The Importance of the Rule of Law

A talk by the Hon. Mr Justice Joseph Fok, PJ
to the ICAC Chief Investigators' Command Course No.36
on Friday, 11th November 2016

Ladies and gentlemen,

1. It is a great pleasure to have been invited to speak to you today on the importance of the rule of law.

2. A talk which is advertised as one about the importance of the rule of law is rather like a newspaper headline that reads: "Dog bites man!" It is unlikely to grab anyone's attention as saying anything unusual and the underlying premise – that the rule of law is important – seems blindingly obvious. However, sometimes, having to examine a statement of the obvious enables us to get back to certain fundamental truths about a thing; and I shall endeavour to do that today.

3. In this case, in identifying the importance of the rule of law, consider this statement taken from the World Justice Project's 2015 Rule of Law Index report:

> "Effective rule of law reduces corruption, combats poverty and disease, and protects people from injustices large and small. It is the foundation for communities of peace, opportunity, and equity — underpinning development, accountable government, and respect for fundamental rights."[1]

[1] World Justice Project Rule of Law Index 2015, Executive Summary, p.5.

4. It would be tempting to conclude my talk to you there. For I doubt there is anyone in the room who would wish to take issue with anything in that statement; and that description of the importance of the rule of law is sufficiently comprehensive not to require any elaboration. But it is worth persevering with this topic for a number of reasons.

Content of the Rule of Law

5. First, it is critically important that we continue to talk about the rule of law. As the statement attributed (rightly or wrongly) to Thomas Jefferson puts it, eternal vigilance is the price of liberty. And talking about the rule of law gives us the opportunity to remind ourselves of its content. (Although rest assured, eternal vigilance does not mean talking forever and I will confine my talk to the time allotted this afternoon!)

6. So let me now begin in earnest by reminding you of the definition of the principle given by Lord Bingham in his seminal book *The Rule of Law*. There, he identifies the core of the existing principle as follows: "that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts."[2]

7. In discussing the core principle, Lord Bingham identified eight suggested principles as constituting the ingredients of the rule of law. I do not propose to list these individually but they are discussed in his book and are quoted in full on the website of the Bingham Centre for the Rule of Law.[3] This Centre was launched in 2010 with the mission of the study and promotion of the rule of law

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[2] *The Rule of Law*, Tom Bingham (Allen Lane, 2010) at p.8.

[3] http://binghamcentre.biicl.org/about-us.

worldwide "as a universal and practical concept that upholds respect for human dignity and enhances economic development and political stability".[4]

8. For its part, the World Justice Project states that it uses a working definition of the rule of law based on four universal principles. It maintains that "[t]he rule of law is a system where the following four universal principles are upheld:

(1) The government and its officials and agents as well as individuals and private entities are accountable under the law.

(2) The laws are clear, publicized, stable, and just; are applied evenly; and protect fundamental rights, including the security of persons and property.

(3) The process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient.

(4) Justice is delivered timely by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve."[5]

9. I do not regard this latter set of principles as being inconsistent or incompatible with Lord Bingham's eight principles. Although expressed differently, the substance is essentially the same.

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4 http://binghamcentre.biicl.org/mission-statement.

5 World Justice Project Rule of Law Index 2015, p.10.

10. As to that substance, though, Lord Bingham drew attention to two different definitions of the rule of law, which he described as the thin definition and the thick definition.[6] The thin type simply requires the state to be subject to laws publicly made and publicly administered in the courts, which laws apply equally to all persons and authorities within the state. There is nothing in this thin definition of the rule of law that says anything about the content of the rule of law. Lord Bingham quotes Professor Joseph Raz who wrote that:

> "A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies …".[7]

Thus, Soviet Communism and German Nazism could be said to have complied with the thin type of rule of law but no one, I suggest, could sensibly argue that the unjust laws enacted by those totalitarian régimes promoted social justice or stability. Lord Bingham therefore rejected the thin definition of the rule of law in favour of the thick definition, which adds the important element that the laws of the state must guarantee fundamental human rights.

11. There is here a tension and a problem. The tension is that the thick type of rule of law is not necessarily essential for economic, as opposed to social, development. History shows us that physical and economic development is possible where only the thin type of rule of law is observed. The industrial revolution in Britain, for example, occurred at a time of gross inequality and gender discrimination. International investment occurs in countries with poor human rights records. Businessmen are concerned with the economic risks of

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6 *The Rule of Law* (*supra*) at pp.66-67.

7 J. Raz, "The Rule of Law and its Virtue", in Raz, *The Authority of Law: Essays on Law and Morality* (OUP, 1979) at p.211.

their investments, which depend on the strength of the laws governing their contractual rights: so long as those obligations are protected and any disputes can be fairly adjudicated and enforced, businessmen will not necessarily be deterred by underlying social injustice in the countries in which they are investing. The problem is that there is no universal consensus amongst different countries as to the rights and freedoms which are fundamental. Some countries place a premium on economic development and societal stability and order at the expense of individual freedoms. Others simply have fundamentally different views as to the rights, for example gender equality, that are regarded as sacrosanct elsewhere.

12. The former tension – the thick rule of law vs. the thin – is mitigated by the outer limits of human tolerance for oppression. A state that denies any rights to its citizens may well find itself descending into civil unrest and disorder. In Hong Kong, we certainly aspire to conform to the thick definition of the rule of law. Those of you from other jurisdictions will be able to consider to what extent your own countries adhere to the thick or thin type of rule of law.

13. The latter problem – in identifying what rights are fundamental – is addressed by the increasingly widespread acceptance of international covenants enshrining basic fundamental human rights: the International Covenant on Civil and Political Rights ("ICCPR") being an obvious and relevant example for us here in Hong Kong, enshrined as it is in the Basic Law.[8] Again, those of you from overseas will be able to reflect on the extent to which the same or similar rights to those guaranteed in Hong Kong's Basic Law and by the incorporation of the rights in the ICCPR into our domestic law through the Hong Kong Bill of Rights Ordinance[9] are enjoyed in your own countries.

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[8] Basic Law of the Hong Kong Special Administrative Region, Article 39.

[9] (Cap.383).

Safeguarding the Rule of Law

14. A second reason to persevere with the topic of the importance of the rule of law is that it enables us to examine what is essential in order to safeguard the rule of law in operation. Here, I would stress three particular factors. There are undoubtedly others but, for the purposes of this afternoon's discussion, I shall focus on these three.

Equality before the law

15. One is equality of all before the law. This is absolutely crucial to any system that seeks to respect the rule of law. There simply cannot be one law for the rich and one for the poor; or one for the powerful or politically well-connected and one for the weak or marginalised. In Hong Kong, this concept of equality is expressly provided for in the Basic Law, Article 25 of which provides that "All Hong Kong residents shall be equal before the law." This is more poetically expressed by Dr Thomas Fuller who wrote: "Be you ever so high, the Law is above you."[10] So, when litigants come before the courts, they need to know that they stand on a level playing field with their opponents. A foreign company needs to know that it will not be disadvantaged when contesting a case against a local company. An individual needs to be confident he can bring a claim to enforce his rights as against the Government. The public as a whole needs to believe that when anyone, be it a wealthy businessman, powerful politician or a senior Government official, breaks the law, he or she can and will be brought to account. Allied to the need for the level playing field is the need to ensure that litigants are able to gain access to justice. This engages the need to put in place systems to secure legal representation and adequate provision for legal aid, where necessary.

[10] Quoted by Lord Denning MR in *Gouriet v Union of Post Office Workers* [1977] QB 729 at 762A.

Respect for the rights of others

16. The second factor is respect for the rights of others. This is a factor of particular importance at a time when societies in many countries seem to be growing increasingly polarised due to perceived social inequalities. In the law enforcement context, respect for the rights of others is reflected in the statement that the ends do not justify the means. Notwithstanding the pressing need to combat serious offences such as terrorism and corruption, due process must be observed and this will often involve a balance of competing rights and interests.

17. By way of specific example, it is recognised that special powers of investigation are necessary in order to fight corruption.[11] But this does not mean that the rights of suspects and others can simply be ignored. As Li CJ said giving the judgment of the Court of Final Appeal ("CFA"), in *P v Commissioner of Independent Commission Against Corruption*, a case concerning the Commissioner's power to obtain information under section 14(1)(d) of the Prevention of Bribery Ordinance:

> "For the purpose of combating corruption, special powers of investigation have been conferred by statute on the [ICAC]. These powers are necessary as crimes of corruption are inherently difficult to investigate and prove. But as their exercise intrudes into the privacy of citizens, the statutory scheme provides that they are exercisable only after judicial authorization has been obtained. In this way, the scheme seeks to balance the public interest in fighting corruption and the public interest in the protection of the individual."[12]

18. Another specific example of the need to strike a balance is in determining whether evidence obtained in breach of a constitutionally protected right is

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[11] See *HKSAR v Chan Sze-ting*, unrep., HCMA 106/1997, 4 September 1997, at [14].

[12] (2007) 10 HKCFAR 293 at [1].

admissible in court proceedings. The CFA has held that there is no absolute bar to the admissibility of evidence obtained in breach of a constitutional right and there is a discretion whether to receive such evidence.[13] In the case of *Ho Man Kong v Superintendent of Lai Chi Kok Reception Centre*, Ribeiro PJ observed:

> "The well-established balance here is between the public interest in the Court having access to relevant and probative evidence on the one hand, and the exclusion of evidence with a prejudicial effect which is out of proportion with its probative value on the other. The Court might also be asked to consider whether the conduct of the prosecution in securing such evidence constitutes an abuse of the process on a stay application. [In] determining the admissibility of evidence or a stay application, the Court carries out its judicial function in the light of the defendant's constitutionally protected right to a fair trial. …"[14]

19. Some rights, of course, do not involve any balancing exercise at all because they are unqualified. The prohibition against torture and cruel, inhuman or degrading treatment or punishment is an example of such a right. So, too, the right to confidential legal advice, or legal professional privilege, is an absolute right based not merely on the general right to privacy but also on the right of access to justice. This right must therefore be respected and, as the CFA recently noted, jealously protected by the courts.[15]

Judicial independence

20. But where there is a need to conduct the balancing of rights, that exercise is the job of the courts, which brings me to the third factor essential to safeguard the rule of law in operation, namely: the existence of an independent judiciary. I have already touched on the important function of the courts in balancing rights. To do so fairly and efficiently, it is absolutely essential that the judiciary

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13 *HKSAR v Muhammad Riaz Khan* (2012) 15 HKCFAR 232 at [15].

14 (2014) 17 HKCFAR 179 at [8].

15 *Secretary for Justice v Florence Tsang Chiu Wing* (2014) 17 HKCFAR 739 at [25]-[29].

be permitted to exercise independent adjudicative power. This means independence both from the parties, i.e. a lack of bias, whether that be actual or perceived, and also institutional independence.

21. In Hong Kong, institutional independence of the Judiciary is provided for in the Basic Law, which refers in no fewer than three places – in Articles 2, 19 and 85 – to the exercise of judicial power independently by the courts. The appointment of judges is by the Chief Executive on the recommendation of an independent commission – the Judicial Officers Recommendation Commission – composed of other judges, representatives of the legal professions and lay members.[16] Judges are chosen on the basis of their judicial and professional qualities.[17] They can only be removed for inability to discharge their duties or for misbehaviour on the recommendation of a tribunal appointed by the Chief Justice and consisting of at least three judges.[18]

22. So far as independence from the parties is concerned, by the Judicial Oath, each judge swears to uphold the Basic Law, to bear allegiance to the HKSAR and that he or she will serve the Region "conscientiously, dutifully, in full accordance with the law, honestly and with integrity, safeguard the law and administer justice without fear or favour, self-interest or deceit."[19] The blind-folded statue of Themis, the Greek goddess of justice, which adorns the top of the Court of Final Appeal Building, emblematically represents the impartiality each judge must exercise in every case. Only then can a litigant, whether he is an individual or company, domestic or foreign, public body or private institution, be confident that their case will be decided in accordance with the evidence and on its legal merits, come what may. Disqualification for bias is

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16 Basic Law, Article 88.
17 Basic Law, Article 92.
18 Basic Law, Article 89.
19 Oaths and Declarations Ordinance (Cap.11), Schedule 2, Part V.

rare, since a judge with a conflict of interest is duty bound to recuse himself from sitting; but occasionally the Court deals with applications for recusal on the ground of apparent bias.[20] In doing so, the courts apply the "reasonable apprehension of bias" test, which is stated as follows:

> "A particular judge is disqualified from sitting if the circumstances are such as would lead a reasonable, fair-minded and well-informed observer to conclude that there is a real possibility that the judge would be biased."[21]

This test reflects the principle of open justice encapsulated in the saying that justice must not only be done, but must also be "seen to be done".[22] As Lord Bingham said in a case in 2004:

> "In maintaining the confidence of the parties and the public in the integrity of the judicial process it is necessary that judicial tribunals should be independent and impartial and also that they should appear to be so. The judge must be free of any influence which could prevent the bringing of an objective judgment to bear or which could distort the judge's judgment, and must appear to be so …".[23]

23. The importance of the independence of the Judiciary cannot be over-stated. It is essential to the rule of law and ensures that the law is applied fairly and consistently to all litigants regardless of their identity. In this regard, transparency is crucial and this is achieved by public hearings in court and through the publication of the courts' reasons for their judgments. By this

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[20] Guide to Judicial Conduct (2004), Part D.

[21] *Ibid.* at para.47; the test being based on *Director General of Fair Trading v Proprietary Association of Great Britain* [2001] 1 WLR 700 at [85] and *Porter v Magill* [2002] 2 AC 357 at [103]: see *Deacons v White & Case LLP & Ors* (2003) 6 HKCFAR 322 at [18]-[24].

[22] This saying is attributed to Hewart LCJ in *R v Sussex Justices, Ex parte Macarthy* [1924] 1 KB 256 at p.259; but see the illuminating discussion of the origins of the aphorism by Spigelman NPJ in his address *Justice "Seen to be Done" or "Seem to be Done"?* at: http://www.hkcfa.hk/filemanager/speech/en/upload/155/Justice%20-%20Seen%20to%20be%20Done%20or%20Seem%20to%20be%20Done.pdf.

[23] *Davidson v Scottish Ministers* [2004] UKHL 34 at [7].

policy of open justice, the public is able to see what has led the judge to his or her decision in any particular case and it can be seen whether the court has applied the letter and spirit of the law – and that alone – to the evidence before it in reaching a decision.

Educating the public and explaining the true meaning of the Rule of Law

24. I come now to the third and final reason I would like to address today as to why I believe it is worthwhile persevering with discussion of the importance of the rule of law. That is, to educate the public generally about the rule of law and to explain what it means and, just as critically, what it does not mean.

25. There is a tendency in Hong Kong, although this phenomenon is certainly not unique to this jurisdiction, for litigants to incant the words "rule of law" in support of their case as if it were a mantra. Thus, in some judicial reviews, it is not unheard of for it to be contended that a decision or an act of a Government department is contrary to the rule of law. In other cases, one finds both sides claiming that a court decision otherwise than in their favour would not comply with the rule of law. In Lord Bingham's book, he gives the example of the US Supreme Court case of *Bush v Gore*, which decided who won the presidential election in 2000 and in which the rule of law was invoked by both sides. Lord Bingham refers to one academic's commentary recognising "a widespread impression that utterance of those magic words meant little more than 'Hooray for our side'."[24]

26. Closer to home here in Hong Kong, there have been many articles in the media about recent court decisions relating to prosecutions arising out of the Occupy Protests in 2014. Some have been in favour of the outcomes and some

[24] *The Rule of Law* (*supra*) at p.5.

have criticised them. Different people will, of course, have different points of view. However, it is disheartening, and a clear example of what Lord Bingham was referring to, when one sees a commentator saying that a particular result is, or is not, consistent with the rule of law simply because he disagrees with the particular outcome. That sort of comment has a tendency to give readers a false impression as to what the rule of law means.

27. If that impression starts to take root, it will almost certainly do a disservice to the rule of law. There are many cases where the result of litigation changes as the matter proceeds through the various levels of court. To say that a decision at first instance is contrary to the rule of law because the outcome is not to one's liking is harmful to the public perception of, and confidence in, the rule of law. The reversal of that decision by an intermediate court of appeal does not, of and in itself, mean that the rule of law, once absent, is now restored. Nor, if the first instance decision is ultimately restored by a final appellate court, does this then mean that the position is again that the rule of law has been breached.

28. A related vice is criticism of court decisions, otherwise a perfectly proper activity in a system that values free speech, that strays beyond legitimate comment and takes the form of highly personalised attacks on the individual judges, which is not proper. This behaviour, of which there is a growing tendency, is similarly damaging to the rule of law. There is a very recent illustration of this point. Some of you may have read about the decision of the English High Court last week in a case concerning the right of the UK Government to serve notice under Article 50 of the Lisbon Treaty to trigger what is referred to as "Brexit". The court decided that the UK Government could not rely on the royal prerogative to do so. This was attacked as being a denial of the popular will, as expressed in the Brexit referendum. One

newspaper branded the three judges who heard the case "Enemies of the People" and the vitriolic and highly personal abuse went much further. It is right that individuals speak up against this form of abusive behaviour which, if left unchecked, clearly risks damaging the rule of law. As one professor of public law hit back:

> "Some of today's press coverage of the judgment in *Miller*, accusing judges of acting undemocratically, is deplorable. It is entirely right and proper that the Court should determine the legal extent of executive authority. That is an axiomatic judicial function in a democracy founded on the rule of law."[25]

The abuse led the Chair of the Bar Council of England and Wales to issue a vigorous defence of the vital role of the judiciary in upholding the rule of law, stating:

> "It is the judiciary's role to ensure the rule of law underpins our democratic system. Without it fulfilling this vital role, the people would have very limited scope to hold the Government in power to account.
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> …
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> Publicly criticising individual members of the judiciary over a particular judgement or suggesting that they are motivated by their individual views, political or otherwise, is wrong, and serves only to undermine their vital role in the administration of justice. It also does no favours to our global reputation.
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> None of the parties suggested that the Court did not have jurisdiction to decide the point in issue. They are simply doing their job – impartially ruling on a dispute between parties, one of whom happens to be the Government in this instance. The right to appeal is there to challenge the Court's decision if a party feels they have grounds to do so. Whilst acknowledging that this question is one of potentially

[25] Professor Mark Elliott, Professor of Public Law at the University of Cambridge, in his commentary on *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin) at: https://publiclawforeveryone.com/2016/11/04/the-high-courts-judgment-in-miller-a-brief-comment/.

significant constitutional importance, the independent role of the Court should be respected, particularly by those who disagree with the outcome."[26]

How the proportionality test works

29. At this point, I would now like to talk in greater detail about a subject I have already mentioned: that is, the balancing exercise that courts sometimes have to carry out in order to give proper protection to fundamental rights. Just how is that to be done?

30. A recent CFA decision in Hong Kong has comprehensively examined this very subject and, I believe, sets out a clear and helpful explanation of the approach to be followed. That decision is *Hysan Development Company Limited & Ors v Town Planning Board*, a judgment handed down in September this year.[27] The case itself arose in the context of town planning and concerned property rights under the Basic Law and the proper approach to be adopted by the Town Planning Board when determining planning restrictions in zoning plans. But the case is of much wider significance because it addressed the correct approach to be adopted in any case where a constitutional or fundamental right was involved.

31. The first question a court will ask itself when a litigant seeks to rely on a constitutional or fundamental right is whether the right identified is engaged. In *Hysan*, the constitutional rights relied upon were those that required the Government to protect the right of private ownership of property, including the rights of acquisition, use, disposal and inheritance of property, "in accordance with law".[28] The CFA held that the words "in accordance with law", as well as

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[26] http://www.barcouncil.org.uk/media-centre/news-and-press-releases/2016/november/bar-council-judiciary-must-ensure-rule-of-law-underpins-our-democracy/.

[27] FACV 21 & 22/2015 (unrep.), Judgment dated 26 September 2016 ("*Hysan* Judgment").

[28] Basic Law, Articles 6 and 105.

the similar words "prescribed by law" and "according to law" which appear in numerous articles in the Basic Law, are not words of qualification or limitation but instead mandate the added protection of the principle of legal certainty requiring that the property rights (or indeed any other rights similarly expressed) be regulated by laws which are accessible and precisely defined, and not left to uncharted administrative discretion.[29]

32. Once a constitutional or fundamental right is identified as being engaged, the court will consider the nature of the right to determine if it is one which is absolute so that there is no room for any proportionality analysis to determine if the restriction is lawful. This is because the courts recognise that certain constitutionally guaranteed rights, such as the prohibition against torture and cruel, inhuman or degrading treatment or punishment, are absolute and therefore cannot be derogated from.[30]

33. On the other hand, if the court determines that the right engaged is not absolute, the Basic Law lays down that lawful limitations of guaranteed rights may validly be created.[31] However, such restrictions must be "prescribed by law", i.e. they must satisfy the requirement of legal certainty, and must be consistent with the provisions of the specified international instruments implemented through the laws of the HKSAR. So, for example, the right to freedom of assembly is expressly subject to those restrictions which are "necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others".[32] Any restrictions on that right, it has been held:[33] (i) must satisfy the principle of legal certainty; (ii) be

29 *Hysan* Judgment at [30]-[32].
30 *Ibid.* at [43]-[44].
31 Basic Law, Article 39(2).
32 Basic Law, Article 27 read with Hong Kong Bill of Rights Article 17.
33 *Leung Kwok Hung v HKSAR* (2005) 8 HKCFAR 229 at [17], [19] and [33]-[34].

subjected to the proportionality test (which I shall expand on in a moment); and (iii) be for one of the express purposes specified. [34]

34. Sometimes, a constitutional right is not absolute but there is no express guidance given as to the allowable limits of derogations from that right. An example of this is the presumption of innocence guaranteed in Article 87(2) of the Basic Law[35] and Article 11(1) of the Hong Kong Bill of Rights.[36] In such cases, the courts, drawing on the jurisprudence of other jurisdictions, have evolved principles as to how the proportionality test is to be applied.[37] Initially expressed as involving two questions,[38] the proportionality test came to be expressed as a structured, three-step inquiry.[39]

35. In *Hysan*, recognising that the property rights were engaged but that they did not make express provision regarding permissible restrictions, Ribeiro PJ, with whom the other members of the Court agreed, held that the existing approach was to undertake that three-step inquiry concerning the planning restrictions involved, asking: (i) whether those restrictions pursued a legitimate aim, (ii) whether they were rationally connected with achieving that aim, and (iii) whether they represented a proportionate means of achieving that end.[40]

36. Crucially, however, the Court went on to hold that, in keeping with substantial authority in the UK, Canada and Strasbourg (from the ECtHR), there should be added to this structured proportionality analysis a fourth step, namely (iv) weighing the detrimental impact of the restrictions against the social benefit

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34 *Hysan* Judgment at [49].

35 This provides: "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."

36 This provides: "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."

37 *Hysan* Judgment at [50]-[51].

38 *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574.

39 *Hysan* Judgment at [52]-[53].

40 *Ibid.* at [54].

gained.[41] This fourth step requires the court to examine the overall impact of the impugned measure to decide whether a fair balance has been struck between the general interest and the individual rights intruded upon, the court describing "the requirement of such a fair balance being inherent in the protection of fundamental rights".[42]

37. The Court in *Hysan* observed that the case for adopting the fourth step in the proportionality analysis was "logically compelling" but noted that, in the great majority of cases, its application would not invalidate a restriction which passed the first three stages of the inquiry. As Ribeiro PJ put it:

> "One would hope and expect that most laws and governmental decisions at the sub-constitutional level internally reflect a reasonable balance between the public interest pursued by such laws and the rights of individuals or groups negatively affected by those laws. In such cases, where the law passes the first three tests, it would be unlikely to fail the test of proportionality '*stricto sensu*' (in the narrow, overall sense) at the fourth stage. But one may exceptionally be faced with a law whose content is such that its application produces extremely unbalanced and unfair results, oppressively imposing excessive burdens on the individuals affected."[43]

38. However, to illustrate the need for this fourth step, Ribeiro PJ quoted an example given by a German professor of law:

> "Assume a law that allows the police to shoot a person (even if this shooting would lead to that person's death) if it is the only way to prevent that person from harming another's property. This law is designed to protect private property, and therefore its purpose is proper. The means chosen by the legislator are rational, since it advances the proper purpose. Therefore, the law meets the necessity test as well. However, the

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41 *Ibid.* at [54], [59], [64]-[80].
42 *Ibid.* at [76].
43 *Ibid.* at [73].

> provision is still unconstitutional because the protection of private property cannot justify the taking of human life."[44]

39. As to the standards the courts should adopt in assessing proportionality, which apply at the third stage of the inquiry, the parties in *Hysan* had put forward two main standards in argument. The property developers argued in favour of a "no more than necessary" standard, suggesting that this meant that the restriction should impair the protected right only to the minimum extent necessary to achieve the legitimate aim to which the restriction was rationally connected; the Town Planning Board argued in favour of a "manifestly without reasonable foundation" standard, meaning that the decision-maker should be accorded a wide margin of discretion.[45]

40. The Court held that the former test, that of "no more than necessary", was a test of reasonable, and not strict, necessity and that this did not mean that the restriction must be the very least intrusive method of securing the desired objective; as a US Supreme Court judge put it:

> "… a judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation, and thereby enable himself to vote to strike legislation down."[46]

41. In relation to the latter "manifestly without reasonable foundation" test, the Court examined its origins which are linked to the margin of appreciation applied by the ECtHR in Strasbourg as a supra-national court in its relationship with Member States with differing political and socio-economic policies. That relationship does not impact on a domestic court such as the CFA. However, the Court held that parallel considerations do arise in a domestic context where

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44 *Ibid.* at [74].
45 *Ibid.* at [82].
46 *Ibid.* at [87], quoting Blackmun J in *Illinois State Board of Elections v Socialist Workers Party* (1979) 440 US 173, 188-189.

the courts are determining the proportionality of a measure taken by the legislature or administration and in which the courts will recognise the different constitutional roles of the judiciary on the one hand and the legislative and executive authorities on the other.

42. Clear recent examples of the courts in Hong Kong affording, at that domestic level, a "margin of discretion" to the decision-maker are the cases of *Fok Chun Wa v Hospital Authority* and *Kong Yunming v Director of Social Welfare*. The former case involved the question of whether higher obstetrics fees were discriminatory in violation of the equality provisions of the Basic Law and Bill of Rights.[47] The latter case involved the question of whether a change in the residence requirement as a condition of eligibility for a basic welfare benefit violated the right to social welfare in the Basic Law.[48] The contexts of these cases, involving the deployment of limited public funds, were necessarily matters of socio-economic policy. In these contexts, the CFA held that these were matters best left to the executive, legislative or other authority and expressed the "manifestly without reasonable foundation" standard to be applied as follows:

> "Where a number of alternative, but reasonable, solutions to a problem exist, the court will not put itself in a place of the executive or legislature or other authority to decide which is the best option. That is not its role. The court will only interfere where the option chosen is clearly beyond the spectrum of reasonable options; in other words, the option has clearly gone too far (or further than necessary) to deal with the problem. In this situation, the court will not have been satisfied under the third limb of the justification test."[49]

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47 Basic Law, Article 25 and Hong Kong Bill of Rights, Article 22; see (2012) 15 HKCFAR 409.

48 Basic Law, Articles 36 and 145; see (2013) 16 HKCFAR 950.

49 *Fok Chun Wa v Hospital Authority* (2012) 15 HKCFAR 409 at [75(3)].

43. As to how the court should choose between one test and the other, the CFA in *Hysan* held that this will depend "on the extent of the appropriate margin of discretion, determined by factors which affect the proportionality analysis in the circumstances of the particular case".[50] These factors will principally relate to (i) the significance and degree of interference with the right concerned and (ii) the identity of the decision-maker and the characteristics of the encroaching measure.[51]

44. As to (i), the significance and degree of interference with the right concerned, the CFA declined to list a hierarchy of rights but observed that there is a sliding scale "in which the cogency of the justification required for interfering with a particular right will be proportionate to the perceived importance of that right and the extent of the interference".[52] The less important the activity restricted, the greater the degree of discretion given to the decision-maker: so, in one case involving restrictions on the dissemination of pornographic material, the city council involved was given a wide margin of discretion to impose the restrictions.[53] And the more extensive the interference with the right, the narrower the margin for discretion and the greater the need for justification of that interference: so, a case involving a substantial intrusion into the right against self-incrimination will be harder to justify than a trivial intrusion.[54] Finally, in this context, the interference may be so extensive that it destroys "the essence of the right". In that event, it will not be capable of justification under the proportionality analysis: the denial to a post-operative transsexual of the right to marry in her new gender was held to be such a case.[55]

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50 *Hysan* Judgment at [106].
51 *Ibid*. at [107].
52 *Ibid*. at [108].
53 *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420.
54 *Koon Wing Yee v Insider Dealing Tribunal* (2008) 11 HKCFAR 170, discussed in the *Hysan* Judgment at [112].
55 *W v Registrar of Marriages* (2013) 16 HKCFAR 112.

45. As to (ii), the characteristics of the encroaching measure, including the identity of the decision-maker, these will be highly material to the court's conclusion on how wide the margin of discretion should be. If the assessment of the proportionality of a restriction calls for the application of purely legal principles and an assessment of the type the courts are well-equipped to make and where the primary decision-maker has no special expertise, the margin of discretion is unlikely to have a significant role to play and so the applicable standard is likely to be the "no more than necessary" test:[56] questions arising in relation to the presumption of innocence and right to a fair trial are likely to fall into this category. But where the decision-maker's views are formed by special expertise, which the court does not have, a wide margin of discretion will be given and the applicable standard is likely to be the "manifestly without reasonable foundation" test: questions relating to national security or touching on defence or foreign policy or involving decision-making institutionally assigned to the legislature might be likely to fall into this category.[57]

46. It is important to stress that these two standards are both located on the same spectrum of reasonableness. For this reason, cases sometimes speak of the intensity with which the courts will scrutinise the particular restriction. When the "manifestly without reasonable foundation" standard is used, the court will allow the decision-maker "latitude to adopt one of a relatively wide range of possible alternatives in fashioning the impugned measure which encroaches upon the protected right"; a less intense scrutiny. But when the "no more than necessary" standard applies, the court will require the decision-maker to show that the measure impairs the right as little as reasonably possible in order to achieve the legitimate objective; a more intense scrutiny: although there will still be a range of alternatives here, the acceptable range will be narrower.[58]

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56 *Hysan* Judgment at [115].
57 *Ibid.* at [116]-[118].
58 *Ibid.* at [119]-[121].

47. In *Hysan* itself, the CFA concluded that, for restrictions on property rights in the planning context, the applicable standard should be the "manifestly without reasonable foundation" test.[59]

Conclusion

48. For all these reasons I have mentioned this afternoon, it is important to the rule of law that its content and the manner in which it is maintained are properly and openly discussed and disseminated to the public.

49. I hope today's talk has managed in some small way to do just that and I hope this may stimulate further discussion on this topic for the remainder of the session. Thank you for your attendance.

11th November 2016

[59] *Ibid.* at Section G.5.