reasonable, solutions to a problem exist, the court will not put itself in the place of the executive, legislative or other authority to decide which is the best option; the court will only interfere where an option is clearly beyond the spectrum of reasonable options.⁶⁰ This is not to say that some sort of *carte blanche* is given to the authorities where matters of socio-economic policy are concerned. Far from it. The courts have the ultimate responsibility of determining whether acts are constitutional or lawful and it would be incumbent on the courts to intervene, even in the area of socio-economic or other government policies, where there has been a disregard for core values.⁶¹

⁶⁰ This is known as the manifestly without reasonable foundation test: see *Fok Chun Wa* at para. 75(3). Depending on the circumstances and the relevant right in question, sometimes a more stringent test, that of reasonable necessity, may have to be applied.

⁶¹ *Fok Chun Wa* at para. 77.

This follows from the starting point of the full recognition of the value of fundamental rights and freedoms. As the CFA said in *Fok Chun Wa*,⁶² “It is convenient here also to remind ourselves that where the subject matter of the challenge has to do with fundamental concepts, in contradistinction to rights associated with purely social and economic policies, the courts will be particularly vigilant to protect the rights associated with such concepts, and consequently much less leeway or margin of appreciation will be accorded to the authority concerned. These fundamental concepts are those which go to the heart of any society.”

27. Moreover, in some situations, the interference may be so great that neither the proportionality analysis nor the margin of appreciation are meaningful concepts. This can occur when the essence of a fundamental right is affected. A

⁶² At para. 79.

margin of appreciation cannot be extended effectively to destroy the essence of a right. This has been the effect of decisions of the ECtHR.⁶³

28. In *W v Registrar of Marriages*,⁶⁴ the Court of Final Appeal had to deal with the case of a transsexual person who through a sex change operation had become a woman. She wanted to marry her male partner. The Registrar of Marriages refused on the basis of the existing marriage legislation which determined sexual identity from the biological and chromosomal position at birth. Thus, notwithstanding that the applicant (W) had undergone a sex change operation and who therefore lived as and appeared in all respects to be a woman, she could not marry a man. The Court of Final Appeal held that the essence of the

⁶³ Such as *Goodwin v United Kingdom* (2002) 35 EHRR 18, at para. 103.

⁶⁴ (2013) 16 HKCFAR 112.

constitutional right to marry⁶⁵ was infringed by not allowing a transsexual to marry a member of the opposite sex. The judgment undertook an extensive analysis of the applicable legal principles referring extensively to a number of ECtHR decisions especially *Goodwin v United Kingdom*. Important for our purposes was the rejection of the argument that there should be a consensus of the Hong Kong community on the issue of whether transsexuals should be permitted to marry members of the opposite sex. Even if a major consensus could be ascertained it was said that “Reliance on the absence of a majority consensus as a reason for rejecting a minority’s claim is inimical in principle to fundamental rights.”⁶⁶ Put another way, the court’s duty was to protect minorities from the excesses of the majority.

⁶⁵ Contained in Article 37 of the Basic Law.

⁶⁶ At para. 116.

29. I should now make some concluding remarks. The constitutional responsibility now thrust upon courts the world over to protect rights and freedoms is as great as it has ever been. In Hong Kong, the challenge of dealing with a written Bill of Rights has been at times a difficult one and there will no doubt be testing challenges in the future. The situations in real life we encounter that are affected by fundamental rights and freedoms are as diverse as they are numerous. Arriving at the right balance is a difficult exercise, made more difficult by the stakes being often so high. But principle is all important. In the Preface to the Eleventh Edition of *Administrative Law*,⁶⁷ my friend Professor Christopher Forsyth writes, “the importance of principle and conceptual analysis and assessment of cases is necessary in order to impose order upon the ‘wilderness of single instances’ that otherwise threatens. And that order is essential to the great and abiding

⁶⁷ By H W R Wade and C F Forsyth (OUP 2014).

task of administrative law: the imposition of the rule of law onto the exercise of public power.” How very true these words are. The Hong Kong courts have had to learn quickly and more than that, to have in place operative and just principles of law in the area of fundamental rights and freedoms to maintain the essence of human dignity. But we have had the benefit of guidance. To paraphrase Lord Goff of Chieveley,⁶⁸ the road to unattainable perfection is indeed endless but to have as fellow pilgrims our friends from Europe, we can be sure that we are going in the right direction.

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⁶⁸ In *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460, at 488C.